Action No.: 1801-10960
E-File No.: CVQ18PRICEWATERHOUSECOOPERS
Appeal No.:_____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the
TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP.
and not in its personal capacity

Plaintiff

and

PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST,
PERPETUAL OPERATING CORP., and
SUSAN RIDDELL ROSE

Defendants

P R O C E E D I N G S

Calgary, Alberta
November 8, 2018

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TABLE OF CONTENTS

Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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November 8, 2018 — Morning Session

The Honourable Justice Nixon — Court of Queen's Bench of Alberta

R. de Waal — For PricewaterhouseCoopers Inc.
L. Rasmussen — For PricewaterhouseCoopers Inc.
D.J. McDonald, QC — For Perpetual Energy Inc.
P.G. Chiswell — For Perpetual Energy Inc.
A. Badami — For S. Riddell Rose
S.H. Leitl — For S. Riddell Rose
A. Gault — Court Clerk
K. Salguero — Court Clerk

Discussion

THE COURT CLERK: Order in court.

THE COURT: Good morning, please be seated. Just a couple of housekeeping matters. We're scheduled for today now until 12:30 and then 2 till 4:30. I've got another application in this courtroom at 12:30. So just if you can keep that in mind, in terms of proceedings today, otherwise I'll turn it over to counsel.

MR. MCDONALD: Good morning, My Lord. My name is Dan McDonald, I appear for the Perpetual defendants. To my right is Steve Leitl, counsel for Ms. Rose. Behind him Paul Chiswell of our firm and to Mr. Chiswell's left, Aditya Badami who is with Mr. Leitl's firm. To my immediate left is Rinus de Waal and Luke Rasmussen beside him, counsel for the plaintiffs.

I see you have a box before you and I know we've flooded you with material over the last week particularly, but, before that as well. I thought I might just do a little housekeeping check to make sure that you have everything that counsel has. I expect that you do, but I'm going to be referring to various coiled documents.

THE COURT: Let's just go through an inventory here. Okay, counsel, at your convenience.

MR. MCDONALD: You should have briefs from -- three briefs, there is a clear covered brief from Mr. de Waal and with that two volumes of authorities.

THE COURT: Let's go by dates.

MR. MCDONALD: Oh by dates, I guess the starting point then is -- I've been sending, I think initially a binder and then with each additional document tabs and an index and my understanding is that you should have a binder that starts with the statement of claim and has 17 tabs.

THE COURT: I confirm I have that.

MR. MCDONALD: Okay. Then I expect the next things that would've been filed would've been -- oh I'm sorry -- I should also say that two of those tabs refer to affidavits that are larger affidavits that weren't included in the binder, Ms. Rose's affidavit and Mr. Darby's affidavit.

THE COURT: Right, okay.

MR. MCDONALD: And I think Mr. Schweitzer's affidavit was small enough that it would be in the binder. I expect the next thing that was filed would've been the transcripts and exhibits, a slightly larger one which would be the transcript of Ms. Rose, the filing date on that is November 1st and then a much smaller one which is the transcript cross-examination of Mr. Schweitzer.

THE COURT: Both of those, sir, I do indeed.

MR. MCDONALD: And then in terms of briefs as I said a moment ago, Mr. de Waal has a brief that's coiled with a clear cover and two volumes of authorities. Two fairly large volumes?

THE COURT: Yes the --

MR. MCDONALD: All the briefs were filed in the same day I don't have --

THE COURT: -- I've got that, I'll just put it altogether.

MR. MCDONALD: Then I filed a buff covered brief and with that a single volume of authorities with the same buff colour.

THE COURT: That was your letter dated November 7th, that's your authorities?

MR. MCDONALD: No, I'm sorry my second volume of authorities is one that would've been dated yesterday and is just three -- a thin volume of three authorities, 32 to 34 that follow on from the first volume which has 31 authorities.

THE COURT: I confirm I have both of those, I just had them in the wrong order. Okay. Thank you, sir.

MR. MCDONALD: And Mr. Leitl filed a red covered brief with two volumes of authorities with similar covers.

THE COURT: I know I have read that, I confirm I got it, I have a suspicion I put it on -- I left it on my desk. I'm going to adjourn for two minutes --

MR. MCDONALD: I'm planning to go first and I'm confident --

THE COURT: Okay.

MR. MCDONALD: -- I'll make it to the break, so if you prefer to go now -- but I won't be referring to the materials -- Mr. Leitl's materials in the next hour or so.

THE COURT: Okay, I acknowledge that I do indeed have that and I have read it so let's proceed with yours, sir.

MR. MCDONALD: I'd also just as some initial housekeeping like to talk to you about what we have in mind in terms of the order of presentation today. And if I could ask you to turn to page 5 of my brief, the buff coloured one.

THE COURT: I'm there, sir.

MR. MCDONALD: Under the heading, Issues, we have -- or I have set out what I consider to be the two issues on the stay application and the three issues on the summary dismissal applications. As you'll have seen from the materials the first issues has been resolved by agreement and so we won't be making any submissions on that. The second issue is whether the plaintiff's application should be stayed. That only needs to be addressed if the defendants' summary dismissal applications are dismissed and so it's my intention, subject to your direction, not to deal with that initially so that everyone can deal

with the summary dismissal applications and then hopefully we'll have time and if you wish to hear from us on that, we can deal with it after all the submissions are in on summary dismissal.

THE COURT: Let's proceed in that fashion.

Submissions by Mr. McDonald

MR. MCDONALD: So dealing then with issues 3, 4 and 5 on the summary dismissal application, I will be addressing issues 3 and 5 on behalf of the defendants. Mr. Leitl will be addressing issue 4 and he will also be addressing two other issues that relate only to Ms. Rose, one of those is the effect of the release and the other is a separate claim against Ms. Rose that is not made against the Perpetual defendants regarding a breach of her duties as a director.

Our gaol is to finish today, but, that's an ambitious goal. You'll have seen from the material it's complicated. I think the facts are well set out in the materials and I don't plan to spend much time initially on the facts unless Your Lordship would like me to, but, exploring each of the issues I think is going to take some time.

So I don't know if we have anymore time in today or if you have any initial directions or if we should just plow on and move as efficiently as we can.

THE COURT: Well let's move as efficiently as we can. I have booked off tomorrow to continue this hearing if we need it. We should certainly not go any later than 3 tomorrow, 'cause I have another matter that I'm going to be in court in at 4 and if we do go into tomorrow, what I'd prefer to do is have a very short lunch break so that we can finish a early as possible, if we need that.

But, I do indeed offer tomorrow as an opportunity if we need that time.

MR. MCDONALD: Thank you, that's very helpful and I will continue at my intended pace if there are certain points where you require additional clarification or if you don't need to hear from me on point, please I'd welcome your direction.

With that, I'll turn to the argument and as I said, I don't intend to spend time on the facts or the procedural history, but, I would like to just draw your attention to the first four pages of my brief which set out in very rough terms the -- or broad terms the transaction, the reference to the Sequoia bankruptcy the three key claims that are made by the plaintiff, at least as against the Perpetual defendants are summarized on page 2 and then on page 3 the procedural history that leads us here today.

You'll have seen that the case started on August 2nd and we have been busy preparing the materials and preparing for today's application which, if successful, would finally determine the issues.

The test for summary dismissal is set out at page 6 of the materials.

THE COURT: I'm there.

MR. MCDONALD: And just for clarification, our original summary dismissal application wasn't as clear as I would've liked, and we filed an amended application to make it clear that for issues 3 and 4, that is the BIA claim and the oppression claim, the defendants are seeking summary dismissal. For issue 5, they're applied to strike out on the basis that the fifth issue, the public policy issue discloses no reasonable claim.

As a result, the evidence that you have before you is admissible and to be considered on issues 3 and 4, but no evidence is permitted on issue 5.

THE COURT: Noted.

MR. MCDONALD: With respect to the test for summary dismissal, I think we're on common ground and it's -- the relevant authorities are set out at page 6 of our brief. Just to add a couple of things, there is a divergence of authority in the Court of Appeal on that test. That question of resolving that divergence is currently before the Court of Appeal, it's been argued, judgment has been reserved. So we still have two somewhat different lines of authority, one saying the test is a balance of probabilities, the other unassailable. I'm sure you've heard many cases dealing with this.

THE COURT: So let's just pause on that or during argument on this matter today, I have no idea when that decision is going to be rendered, but, it could be in the next week or two, let's just speculate but that's all it is. Assuming I don't decide this in the next 24 or 48 hours, if that decision comes out, do the parties want to have the opportunity to come back?

MR. MCDONALD: Well, not surprisingly, we say we can succeed on either test and my friends say we fail on either test and I think we're both going to be arguing to you that our cases are strong enough no matter which test you apply. I suppose if you disagreed and you found that the test was important to your decision and you needed to hear further submissions on it, then we'd welcome the opportunity to speak to it and maybe I should pause there. Those are just my thoughts, I don't know if my friends want to address that.

THE COURT: And I'll this before we speak, we can just hold that until the end of this hearing and you may want to speak to it then. I've had this issue before me on another matter last month and I'm probably going to render a decision on that particular case in the next two or three weeks, whether or not the Court of Appeal comes out with their decision. But, I'm sensitive to it, so I just wanted to at least raise it as a question.

MR. MCDONALD: Okay, well those are my initial thoughts, but, perhaps if one of us can remember we'll speak to it at the end of the session today.

THE COURT: Thank you.

MR. MCDONALD: Perhaps two unusual points about this application. The first is that the plaintiff, as the responding party, does not argue that it is not a suitable one for summary determination. Normally you would hear in a summary judgment application arguments that there are factual issues in dispute or credibility issues that need to be resolved in a trial. That position is not raised here for the simple reason that the plaintiff's application, which we seek to stay is seeking summary determination of all the issues, which would include these issues.

So unless my friend has some submissions to the contrary, as I see it, we're on common ground that the materials before you allow you to make a decision one way or the other on these applications.

The second perhaps unusual point is that the plaintiff did not file any responsive affidavit evidence. And usually you would see responsive evidence and we're all familiar with the law that says that the respondent must put its best foot forward. The plaintiff relies only on Mr. Darby's affidavit which was filed with the statement of claim and well before Mr. Schweitzer's or Ms. Rose's affidavit and it doesn't, of course, address or respond to anything in Ms. Rose's affidavit.

Just so that we can put the tests behind us, if I could ask you to turn to page 7 of my brief.

THE COURT: I'm there, sir.

MR. MCDONALD: The test to strike out pleadings is set out there, it's *Rule 3.68* and the test is whether or not the claim discloses a reasonable cause of action or has a reasonable prospect of success. I don't think there's any dispute about the test.

That then takes me, My Lord, to issue 3 which is, were the parties dealing at arm's length

with each other within the meaning of the *Bankruptcy & Insolvency Act* and I have two principal submissions on that. The first one is that that the proper subject of the analysis under section 96 of the *BIA*, is the entire transaction that is Perpetual's sale of some of its shallow gas assets in Alberta to 198 in October 2016, that entire transaction and I'll typically refer to it as the entire transaction, was an arm's length transaction. It was between two willing, unpressured, knowledgeable strangers, following extensive commercial negotiations.

My second submission is that even if one isolates and focuses only on one step in the transaction, that is the combination of the beneficial and legal interests into PEOC, which was accomplished in the asset transaction, the parties to that agreement two Perpetual entities, although related, were dealing with each at arm's length.

Before I give you my argument on the first point, I'd like to list what I believe are a number of points that are not in dispute that are relevant to this argument. The first is, that there are three essential conditions for a declaration that a transfer is void as against the trustee under section 98(1)(b) (sic) of the *BIA*. And for your reference I've excerpted the relevant provisions at page 10 of my brief.

THE COURT: I'm there, sir.

MR. MCDONALD: The first is that there was a transfer at undervalue, the second that the parties were not dealing at arm's length and the third that the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer. And if all three of those conditions are satisfied and the transfer occurred in the five year period before bankruptcy the trustee is entitled to an order.

The second point that I believe is not in dispute is that Perpetual and Kailas and 198 and based on the materials, will you understand what I mean if I refer to those?

THE COURT: Yes.

MR. MCDONALD: Probably interchangeably, but, typically 198 once it was incorporated in August, were dealing at arm's length and I won't take you to it, but, I could give you a reference, Mr. Darby acknowledged that on cross-examination at page 53 of his transcript, line 21 and following.

THE COURT: Just one point of clarification, you refer to section 98 at one point --

MR. MCDONALD: Sorry?

THE COURT: -- did you mean 96?

MR. MCDONALD: I'm sorry, I meant 96, did I say something else? My apologies.

THE COURT: Okay. I just want to make sure we're on the same wavelength.

MR. MCDONALD: Yes. I'd just given you the reference on the arm's length relationship between Perpetual and Kailas 198.

THE COURT: Yes.

MR. MCDONALD: The next point is that POT and PEOC, the parties to the asset purchase agreement were related persons under the *Bankruptcy & Insolvency Act*.

My fourth point is that pursuant to section 4(5) of the *BIA* for the purposes of section 96, related persons are deemed not to deal with each other at arm's length, in the absence of evidence to the contrary and you'll be hearing quite a bit from me about that section of the *Act*.

My fifth point, the jurisprudence under the *Income Tax Act* provides appropriate principles for determining whether parties are dealing at arm's length under the *BIA* and that's discussed at paragraph 39, on page 11 of my brief.

THE COURT: I'm there.

MR. MCDONALD: And the reference is made to the *Piikani Energy* decision of our Court of Appeal in 2013. There are some cases that I'm going to need to refer to for the passages. In the interest of time, I think the key passages are highlighted in the brief, there's probably more that are highlighted in the materials and unless you want me to take you to them for some clarification, I'll just limit it to providing you with the reference in the written brief.

The next point, number 6 is, all the relevant circumstances must be considered in determining whether the parties were dealing at arm's length and each case will depend on its own facts and the references there are at paragraphs 40 to 43 of my brief and in particular to the *McLarty* case. I'm sure you're familiar with *McLarty*, *Piikani* expressly adopts *McLarty* as the starting point or the reference point for the analysis of arm's length and

McLarty says clearly and I just read a couple of the highlighted passages at paragraph 42: (as read)

> In this case, while the initial focus is on the transaction between the vendor and the agent of the acquiring taxpayer, all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length.

And you'll recall in *McLarty* there were two Compton companies, so two related persons who were involved in a seismic transaction and Mr. McLarty was the taxpayer and the question which was resolved differently at the trial court and the Court of Appeal, was what the proper focus on the analysis was on. Was it on the two Compton companies, which is what the Court of Appeal said, or was it on the relationship between Mr. McLarty and Compton, which is what the trial court and the Supreme Court said. And the Supreme Court came to that conclusion by considering all the relevant circumstances, not isolating just on the part of the circumstances, the Compton transaction.

There's also referenced and highlighted at the bottom of page 12, to the criteria that the Court used in assessing whether parties are dealing at arm's length. Those criteria are familiar and come from the Income Tax Bulletin that's referred to. Finally, at paragraph 43, I made reference to three other cases that adopt these same principles. There are countless cases and I didn't think it was helpful to overload you with.

The final point that won't be disputed is the word of caution that I have at paragraphs 44 and 45 of the brief. Before 2007, section 4.5 only included the first sentence: (as read)

> … persons who are related to each other are deemed not to deal with each other at arm's length.

And so once there was a determination in cases before that or dealing with tax that arose before that that parties were related there was a conclusive deeming that they were not dealing at arm's length and it's my understanding that the *Income Tax Act* still contains a provision like that. But, Parliament amended the *BIA* in 2007 to add the second sentence which is the one that we'll be emphasizing and that is, it's quoted at 45: (as read)

> For the purposes of paragraphs 95(1)(b) or 96(1)(b) the persons are, in the absence of evidence to the contrary deemed not to deal with each other at arm's length.

So it's important if we're looking at any cases that pre-dated that under the *BIA* that that statute was quite different and that's of real significance in the case at bar.

So with that I'll turn to the first of my two submissions, which is the proper subject of the analysis is the entire transaction. And it's an essential element of the plaintiff's claim under section 96 that the asset transaction alone is the focus of the analysis. There's no allegation in the claim that the entire transaction or the share purchase agreement were not at arm's length.

In my submission, it's wrong to isolate one step in an overall commercial transaction n these circumstances and that the correct approach under section 96 is to consider the entire transaction for three reasons. The first is that a restrictive approach of only examining part of the transaction was rejected in *McLarty*. The second is that examining the entire transaction accords with the commercial reality and the third is that the parties in their agreements considered all the agreements together to constitute their entire agreement.

Dealing with the first point, that the restrictive approach of just looking at part of a transaction was rejected in *McLarty*, could I ask you to turn to paragraph 59 of my brief.

THE COURT: I'm there.

MR. MCDONALD: Justice Rothstein stated at paragraph at paragraph 65 of *McLarty*: (as read)

> The Minister states that "[i]t is the relationship between vendor and purchaser [which were the two Compton companies] at the time of purchase that must be examined, and not the relationship at any other time or with respect to any other transaction". I am unable to agree with such a restrictive approach.

He then goes on and I'll just read the passage at 73, as I mentioned a moment ago, that was the approach the Court of Appeal accepted, the trial judge did not. 73: (as read)

> It was appropriate for the trial judge to have considered the entirety of the transactions by which McLarty bound himself to purchase his interest in the seismic data and place limitations on Compton as his agent with respect to the purchase price of the data. It was for the trial judge to draw inferences from these facts. The Federal Court of Appeal was in error in interfering with the conclusion of the trial judge.

And I say the same reasoning applies in this case, it would be inappropriate to isolate one element of the transaction and one should instead have looked at the entirety of the

transaction and the entirety of the transaction includes the share purchase agreement, the asset purchase agreement, many other agreements and affected the commercial purpose of selling oil and gas assets from a seller to a buyer.

My second point was that examining the entire transaction accords with commercial reality and for that I refer you to paragraphs 60 through 64 of my brief.

THE COURT: I'm there.

MR. MCDONALD: You'll have seen from Ms. Rose's affidavit that the process started with a decision by Perpetual to sell some of its shallow gas assets in Alberta. It was followed by steps that are typical in the energy and other industries whereby a data room was set up, respective purchasers were approached, confidentiality agreements were signed, parties had gained access to the data room, communications occurred between prospective purchasers and the vendor.

All those steps led to the letter of intent from Kailas that is referred to in the first line of paragraph 60 and I might take you to that very briefly, it's at Exhibit E of Ms. Rose's affidavit which is the large clear covered one.

THE COURT: I'm there.

MR. MCDONALD: And you'll see it's a letter from Kailas to Perpetual entitled Draft to Guide Definitive Agreement, it's dated July 7, 2016 and summarizing in the first paragraph: (as read)

> Kailas submits for your consideration a proposal for the purchase of the shares of PEOC which will hold all of the legal and beneficial interests in certain Eastern Alberta shallow gas assets of Perpetual at a price of $1 including assumption of outstanding environmental obligations.

And then it goes on and I won't read the other parts of it, but the purchase price is described in paragraph 1, includes something you'll have seen referenced in the materials, the gas marketing agreement or a hedging contract, the definitive agreement contemplated starts -- is described at paragraph 3, due diligence referencing as we go on. Again, a typical type of document that we would expect to see in a situation like this and one that shows that the purchaser made its proposal contemplating as one of the steps that the legal and beneficial interest would be combined before it acquired the shares and contemplating a share purchase transaction, not an asset purchase transaction.

By any understanding, this was an arm's length oil and gas transaction negotiated between self-interested adversaries, you've seen in the materials, represented by experienced representatives and by separate counsel. And it was only the Trust structure under which Perpetual had held these assets in a trust structure since 2002, that presented the Trustee with the opportunity to challenge this transaction under section 96. Without that structure the asset transaction would not have been required and we wouldn't be here today.

In my submission, the commercial reality is plain that it was an arm's length transaction and that that focus in any analysis under section 96 should be on the entire transaction.

My third point on this is that the parties in their agreements consider all the agreements together to constitute their entire agreement and the submission on that is at paragraph 65 of the brief on page 18.

THE COURT: I'm there.

MR. MCDONALD: And it makes reference to the entire agreement clause in the share purchase agreement, I might take you to that, it's in Ms. Rose's affidavit at Exhibit H.

THE COURT: I'm there.

MR. MCDONALD: Page 54.

THE COURT: I'm there.

MR. MCDONALD: Paragraph 19.5 entire agreement: (as read)

> … this agreement, the office sub-lease, the existing work order release and indemnity agreement, the litigation release and indemnity agreement, the purchase and sale agreement and the gas marketing contract constitute the entire agreement between the parties with respect to the subject matter hereof and cancel previous understandings.

So it's significant, in my view, that the parties themselves didn't consider this a series of isolated agreements, but considered this all one entire agreement.

The plaintiff has not responded to this submission, we have the concession I mentioned a moment ago by Mr. Darby in his cross-examination that Perpetual and 198 were dealing at arm's length, but, my friends do not say why the entire agreement is not the focus of the

section 96 analysis. They only focus -- the statement of claim only focuses on the asset transaction. We raised clearly in paragraph 37 of our statement of defence, which is in the binder at tab 4.

THE COURT: I'm there.

MR. MCDONALD: That the transaction as a whole, not just one part of it, is the proper subject of the analysis under section 96(1) of the *BIA*. So it's been front and centre since then, there has been no reply filed to the statement of defence. Ms. Rose's affidavit clearly sets out all the facts relevant to this issue, as I said, there's been no responsive affidavit from Mr. Darby or any other witness and the brief is silent.

So I'm sure my friend will address it orally, but it's -- at this stage you don't have an answer to that argument and in my submission it's compelling and if you accept it, that's the end of the section 96 claim, the essential threshold issue of whether or not the parties were not at acting at arm's length isn't met and that part of the claim would be dismissed. That part, being the section 96 part of the statement of claim, would be dismissed.

My second submission is in the alternative and that is if you don't accept that it is the entire transaction, the second reason also is sufficient to satisfy our threshold issue and dismiss the section 96 claim and that is, that the parties to the asset transaction were dealing with each other at arm's length.

The plaintiff's position on that is remarkably simple. I've summarized it at paragraph 46 on page 13.

THE COURT: I'm there.

MR. MCDONALD: The plaintiff says the asset transaction should be viewed in isolation, not in context. PEOC and POT were parties to the asset purchase agreement, which of course, is true. Perpetual controlled PEOC and POT, PEOC was the trustee of POT. Ms. Rose signed the agreement on behalf of both parties, therefore, PEOC and POT are related persons.

Then the next step as if we were back before 2007, persons who are related to each other are deemed not to deal with each other at arm's length while so related. Full stop. And Mr. Darby's evidence on this in his affidavit was very brief, he simply identified the corporate relationships, identified the parties to the asset purchase agreement and exhibited that agreement.

And when he was questioned on it, his approach was the same and I won't read the entire

quote at 48, but, if I could start halfway down: (as read)

> Q So is it fair to say that by June 26th you had reached a preliminary view that the asset purchase and sale agreement was a non-arm's length transfer?
> A Yes.
>
> Q So what work did you do after that to come to a more definitive view about whether it was a non-arm's length transfer?
> A On the top of non-arm's length transfer, there was really no more work required.
>
> Q Okay. And was it because you concluded it was a non-arm's length transfer because one party to the transfer was POT and the other party to the agreement was PEOC?
> A Yes.

Mr. Darby had a duty to consider more than that. He had the means to consider more than that as the Trustee, he had in his possession all of Sequoia's records and on cross-examination he acknowledged that including records relating to the negotiation of the transaction. He had spoken to Mr. Yang and Mr. Wang, Sequoia's principals. He had used his powers under the *Bankruptcy Act* to obtain records from Perpetual and he had Ms. Rose's repeated requests to meet to discuss this situation, which he declined.

In my submission a Bankruptcy Trustee, as an officer of the Court, has a duty to go beyond what Mr. Darby did. But, here we are today in a courtroom examining for the first time what, in my submission, should've been examined long ago and that's all the relevant evidence to assess whether there is evidence to the contrary that would rebut the presumption that related parties are not dealing at arm's length.

I'm going to pause and just address an argument my friend's make now, it doesn't really fit in the narrative, but I think it will make sense when I get a little further along. My friends make an argument in their brief that 198 became a related party to PEOC following the signing of the share purchase agreement on September 26th. And you may recall from the evidence that the share purchase agreement was signed on September 26th, the closing was on October 1st and at the time of the closing, the asset purchase agreement was executed, it closed and then two minutes later, the share purchase agreement closed. And section 4(3)(c) of the *BIA* has the effect that, in that period from September 26th to October 1st, 198 had control of PEOC and I think I have a passage that might make this clear in our brief.

Are you familiar with the argument from the written materials or should I --

THE COURT: M-hm --

MR. MCDONALD: -- okay then I won't belabour it, 4(3)(c) is set out at paragraph 74 of our brief and my friend relies on a case in his materials called *Green Gables* which is a 1998 decision of the Ontario Court of Justice. It's essentially a fraud case, a fraudulent conveyance case, very unique facts and goes through the analysis of 4(3)(c). I don't think it's necessary for me to take you to it right now, since it's a pre-2007 decision it's not of importance in considering section 4(5) in the case at bar. But, the Court struggled in fairly offensive -- in the face of fairly offensive facts that didn't give rise in the normal definitions to a non-arm's length relationship or a related party relationship and found through 4(3)(c) that a party to a unanimous shareholder's agreement had the type of control contemplated by that section and so had control and so was related to the company that was part of the bankruptcy proceedings.

I had put reference to that in my brief, more to show the role of 198 and the de facto and de jure role they had. My friend uses it for the proposition that 198 became a related party and therefore, at least from September 26th to October 1st was not at arm's length with PEOC. The critical point, in my submission, is that even if you accept that, that for those five days that was a related party relationship, it does not supplant 4(5) and you still have to look at all of the evidence to determine whether or not there is evidence to the contrary and all of the evidence cries out only that 198 was at arm's length with Perpetual and PEOC and POT throughout the transaction.

THE COURT: So in making that argument you're referring implicitly to the additional words that were added; is that correct?

MR. MCDONALD: I'm referring to the additional words that were added before (5).

THE COURT: Right.

MR. MCDONALD: If those words weren't added and you concluded that 198 was deemed to be -- conclusively deemed to be related to PEOC, I'd be working on a different argument. But, I don't need to find another argument because those words were added long after the *Green Gables* decision and it's clear that they apply to the entire analysis of whether or not the parties to the transaction, and we're talking just now about the asset transaction were at arm's length.

THE COURT: And just for the record -- we're both -- I'm referring to the additional words in the absence of evidence to the contrary.

MR. MCDONALD: That's what I understand. So as I say that was a little diversion and I'm going to return to my main theme now, which is that one has to look, when examining the asset transaction in isolation for the purpose of a section 96 transaction to all of the evidence.

And all of the evidence is mostly that evidence contained in Ms. Rose's affidavit. There's little in Mr. Darby's affidavit that's going to be of assistance. There's nothing put forward in response to Ms. Rose's affidavit. Her evidence, in my submission, is reliable and uncontradicted and rebuts the presumption that the parties to the asset transaction were not dealing at arm's length.

I told you I wasn't going to take you to much of the evidence mainly in the interest of time and I won't in any detail, I assure you, but, could I ask you to take that affidavit for a moment?

THE COURT: Ms. Rose's?

MR. MCDONALD: Ms. Rose's the big one with the clear cover.

THE COURT: Yes, I'm there.

MR. MCDONALD: And I'm going to start at page 6 and I'll essentially just refer you to the headings with some brief comments.

THE COURT: I'm there.

MR. MCDONALD: She has a heading, The Parties Were Dealing at Arm's Length With Each Other and she makes reference at paragraph 22 to the claim that the asset purchase agreement was not at arm's length. It says at 23: (as read)

> That is not correct. The asset transaction was a necessary and integral embedded step in the transaction that involved the combination of legal and beneficial interest in the Goodyear assets in PEOC. The negotiation and entering into the entire transaction including each of the share purchase agreement, the asset purchase agreement and each of the other related steps were at arm's length.

And then she goes through for much of the rest of her affidavit to describe the commercial

context and the support for her statement and she starts halfway down page 6 with the sales process, I already referred you to that, it's the typical process one would expect. She then goes to page 7 and the negotiations with Kailas and 198, how they were strangers, they approached Perpetual, gained access to the data room, signed the letter of intent and their purchaser team which is referred to in paragraph 35 negotiated with the vendor team, of which she was a part. At paragraph 38: (as read)

> Based on my experience and observations the purchaser team was knowledgeable, willing, unpressured and experienced in negotiating and executing oil and gas transactions of the scale, complexity and scope of the transaction.

She then goes through in paragraph 39, some of the key aspects of the negotiations and they're what she would expect in a complex arm's length negotiation. Turning over to page 10, she has a description of the share purchase agreement and she highlights some of the key terms of that in paragraph 33 and I know you'll have seen this, but while the consideration was a dollar, there was the fact that that part of the consideration was a dollar, there was much additional consideration, the gas marketing contract or the hedging contract with provided the purchaser with a floor price for its gas for 22 months, I believe it was, free office, sub-lease, seismic data, employees.

She then refers at page 11 to the asset purchase agreement and describes how it too was negotiated between the vendor team and the purchaser team. So here we get to the part where we aren't only talking about the overall commercial transaction, but the asset transaction in isolation.

And she says at the top of page 12, paragraph 46: (as read)

> The asset transaction was entirely negotiated between the vendor team on behalf of POT and the purchaser team on behalf of PEOC.

And then I stop there to say that's completely unsurprisingly, indeed what else would one expect when the transaction involved the purchaser buying all of the shares in PEOC. The purchaser is the party that has the commercial interest in determining that the asset purchase agreement properly gets into PEOC the assets that the purchaser was bargaining for and was going to own as the sole shareholder of PEOC.

But, she doesn't just rely on that perhaps obvious point, but, then takes us through the negotiations for some of the key terms of the asset purchase agreement that were negotiated, those are set out in paragraph 48 and refer to a purchase price of $10, some additional consideration to balance adjustments. Again, the seismic data and the gas

marketing contracts were also parts of the that transaction.

She points out at paragraph 49 that the gas marketing contract over its life was at a cost to POT or the vendor side of $12.9 million. And then she takes us through with the heading starting at the bottom of paragraph 13, Emails and Drafts of Agreements Showing Arm's Length Dealings. And you'll be pleased to know I'm not going to take you through all those exhibits, but we have Exhibits M through W, and I've highlighted three of them in my brief that are the types of documents that one would expect to see between negotiating parties negotiating a commercial agreement with one side being the purchaser team, focussed on the interests of PEOC and the other side being the vendor team, focused on the interests of POT. The purpose of which to affect an asset transaction that combined the beneficial and legal interests including the exchange of drafts of the asset purchase agreement with the purchaser team commenting on them, exchange of emails between the respective counsel for the purchasers and counsel for the vendors; doing what the lawyers typically do in these transactions.

All of which, in my submission, unequivocally shows the arm's length negotiation of the asset transaction and unequivocally is evidence to the contrary as contemplated by section 4(5) of the *BIA* and rebuts the presumption that the related parties to that agreement were not dealing at arm's length.

I'll just ask you to turn to paragraph 72 and 73 of the brief.

THE COURT: I'm there.

MR. MCDONALD: I won't say much about them only that we argue that the Court, experienced commercial lawyers and even the Trustee will see that this is the type of evidence that clearly illustrates an arm's length dealing between parties. And at paragraph 73, I've just highlighted some passages from Mr. Darby's cross-examination that reflects at least in part his understanding of it.

Now, the plaintiff's response to this isn't so much a challenge to the evidence as it is a single legal proposition supported by a single case that, in my submission, is just plain wrong. The plaintiff argues that the presumption that related parties do not deal at arm's length for the purposes of section 96 can only be rebutted by proof that the consideration was at fair market value. And of course, the plaintiff says I have the ability under section 96 to put an affidavit before the Court that, based on hearsay evidence about values and I say that it wasn't at fair market value.

But, the authority that's relied on is a 2011 Registrar's decision from New Brunswick called coincidentally *PricewaterhouseCoopers v. Legge*. It's a case that has not been judicially

considered, but the proposition it makes has been refuted in subsequent cases. I'd like to take you to the case, it's at tab 21 of my friend's authorities which is in the second volume.

THE COURT: I'm there, sir.

MR. MCDONALD: This was an application for a declaration that a transfer I believe of $10,000, 13 weeks before a bankruptcy was either a transfer under value for the purposes of section 96 or a preference. Mr. Legge was the bankrupt and he was the sole shareholder of a company that transferred this $10,000 into a numbered company for no consideration.

And a director of the numbered company was his brother and the Court considered the elements -- initially the elements of section 96 and initially addressed whether Legge was dealing at arm's length with the numbered company.

If I could turn to -- ask you to turn to paragraph 11.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> I shall first consider paragraph (b) [which is 96(b)] to see whether it can be determined that the bankrupt was not dealing at arm's length with the numbered company when issuing the cheque from Atlantic Coastal.

And then onto paragraph 14: (as read)

> In the present instance each corporation is controlled by one person and the person who controlled one at the time of the transaction was related to the person controlling the other. There is a presumption of non-arm's length dealing which requires rebuttal by those seeking to oppose the order.

So we've got a finding of related parties, we're post 2007, so we've got the question of can the presumption be rebutted and the critical point is at paragraph 15 from this decision: (as read)

> To rebut the presumption in favour of the Trustee, those seeking to oppose are required to show that the presumption was one with appropriate consideration in the normal course of business and with

> no view to insolvency. The Trustee has deposed that he has found no evidence of consideration and that the full value of $10,000 is owing to the estate. Section 96 [it goes on] …

So what the Registrar determined in that case was because the transaction was not for fair market value, it was not at arm's length, the presumption was not rebutted. And my friend gives you the proposition that in this case, because he has evidence -- I might be dealing with this later -- but evidence of liabilities that exceed assets, I'll leave it at that for the time being, that it wasn't fair value so presumption can't be rebutted.

And indeed, I suppose if the *Legge* decision was the law and if we didn't consider *Piikani* or *McLarty* or the entire context or all of the evidence we might come to that conclusion. Consideration is, of course, a relevant factor in a section 96 analysis, indeed it's one of the essentials. But it's wrong, in my submission to say that it is the only way to rebut the presumption to show fair value consideration. If that was so, a Trustee would never have to prove an non-arm's length dealing once it approved consideration less than fair value or inadequate consideration and that's can't be the law, there are multiple parts to the section 96 test.

But, it's not just my argument that I have to offer you, but also two authorities, recent authorities from the Ontario Superior Court of Justice. I'm going to start with -- and they're from the same insolvency actually, start with the decision of *National Telecommunications v. Stalt*, I'd ask you to turn to tab 28 of our brief of authorities.

THE COURT: I'm there.

MR. MCDONALD: This is the decision of Justice Myers of that Court in 2017, it's a section 96 application and it addresses, starting at page 9, paragraph 41 were the bankrupt and Mr. Coones dealing at arm's length.

THE COURT: I'm there.

MR. MCDONALD: His Lordship starts with *McLarty*, he refers also to a case that is in our authorities, *Juhasz v. Cordeiro* and then reading three lines from the bottom: (as read)

> Apart from reliance on their friendship, the trustee's arguments to support the finding of a non-arm's length relationship essentially turn on the same facts that underlie the finding that the agreement between the parties was a transfer at undervalue. Among other things, the trustee relies on the lack of evidence that Mr. Coones actually did

> anything of value; that he was paid more than Mr. Guyatt; and that payments continued while the bankrupt was already insolvent …

Paragraph 47: (as read)

> The *BIA* allows for the possibility that transfers at undervalue can occur between parties who deal at arm's length. If a finding that parties are not at arm's length is [to] be made based upon the same facts that supported the finding of a transfer at undervalue, there is a risk of depriving the concept of arm's length dealings of any independent content. The finding of a transfer at undervalue would answer both questions.

So head-on dealing with the *Legge* decision. He goes on in the next paragraph to look at the circumstances and about six lines down a sentence starting, "I am not finding", he goes onto say: (as read)

> … I am not finding that there was a non-arm's length relationship because the parties entered into a transfer at undervalue. Rather, with full focus on each question independently, looking at the totality of the evidence concerning the relationship, I cannot find …

On that evidence could not find an arm's length dealing in the case. The critical point is, he refuses to do what the Registrar in the *Legge* case said and says quite clearly what I think is the only sensible conclusion from *Piikani* and *McLarty* and the other authorities, you have to look at the totality of the evidence and solely focussing on consideration and making -- finding that that answers the question of arm's length is wrong.

The other decision that referred to more briefly arising from the same *National Telecommunications* bankruptcy is found at tab 33 of our authorities.

THE COURT: That's the new --

MR. MCDONALD: That's in the small book.

THE COURT: Yes. I'm there, sir.

MR. MCDONALD: Another section 96 application, another discussion of arm's length, this time starting at page 6, paragraph 33.

THE COURT: I'm there.

MR. MCDONALD: At paragraph 37, I won't read it -- I think it's helpful only that it fairly summarizes what I had just read to you from Justice Myers decision.

And then it goes onto paragraph 38: (as read)

> The approach of considering the degree to which the transaction departs from what would otherwise be considered ordinary commercial incentives is similar to the approach adopted by Justice Wilton-Siegel in *Juhasz v. Cordeiro*.

And once again, refers to the leading authorities, refers to *McLarty* and over on the next page, paragraph 41, refers to the need to consider the totality of the evidence.

And I should read the rest of that sentence because I haven't made a point I intended to make earlier: (as read)

> I conclude that the finding of fact mandated by section 44 [that's the non-related party's arm's length section] requires a determination based on the totality of the evidence and whether the transaction involved generally accepted commercial incentives, such as bargaining and negotiation in an adversarial format and the maximizing of the party's economic self-interest. In the absence of such indicia the inference that arises is that the parties were not dealing at arm's length.

That concept comes from *McLarty* and that concept pervades the negotiation, not only of the entire transaction, but of the asset transaction. It did involve the generally accepted commercial incentives of bargaining and negotiations in an adversarial format and maximizing self-interest.

So my conclusion on that point is that the only argument I've seen raised against the rebutting of the presumption is the *Legge* argument and it's wrong and is expressly not accepted in the *Stalt* cases.

I should say, as well, that even if you were troubled by that and wanted to look at the consideration point, the consideration evidence put forward by Mr. Darby is highly suspect. He -- for the value of the consideration received by PEOC, he comes up with a number in the $5 million range and he bases that on an outdated reserve report addressing some of the properties, some the Goodyear assets, that's the expression used to mean the transferred

properties, of course, not addressing facilities or anything of that sort at a different date from the transfer.

And when cross-examined on it, he acknowledged what we all know, that reserve reports don't purport to state fair market value. So his evidence is of no assistance on the value of the consideration received by PEOC. So he also deals with the valuation of the consideration given by PEOC and on that point, he says colloquially, I've talked to some guys with a computer model and this is the number they gave me and I don't mean to trivialize it like that, but it's -- you'll have seen it in his affidavit. It's not much more than that.

And while at this stage, you don't have all the evidence on value, of course, the suspect nature of that evidence and the qualifications in the cross-examination give rise to something I want to refer you to in the small book of authorities at tab 32.

THE COURT: I'm there, sir.

MR. MCDONALD: This is a decision of the British Columbia Court of Appeal in *Randen v. HPCB* and referring first at paragraph 14 on page 5.

THE COURT: I'm there.

MR. MCDONALD: The Court of Appeal is referring to the trial judgment and to paragraph 41 of the trial judgment. He says: (as read)

> I am aware of the requirement of the Act that I am required to accept the trustee's opinion as to the value, or in this case the opinion of those who stand in his place, "unless other values are proven". What I have is a clear opinion of a trustee, by their action when the bankruptcy first happened, that these assets had no value. By these assets I mean the auction files, mailing and sorting software, and goodwill. Years later, those who stand in the place of the trustee say the value is combined close to $1.07 million. As such, I am faced with trustees, or those who stand in their place, at different times offering different opinions as to value of the same assets. As such, I cannot rely on any trustee "opinion" as to value.

Just to pause there, I say the Trustee who says the value of the assets was $5 million based on an outdated reserve report and then on cross-examination acknowledges the reserve report doesn't purport to provide estimate of fair market value, is in the same position as the Trustees in *Randen*.

But, the Court goes on at -- the Court of Appeal goes on at paragraph 21 on the next page.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> For the purposes of this appeal I am prepared to assume, without deciding the issue, that the presumption continued to apply. That presumption is, however, a rebuttable one, and in my view the judge did not err when he concluded that the presumption had been rebutted by the evidence before him which demonstrated the trustee's opinion was not reliable.
>
> The respondents' interpretation of section 100(3) [and that's 96(2) in this case] would lead to the extraordinary result that a court would be bound to accept values which had clearly been demonstrated to be unreliable. Such an interpretation cannot be sustained.

And then paragraph 23, quoting from Houlden & Morawetz: (as read)

> If the trustee's determination of fair market value was contested, the court would then examine all the evidence and arrive at what it considered to be fair market value.

So my short submission is that if you find it necessary, which I say you needn't because *Legge* is not good law to look at the question of value and hear the argument that section 96(2) tells you all you need to know, it's not all you need to know and even at this stage of the proceedings before we have expert evidence on value opposing the Trustee, it's highly unreliable evidence.

My Lord, that concludes my argument on issue three. I say that whether you look at the entire transaction or you isolate and look only at the asset transaction, the parties were dealing at arm's length and the section 96 case fails.

I can turn to issue 5 now, I see it's 11:30, if you'd like to take a break, I'm fine, if you'd like to continue, I'm fine.

THE COURT: I'm in your hands, counsel. I think other may want a 5 minute break or a 10 minute break. How much more do you have to go?

MR. MCDONALD: Twenty minutes.

THE COURT: Twenty minutes.

MR. MCDONALD: I may have just lied, Sir, I'd like to think 20 minutes, but there's one case I'm going to have to deal with.

THE COURT: Why don't we take a brief break, no longer than 10 minutes. We will return at quarter to and then you can take whatever time you need. Again, I have to -- I'm going to have another hearing in this courtroom at 12:30. So presumably you will, if you end in 20 minutes, perhaps your friend can start, that's Mr. Leitl's discretion and then at 2:00 we'll hear from your friends on the other side.

Is that likely to --

MR. MCDONALD: That's not -- speaking to Mr. Leitl that's not going to happen --

THE COURT: Okay.

MR. MCDONALD: -- Mr. Leitl's issue, Sir, is a complicated or more than mine.

THE COURT: Certainly, I didn't mean to suggest that we were going to speed through it in a few minutes. What's your time line, likely to be?

MR. LEITL: I'm guessing 75 minutes, 90 minutes.

THE COURT: Okay.

MR. MCDONALD: If you prefer, I can keep going. I'm in your hands.

THE COURT: Let's keep going.

MR. MCDONALD: Okay.

THE COURT: Okay.

MR. MCDONALD: So the next issue I'm addressing is issue 5: Should the claim made on the grounds of public policy, statutory illegality or equitable

rescission in paragraph 24 of the statement of claim be struck?

And as I said earlier, no evidence is admissible on this. The facts pleaded in the statement of claim are assumed to be true and the test is whether there's a reasonable prospect of success. Could I ask you to turn to paragraph 24 of the statement of claim?

THE COURT: Certainly. I'm there, sir.

MR. MCDONALD: And I also deal with this starting at page 23 of my brief.

THE COURT: I'm there.

MR. MCDONALD: The pleading is about as bare bones as possible and indeed to the point of being meaningless in my submission. It says interestingly, the transactions, so we're not now talking about the asset transaction, but, about the transactions plural which are defined in paragraph 12 of the statement of claim to include the asset transaction, the share transaction and the retained interest transaction.

So the claim is that the transactions are void for three reasons. The first is, on grounds on public policy, doesn't tell us what that public policy is, but it's reflected in, to use the words of the pleadings, "an act, some rules, directives". The *Oil & Gas Conservation Act*, the *Rules* there and 3) directives, which has been given the defined term, regulatory regime.

Then the second, perhaps cause of action, the transactions are void on the basis of statutory illegality, expressly or impliedly prohibited by the regulatory regime. Again, no reference to what provision in what statute or rule or both or neither or directive, makes what in the transactions illegal.

And the third is that the transactions are void on equitable grounds, which is interesting because the heading in the argument seems to be that this is a claim of equitable rescission because those words are mentioned in a heading, in a pleading. But, then when we get to the pleadings, there's no mention of rescission, but, the equitable grounds, whatever equitable grounds is intended to mean. It says, "for the reasons and in the circumstances set out in the statement of claim". So I suppose we're to infer that all of the statement of claim read together creates some amorphous equitable grounds.

So a starting point, a pleading that vague is essentially meaningless but there's more to my argument than that. I'll deal first with the first two sub-paragraphs of 24, public policy and statutory illegality are not causes of action. And this is dealt with at page 23, paragraphs 82 to 90 of my brief and the leading authority is the decision of the Saskatchewan Court of

Court of Queen's Bench in *Brooks v. Canadian Pacific Railway* which is at tab 19.

THE COURT: I'm there.

MR. MCDONALD: This was an application for certification of a class action arising out of a train derailment in Saskatchewan and shortly after the derailment the CPR employees approached members of the community who had been evacuated and they signed agreements for some compensation.

So a representative plaintiff stepped forward and applied for certification and one of the requirements in a certification application in class actions is set out in section 6 of the *Class Actions Act* at page 9 of the decision: (as read)

> The Court shall certify an action as a class action on an application pursuant to section 4 or 5 if the Court is satisfy that (a) the pleadings disclose a cause of action.

So Justice Dawson was faced, albeit in a different context, with the same question that you are faced with today. And the plaintiff searched desperately it seems for a cause of action and had trouble with a number that they put forward, but one of them is illegality of contract and the discussion on that starts at page 45, paragraph 112.

THE COURT: Paragraph 45 of the *Brooks* case.

MR. MCDONALD: Sorry, paragraph 45, paragraph 112.

THE COURT: I'm there.

MR. MCDONALD: (as read)

> Does the statement of claim disclose a case of action for the doctrine of illegality of contract? The pleadings assert under the heading, "Alternative Settlement Mechanism" a claim for what the plaintiffs refer to as "illegal contract".

And that's the contract that the *CPR* entered into with the individuals who may be members of the proposed class. And then there's a fairly well particularized allegation at paragraphs 23(a) through (d) about why the plaintiff's claim that the settlement agreements are illegal.

Starting at paragraph 114 --

THE COURT: I'm there.

MR. MCDONALD: The Court starts: (as read)

> The doctrine of illegality of contract was examined by the Federal Court of Appeal in *Still v. Minister of National Revenue* …

And it highlights the origin of the doctrine. Onto paragraph 116: (as read)

> As can be seen from the above references, the real nature of the doctrine of illegality is to preclude a cause of action, not provide the foundation for one.

The Court refers to Halsbury's: (as read)

> No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly …

And then at 117: (as read)

> At paragraph 608 of the plaintiffs' brief of law, a number of authorities are cited illustrating the application of the doctrine. However, in each one of those authorities, it is clear that the doctrine is employed in refusing to grant relief, on public policy grounds, to a plaintiff suing on an illegal contract. The doctrine of illegality, where properly invoked, goes simply to the enforceability of rights that a plaintiff may otherwise have. It is clear, on the basis of the authorities, that the doctrine of illegality is applicable only in disputes involving the enforcement of rights on the part of a plaintiff, and in particular contracts.

And it points out that in this case, in the *Brooks* case there was no allegation of breach of contract and goes on at 119: (as read)

> A further allegation in the claim is that the settlement agreements are in breach of a statutory duty imposed by the CAA. [that's the *Class Actions Act]* No specific breaches of the CAA statute are pled. But even if they were pled, it is clear that no reasonable cause of action would be made out on that basis.

And I'll just also refer paragraphs 124 and 125: (as read)

> It may be that the pleading that the settlement agreements are void for public policy would provide a defence to the plaintiffs, if the defendants were suing to enforce the agreements. But there is no cause of action in law for a claim for a void or voidable contract which would give rise to damages.
>
> The pleadings do not assert a cause of action for illegal contact.

I did read it, but perhaps I should've in, in paragraph 119 the Court referred to the well known case of *Saskatchewan Wheat Pool* from the Supreme Court of Canada that it stands for the proposition that a breach of a statutory duty is not a cause of action. It's not precisely on point, but it's supportive of the notion that Justice Dawson was describing.

To my knowledge, there's been no subsequent authority on this point since *Brooks*. I have set out at paragraphs 86 and 87 the writers on the subject, support the *Brooks* proposition. Professor Fridman in his book says: (as read)

> A contract which is illegal either at common law or under statute is void and unenforceable by either party.

And Mr. Kain and Mr. Yoshida at paragraph 47 says what that last passage from *Brooks* said: (as read)

> While illegality may have a preclusive effect upon the enforceability of an agreement, it appears that illegality (and the contravention of public policy) cannot, when standing alone in the absence of any contractual breach, ground a cause of action for damages.

And then they also have a passage which says:

> Courts have an aversion to concluding that a that a contract is prohibited by statute.

I'd say that Courts should have a particular aversion when we don't even know what it is in the statute or the rules or the directives that is allegedly prohibiting what in the transactions.

In my submission, such vague allegations making a claim that the leading authority says does not exist has no reasonable prospect of success and should be struck. And like *Brooks*, these pleadings do not -- they do not even comes as close as *Brooks* did in disclosing a cause of action for either illegality or conduct contrary to public policy. Not only because

of their lack of particularity and vagueness, but because of the law that cause of action doesn't exist.

My friends don't refer to *Brooks,* but they do have a decision that they refer to at length of *Sidmay v. Wehttam Investments* which is at tab 28 of their materials. So the second volume.

THE COURT: I'm there.

MR. MCDONALD: And this is a decision of the Ontario Court of Appeal in 1967 and the reliance is placed on obiter in this decision -- sorry but I've got to get into the facts in a little detail. In this case, it's really -- what's referred to in the case is one of the money lender cases where a money lender not registered to lend money lends it and then the question is, can the plaintiff sue for a declaration that because the contract was not authorized or breached the money lending statute, it was illegal and so the lender doesn't have to pay the money back. That's what many of the cases refer to in here and what this case was all about.

In this case, a mortgagor was granted judgment at trial against a mortgagee declaring a mortgage void and unenforceable on the grounds of illegality. So exactly what is sought to be done here and the reason was because the lender wasn't a registered loan company under the relevant statute or the reason here, because something in the transactions violated something in the regulatory regime.

On appeal, the Court allowed the appeal and dismissed the action. It carefully reviewed the statutory provisions that allegedly created the illegality and decided on a proper interpretation that the statute did not make the loan illegal. So the discussion that follows then, they say well, but even we concluded that it was illegal, what would we do about it? And that's the obiter discussion that starts at paragraph 45 on page 15.

THE COURT: I'm there.

MR. MCDONALD: And I'll only start with the first line: (as read)

> Assuming, contrary to the conclusion already reached, that the transaction in question is illegal …

So there we get into the discussion that my friends rely on and here's a discussion of the money lender cases that I just mentioned to you and we get to what's called the usual rule, which is what my friends rely on and it is described at paragraph 52: (as read)

> In the case before us the attack is upon the legality of the contract and if it be held to be illegal the result would be that the Courts would not lend their aid with respect to any remedy arising out of the illegal contract unless the respondents can bring themselves within the class of person for the benefit of whom the debilitating legislation was enacted.

So we have a rule of sorts that says a court won't go to the aid of someone suing on an illegal contract unless they fall within an exception. The exception referred to here and relied on by my friends is that the plaintiff falls within the class of persons for whom the legislation was designed to protect.

Further on, on page 18, there's reference to a decision of *Chapman v. Michaelson* and my friend, while he doesn't include the *Chapman* decision in his materials makes an argument about that saying essentially that a Trustee can sue for a declaration. I just want to highlight starting the fourth line at paragraph 54: (as read)

> Due to the peculiar facts of this case I consider that no principle of general application supporting the proposition of counsel for the respondents can be extracted from it and that it should be considered only as an authority to be followed when the identical situation comes before the Court.

And then the Court said we're not going to follow it because the facts are different. My friend urges a general principle on you and I just caution you that you should be concerned as was this Court.

Turning to page 58, we've got the conclusion of the Court on the assumption that --

THE COURT: Page 58 or paragraph?

MR. MCDONALD: I'm sorry, My Lord, paragraph 58, page 20.

THE COURT: Thank you, I'm there.

MR. MCDONALD: And I'm sorry again, I'm going to back up to 57, the Court said if we're wrong and it was an illegal contract and the plaintiff falls within the exception, the remedy is only available if the Court can restore the parties to the status quo ante. You see in the third last line of paragraph 57.

THE COURT: I'm there.

MR. MCDONALD: I'm going to be mentioning that in a few moments that if would be impossible in this case to restore the parties to status quo ante, given the two plus years that have passed and the circumstances of this transaction.

But, the conclusion is set out in paragraph 58 about the general rule and stated perhaps a little more clearly here: (as read)

> There is a general rule that the Court will not render assistance to the enforcing of any rights of parties to an illegal contract unless the party claiming relief before the Court can bring itself within the class of persons for whose protection the illegality of the contract was created.

And goes onto to say the respondents in this case are not those persons. I won't prefer you to read from it, but Justice Laskin, now on the Court of Appeal, had a concurring judgment at page 21 and he emphasizes --

THE COURT: At page 21?

MR. MCDONALD: Yes, paragraph 61, page 21, it says Laskin, J.A. about the middle of the page.

THE COURT: Okay, sorry.

MR. MCDONALD: He writes clearly as he always does and I just want to mention at paragraph 63 the last line he emphasizes that: (as read)

> … the status quo ante could not be restored and hence the plaintiff failed.

In a case referred to as *Lumley v. Broadway Coffee*. That was a long trip into an old case, but, I thought important because of my friends reliance on it and I say it's of no assistance to the plaintiff.

THE COURT: Just to pause, this is Justice Laskin, who went to the Supreme Court, not the current Justice Laskin on the Ontario Court of Appeal.

MR. MCDONALD: I think that was Justice Bora Laskin when he was on the Court of Appeal of Ontario before he was elevated.

THE COURT: That's why I was stumbling, that makes sense

now. Thank you.

MR. MCDONALD: As I say, in my submission, the *Sidmay* case is of no assistance to my friends for four reasons.

The first, *Brooks* is on point, it's clear, it was the ratio of the case, not obiter and should be accepted.

Second, there's nothing in the statement of claim that shows anything in the transactions was illegal and we shouldn't have to guess about what part of what transaction broke what law.

Third, there's nothing in the statement of claim that shows that the Trustee or the Sequoia creditors are within the class of person for whose protection the illegality of the contract was created. That's the exception. That's what my friends would hope to convince you that *Sidmay* is better law than *Brooks* and that this is a case where the exception applies. But, it's impossible, in my submission to find anything in that pleading that could lead you to conclude that the Trustee falls within the *Brooks* exception.

And the fourth point for the reasons I'll discuss in a moment, it's impossible to restore the status quo ante. So even if all the conditions of *Sidmay* were met, relief should be denied.

My final argument is on equitable rescission or equitable grounds, whatever that cause of action alleged is in 24.3 and I refer to it at paragraphs 91 to 94 of the brief.

THE COURT: I'm there.

MR. MCDONALD: In 91, equitable rescission is a remedy, not a cause of action. It is predicated on a plaintiff alleging some contract arising from fraud and as a result, the plaintiff mistakenly entered into a contract or misrepresentation leading to a contract or a contract was obtained by some unconscionable act.

The Trustee/plaintiff has made none of those claims or alleged no facts that would support any of those claims.

So it's so vague, to fail on that ground alone, but if you've concluded that somehow it had characterized an equitable rescission claim it's a claim that doesn't exist as a cause of action, it may be a remedy. But, my friend's answer to that, is well the statement of claim alleges unconscionable acts and presumably meaning that the transactions were entered into on the basis of unconscionable acts.

The unconscionable acts alleged are not in the pleading, of course, well not characterized as such in the pleading, but described in paragraph 205 of my friend's brief that the retained interest agreement allowed the transaction to proceed without regulatory approval or that Ms. Rose breached her duties as a director.

What is impossible to conclude in my submission on that argument, is that that comes anywhere near making an allegation of unconscionability let alone unconscionability that induced a contract. And the only authority I'll refer you to is at tab 34 of my small book.

THE COURT: I'm there.

MR. MCDONALD: Paragraph 16 on page 3.

THE COURT: I'm there.

MR. MCDONALD: The Alberta Court of Appeal decision in *Cope v. Hill* in 2007: (as read)

> Turning to unconscionability, the test for unconscionability was recently stated in this Court in *Cain v. Clarica Life Insurance Company*: (as read)
>
> 1. A grossly unfair and improvident transaction;
> 2. The victim's lack of independent legal advice or other suitable advice;
> 3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
> 4. The other party's knowingly taking advantage of this vulnerability.

I'll leave it at that.

Paragraphs 92 to 94 of my brief, state that there's another fatal bar to an equitable rescission claim and that is that as Fridman takes in the quote at 92, it must be possible to restore the parties substantially to their pre-contractual position: (as read)

> Restitutio in integrum, to return the plaintiff to the position in which he was in before the contract was made. One of the essential features of an equitable remedy is mutuality. It follows that unless both parties

> can be restored to their respective original situations, it should not be open to a court to rescind the contract.

My friend's answer to that is -- there's a decision called *Houle*, I won't take you to it that says substantial equivalence is good enough and you can make adjustments and do practical justice. In my submission, substantial justice or practical justice and substantial equivalence is not the law and the Court in *Houle* even reflects the general principle that Courts will deny rescission where it was impossible to restore the parties to their original position.

But, even if one were to say, close is good enough, how do we -- what adjustments would we look at in a case like this? My friend doesn't offer any and I just pose the following: How would the share purchase agreement be rescinded? The Trustee can't redeliver the shares of Sequoia PECO to Perpetual. The Trustee doesn't have the shares. 198 owns the shares. 198 isn't a party. That on its own makes it impossible for a Court to order rescission of the share purchase agreement. No adjustments can fix that.

Sequoia is now bankrupt. Would the bankruptcy be rescinded? What about the hedging protection of the gas marketing agreement, would that somehow be adjusted through compensation to replace that with an equivalent? We know it cost Perpetual over $12 million, how does that work in a rescission. What about the free office rent? Do we give the office back and restore the rental rate? It's frankly impossible.

What about the asset purchase agreement, how would it be rescinded? Well, the reserves have been produced for two years, do we somehow restore the replete reserves or replace them with some others? Do we put the gas and the liquids back in the ground? Do we restore the production revenue to PEOC or Sequoia even though the company is now in bankruptcy? Shut-in wells that were shut-in by Sequoia do they, are they returned after wells? It's a real property transaction in a sense and the property has changed so substantially that a rescission wouldn't be possible, even if for some reason you considered it to be viable and it's just another reason that the cause of action alleged has no reasonable prospect of success.

My submission, that claim, as well should be struck and that if you agree with me on those two issues, that's the end of those two claims and there remains only one other claim against my clients and that's the oppression claim that my friend Mr. Leitl will deal with.

Thank you for your patience, My Lord, I know I was longer than I expected and longer than the 20 minutes I thought I might be, half an hour.

THE COURT: Thank you, Mr. McDonald. It's quarter after, do

you want to start, sir?

MR. LEITL: I can go ahead, I didn't know if you needed a break between your next --

THE COURT: Yes, we start at 12:30, they'll probably drift in, so why don't we go to 12:30 and then this contingent will adjourn and we'll recommence at 2:00. Let me look at my calendar, I know I have a call at 4:45, I can displace that and if the parties are agreeable, I don't mind sitting until 5. Madam clerk, are you okay with that?

THE COURT CLERK: Yes, Sir.

THE COURT: Thank you, so I'll offer that if it's of assistance.

MR. LEITL: Thank you.

THE COURT: Go ahead, Sir.

Submissions by Mr. Leitl

MR. LEITL: So good afternoon, My Lord, my name is for the record Leitl, initial S., counsel for the individual defendant Ms. Rose and you're been introduced to my colleague, Mr. Badami, whose behind me, who is assisting me.

I will primarily be referring to our own brief at some selected authorities so the two red sets. I obviously do not intend to read the brief to Your Lordship, we stand by it and leave it with you.

And subject to any questions or directions that you have, what I'm going to do is address certain aspects of what was defined as the Darby affidavit, when I call it that, or Darby, I don't mean any disrespect to the gentleman. I will talk about the release which I say is a bulletproof defence. So called ARO, asset retirement obligations. The Trustee's lack of standing to sue on two bases, one under the *BIA* and one under the *ABCA*. The oppression claim and then the director claim, the last of which the director claim is an application to strike on the pleadings similar to my friend, Mr. McDonald's application on the public policy claim and we have adopted his submissions on the law and applications to strike and the law on summary judgment. I didn't want to repeat all of that.

So let me begin with the Darby affidavit, My Lord, and given the affidavits of Mr. Schweitzer and Ms. Rose and given our cross-examination of Mr. Darby, I was very surprized to see at paragraph 11 of the Trustee's brief the assertion that none of Mr. Darby's

evidence is disputed. I was very surprised to see that and it is very much disputed. Not in terms of credibility, which is not an issue and the main reason for that is Mr. Darby has no firsthand knowledge of anything.

We do dispute, or if you prefer challenge his evidence on two basis and one is that some of it, in terms of admissibility and some of it in terms of completeness. Admissibility and this is addressed, just for your reference, I'm not going to read it to you at paragraphs 28 and 29 of our brief, it's that he is a lay witness primarily who should not be giving opinion evidence on legal issues. He told me in cross-examination he didn't intend to give his opinion on legal issues, yet you'll see in his affidavit at paragraph 51, he gives his opinion, it's stated to be his opinion that there was oppression and that is the only express evidence on the subject of oppression in his entire affidavit.

He gives his opinion in his affidavit that Ms. Rose was the directing mind of PEOC at the time. A legal concept and remarkably an opinion which expressly contradicts his own pleading which is that PEOC was a wholly owned subsidiary of Perpetual.

And the issue of opinion evidence and completeness overlaps in this respect, because you'll see that Mr. Darby's opinion that there was oppression is based on his opinion about the interest of the AER, the Alberta Energy Regulation if I can use that, and his opinion about the interests of certain unidentified municipalities and where does that overlap with completeness? He didn't speak to the AER and he didn't speak to the municipalities about their interests.

He opined that Ms. Rose is the directing mind of PEOC, but he didn't speak to her about that. He opined that Ms. Rose personally benefited from the impugned asset transaction, but he didn't ask her for her view or explanation about that. He just thought it was so obvious he didn't need to research the issue.

As my friend alluded to, he has all of the records of Sequoia in respect of their business operations, since October 2016 to date. He has interviewed principals of Sequoia and yet he offers no evidence about any of that. And as you may have seen, My Lord, PricewaterhouseCoopers was first -- their first role in this was as proposal trustee. They were hired by Sequoia. They would've had to go over with Sequoia all of their affairs and yet, Mr. Darby's affidavit is silent on that and yet, the Trustee alleges that somehow Ms. Rose and the Perpetual defendants were the cause of Sequoia's bankruptcy 18 months later.

So further with respect to the issue of completeness of the Trustee's evidence, you would've seen in our brief that underlying all four causes of action is this concept of the ARO being a liability and I'm going to come to that to explain why that's wrong, but even to make and advance that theory, you think that the Trustee would've gone to the AER and said, was it

a liability? Did you consider you had a liability, or they had a liability to you? Did you have any interests that you thought were actionable in terms of reasonable expectations? Didn't ask them about that.

They didn't ask the municipalities about their interests. The Trustee assets that the oppression claims are an asset of the bankrupt estate and Your Lordship would've seen section 30 of the *BIA* which talks about the authority of a Trustee to sue. One of the conditions and there are others, well one of the conditions is that they have to be suing in respect of property of the bankrupt. And despite the fact that the Trustee has all of the records of Sequoia to date, they have offered no evidence that these claims can somehow be considered property of the bankrupt and I'll be getting to that in more detail probably after the break.

And even more remarkable when I read my friend's brief, My Lord, was that they write, "The Trustee's application relies on the facts as presented by the defendants". My client, Mr. McDonald's clients. That includes the affidavit of Ms. Rose, that includes the affidavit of Mr. Schweitzer. So I look forward to hearing from my friend when they get up to explain why they can't rely on that evidence, only certain selected portions that they got back in the summer.

So that takes me to the release and this is an issue, My Lord, that I say should completely end the claim against Ms. Rose today. In respect of the release, it bears emphasis that Mr. Darby in his affidavit acknowledged it. He knew about it and he made it an exhibit to his affidavit. He doesn't question it. While he was happy to give his opinion about oppression for example in respect of certain creditor interests, he said nothing about the release, had no problems with it.

Nor does the Trustee's claim challenge the share purchase agreement, only the asset agreement and why is that important? Because you would have seen from our brief that the delivery of the release was a closing delivery condition under the share purchase agreement and my friends admit that that was an arm's length agreement.

More pointedly, the statement of claim does not seek to set aside the release like it does with the asset transaction. And of course we know the Trustee today comes to court standing in the shoes of PEOC now named Sequoia and it was PEOC under new ownership who negotiated the release and it wasn't a one-way release, it was a reciprocal release.

So if you have my brief handy, My Lord, I'm not going to read it out, but, I'll walk through certain things that I think are important and this begins at paragraph --

THE COURT: I'm just reminded, I left it on my desk upstairs,

but go ahead, I've got it in my mind.

MR. MCDONALD: Can I offer you --

THE COURT: Sure, it won't have all my highlighting, but thank you.

MR. LEITL: And this is simply -- I simply intend to walk over the high ground.

THE COURT: That's fine.

MR. LEITL: Let me begin at paragraph 41 on page 10, My Lord.

THE COURT: I'm there.

MR. LEITL: You'll see there I've touched upon this already that the idea of a reciprocal release was negotiated at arm's length between the parties, this is part of the deal and over to 42, they use the defined term "claim" and "claim" is broadly defined in the share purchase agreement to include, among other things, any existing claim as against -- in this case, as against Ms. Rose in her capacity as a director of PEOC.

And then paragraph 43, you'll see the words of the release: (as read)

> … release and forever discharge Susan Riddell Rose from all claims as defined which PEI and PEOC now have or can here have or can hereafter have against her by reason of existing out or in connection with her having acted at the request of PEI as a direction of PEOC.

Clearly, unless Your Lordship finds this to be illegal on some basis, clearly the parties' intentions were retroactively to wipe the slate clean, both in terms of any claims that Ms. Rose might've had against the companies and any claims the companies may have had against her.

And it's clear in the evidence the share purchase agreement was negotiated, not only between sophisticated parties but with sophisticated legal counsel, the law firm of McCarthy Tetreault represented 198 and Kailas. And in paragraph 45, you'll see that there's an acknowledgement of the parties understanding what they're doing and they talk about, we have had independent legal advice.

Paragraph 47, this goes back again to my complaint about the incompleteness of the evidence and of the process followed by the Officer of the Court, the Trustee. When Mr. Darby and his team met with Perpetual team and they had decided to sue Ms. Rose and they never told her that and Officer of the Court and they knew about the release, they didn't think it was necessary to ask her about it. They sued anyway.

I'm not going to -- you've seen if you've read the Rose affidavit she talks about the release, not one question on cross-examination, didn't even bring the subject up.

So here I maybe will break so that your directions -- if you go to paragraph 53, here is what I say is the very strange theory by which the Trustee addresses, I would say attack, but they don't attack the release, they don't seek to set it aside. They seek damages and here's the pleading and this by the way is in the section regarding Ms. Rose's duties as a director not in any section discreetly dealing with the release. But here's the pleading: (as read)

> That Ms. Rose breached her duties to PEOC …

And pause there, this is PEOC who wanted the release under new ownership, but they say she breached her duties: (as read)

> … by causing PEI to require 198 to agree to the release being a condition of the deal.

So let's unpack that and then maybe I'll pause. There is not one iota of evidence that Ms. Rose could've caused PEI to do anything. PEI is and was a publicly traded company which was the parent that owned 100 percent of the share of PEOC. If you recall and it's in our brief my friend's submissions of Justice Jeffrey described the plaintiff's conception of this transaction he said, this was Perpetual doing a deal through and using one of its subsidiaries, PEOC.

So under what theory could there be the allegation that Ms. Rose personally cause the parent company, has its own Board of Directors, to do anything? So I say it's a complete bust, you can stop there.

But, the allegation goes on further, that she caused the parent company to require the arm's length party to agree to this. Impossible. And you'll see over on page 14 when Ms. Rose expressly denied the argument, the allegation that she's the directing mind of PEOC and explained how the ultimate decision to enter the transaction was that of the parent company who had its own Board of Directors.

And we know that even if Ms. Rose was able to somehow cause the parent company to do

something, the parent company was not able to cause 198 to do anything because 198 was an arm's length party who wanted its turn in the deal. And you'll see paragraphs 59 and 60, on the cross-examination of Mr. Darby where I put it to him, that 198 was not pressured in any way to enter this deal and he said, I can't comment on that, doesn't know.

I put it to him that surely the signatures of the new owners of 198 on the release evidenced their intent to agree to the terms of the release and he fought me on that.

Now, we get into the law, my friend's raised one case and one provision of the ABCA, but in light of Your Lordship's commitment, perhaps I should pause there?

THE COURT: Yes, that's a good time for us to pause, so we'll ask madam clerk to adjourn this matter.

MR. LEITL: We'll clean up here? We should clean up here.

THE COURT: Probably you can just shuffle the stuff off to the side, I don't think counsel will be disturbed, one side is from your firm so …

MR. LEITL: 2:00?

THE COURT: 2:00.

MR. LEITL: Thank you.

THE COURT: Madam clerk, could you adjourn till 2:00.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 2:00 PM

Certificate of Transcript

I, Su Zaherie, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: 1001-8936
Dated: November 12, 2018

Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta

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November 8, 2018 — Afternoon Session

The Honourable Justice Nixon	Court of Queen's Bench of Alberta
R. de Waal	For PricewaterhouseCoopers Inc.
L. Rasmussen	For PricewaterhouseCoopers Inc.
D.J. McDonald, QC	For Perpetual Energy Inc.
P.G. Chiswell	For Perpetual Energy Inc.
A. Badami	For S. Riddell Rose
S.H. Leitl	For S. Riddell Rose
A. Gault	Court Clerk
K. Salguero	Court Clerk

THE COURT CLERK: Order in court.

THE COURT: Good afternoon, please be seated. I apologize, I finished at 2 and I just wanted to grab half a sandwich.

MR. MCDONALD: We witnessed your schedule today and we appreciate you making the time.

THE COURT: At your convenience, counsel.

Submissions by Mr. Leitl

MR. LEITL: Thank you, My Lord. So where I left off was on the evidence regarding the release of my client, Ms. Rose and in short, the Trustee has no evidence and no evidentiary theory as to why the release would not be enforceable nor does it seek to actually challenge the release, in terms of its enforceability, but for one legal theory as I understand it and I'll come to that.

THE COURT: Can I just pause you for two seconds?

MR. LEITL: Yes?

THE COURT: I did during the break get my own copy of this, madam clerk, if you could return that to Mr. McDonald. Thank you. At your convenience counsel.

MR. LEITL: You'll see in our brief and I'm not going to walk through it in any detail, but we do talk about the juris prudence on the construction of a release and in large part it's like basically the same as the construction of a contract, you have, like I said the parties intent. There's not a lot of magic involved.

The case cited by my friends, the decision of Queen's Bench and then Court of Appeal in *Tongue v. Vencap* and just for your reference that's -- those two decisions are tabs 11 and 12 of our brief. I don't need to take you to them unless Your Lordship would like, but --

THE COURT: No go ahead.

MR. LEITL: -- *Tongue* involved current directors of a company using insider information to enter into a transaction, and inside information they didn't disclose to their counterparty. They continued to be directors and in my submission, the ratio of the decision there was non-disclosure and the fact that they were in a fiduciary position as directors and they continued to be directors.

So you'll see in the lower court decision and it's cited in our brief, the Court talks about you can't relieve directors of future obligations and if you look at paragraph 64 of our brief, this is on page 15, where we quote the section.

THE COURT: I'm there.

MR. LEITL: And this according to my understanding and my friend's position they hang their hat entirely on this section, on this provision, subject to the provision that deals with USA's, no provision in a contract, articles or bylaws or resolutions relieves a director or officer from a duty to act.

So I'll pause there, you can't -- by contract if you are a director relieve yourself of those obligations and then it goes onto say, or any liability from that duty. Nowhere in *Tongue* or the other juris prudence you've seen is there any suggestion that this is meant to have a retroactive effect and in my submission, the position of the Trustee, as I understand it, is simply a director cannot be released ever.

I mean in this case, arm's length parties negotiated the release, the reciprocal release. It was -- the release concerned, in this case the subject matter, the transaction which they negotiated. They had full knowledge of what they were giving away, if anything and if my

friends interpretation of this section works, that means change of control transactions like this one, directors as is common, can never have a clean break, can never receive a release and more fundamentally, more importantly you could never settle a lawsuit against a director because you could never the director.

And in my submission, my friends talk about it in the context of derivative applications, they cite a decision about the absurdity principle, in my submission, that interpretation of this provision leads to nothing but absurdity. Imagine what would happen in the DNO markets if they find out that in Canada you can't release directors who are being sued, they're no uninsurable.

So in summary, My Lord, on the basis of the evidence and the law, I mean this is just a bulletproof defence to any claims against Ms. Rose in respect of her capacity as an officer or director of PEOC at the time.

I want to briefly move onto a different subject and that's the ARO, the mysterious ARO which you'll see referred to repeatedly and as I mentioned, this underlies all four causes of action in this claim. And this is addressed at paragraphs 82 through 90 of our brief, I'm not going to read it, but I'll walk through some points.

You'll see at paragraph 82 we explain how this concept underlies each of the causes of action, the stated causes of action and the premises that my friends put to the Court is the ARO is a liability and in my submission, it's not. The premise is that because of the ARO that AER was a creditor of PEOC at the time of the transaction. And why is that important? Because as you've seen from our materials, when you sue for oppression, you can only sue in respect of the time when you were a stakeholder and in respect of the conduct at the time. You can't buy into an oppression claim.

So they have to establish, in order to proceed with an oppression claim based on the AER's interests, that the AER was a creditor of PEOC in October 2016. And you'll see in paragraph 84 of our brief, we cite the authority and Mr. Darby admitted that ARO is not a liability, for accounting purposes it's called a provision, it's inherently uncertain, subject to people's judgment. All that you know is that the ultimate owner of these assets down the road, the last guy to own them is going to be responsible for the clean up. And even then, the presumption is, it's the owner who be responsible to hire third parties or do it in-house to do the reclamation work. There's no assumption that the AER will be a creditor.

And you've seen in this case like other cases, parties when they're negotiating make their own judgment calls about ARO. You've seen in paragraph 9 of our brief, the quotation from Sequoia telling its story what happened, which by the way was cited in a preliminary report of the Trustee. No other evidence from the Trustee about what happened at Sequoia,

where they said they had their own ARO plan, their own plan for minimizing ARO. They reclaimed a lot of the well -- the Goodyear assets.

And I though it was helpful, My Lord, to draw the Court's attention to the -- let me pause. You heard my friend, Mr. McDonald, talk about the *McLarty* case and I believe my friends cite that for the non-arm's length issue. But, that case also does talk about contingent versus absolute liabilities and the statement of claim in this claim does mention the term contingent creditors although none of them are identified. But, I want to be clear in our submission that the ARO is not a current liability and it is not a contingent liability.

And if you have our authorities, My Lord, volume 1 --

THE COURT: I'm there.

MR. LEITL: -- the decision of the Supreme Court of Canada in *Daishowa*.

THE COURT: Tab?

MR. LEITL: 13, I'm sorry.

THE COURT: Thank you, I'm there.

MR. LEITL: So this case came from Alberta, it wasn't in the oil and gas industry, it was in the forestry industry, but it turns out the forestry industry is quite analogous in the sense that the forestry companies have reclamation obligations. And this case concerned, it was a tax case, but it concerned the deductibility, the accounting of those reclamation obligations.

And you'll see at paragraph 35 -- let me go back -- if you go -- let's start with paragraph 29, just for context.

THE COURT: I'm there.

MR. LEITL: You'll see the Court said that: (as read)

> I agree with [another Judge] and the industry intervenors that the assumed reforestation obligations are not appropriate characterized as the assumption of an existing debt of the vendor that forms part of the sale price of the property. The obligations -- much like needed repairs to property -- are a future cost embedded in the forest tenure that

> serves to depress the tenure's value at the time of sale.

The Court expressly rejected the counter thesis that it was more like a property with a mortgage. So the Court said, no, no, no, this goes to the valuation of the property, you don't add to the value what you have to pay to reclaim.

And over in paragraph 35, you'll see where the Court concluded in the last sentence: (as read)

> As I have explained above, the reforestation obligations were not a distinct existing debt, like a mortgage, but were embedded in the tenure so as to be a future cost associated with ownership of the tenure.

So if you accept that this is analogous, you accept that it's not a debt. Not a current debt and now we get to the part, is it a contingent debt and the answer is no and that begins on the same page, you'll see the heading, Contingent Liabilities.

THE COURT: I'm there.

MR. LEITL: For context, paragraph 39 the Court considered the *McLarty* decision in that regard and then the important paragraph in my submission is 40 and I'll leave it with you, but just to paraphrase to keep this moving along, My Lord, the Court completely rejected the argument that reforestation obligation is a contingent liability.

Which takes us to the next tab and that's the decision in so-called *Redwater*, it's actually called *Orphan Well Association v. Grant Thornton*, but, the company involved is called *Redwater*.

THE COURT: I'm there.

MR. LEITL: My friend's submission say that the decision in *Redwater* definitively shows that ARO is a liability and I say that is fundamentally wrong. ARO wasn't even an issue in this case. But, what this case showed and I commend it to Your Lordship, just as a good primer on how the system works, but for the purposes of this particular case, if I can take you to paragraph 21 and I won't read all of paragraph 21, but this is the Court describing how the Orphan Well Association and the ARO system works and they emphasis that the rubber hits the road, this is me paraphrasing of course, but the rubber hits the road at the end of the lifecycle of the asset.

And they quote from the AER's directive 006: (as read)

> A well facility or pipeline in the LLR program is eligible to be declared an orphan when the licencee of that license become insolvent or defunct. Once it determines a well … [et cetera and it goes on and then the bottom of the page]
>
> Designation as an orphan is usually only done after any insolvency process is completed when and if it becomes apparent that there's no one capable of properly abandoning the well.

That has not happened in this case yet. In fact, in this case while not disclosed by the Trustee, we found it on our own, we asked the Trustee for it, I should be honest, the proof of claim filed by the AER, as you may have seen is stated to be somewhere between $1 and approximately $225 million. And as you know from the insolvency process, the trustee could say I'm calling it zero, that hasn't happened yet.

And then if we're still with *Redwater* and we go to paragraph 60, My Lord.

THE COURT: 6-0?

MR. LEITL: Yes. My friends, if I understand their submission correctly, submit that the AER claim -- and I should pause -- I should pause -- the AER proof of claim is at the date of bankruptcy. Oppression claim must refer to its claim as at the date of the transaction.

The AER proof of claim doesn't say if it had a claim at the date of the transaction, doesn't refer to an oppression claim, Trustee says nothing about that and I'll come to that more when I'm in the oppression. But, these two temporal goal posts are important for a lot of reasons, at the date of the transaction and the date of bankruptcy.

But, here paragraph 60, we're talking about the test of the Supreme Court of Canada in *AbitibiBowater* and the test here if Your Lordship is not familiar with the case, is when does an enforcement order issued by a regulatory body become provable in a bankruptcy proceeding? And here is the *AbitibiBowater* test which if I understand my friend's submissions correctly, they say they've met it. But, let's just walk through it: (as read)

> There must be a debt, liability or obligation to a creditor.

It's not the case here, at the time of the transaction, I'm talking about now for oppression.

> The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency.

It still hasn't happened. Proof of claim has not even been determined.

> It must be possible to attach a monetary value to the debt, liability or obligation.

Not possible in this case, because it's somewhere between zero and a quarter billion dollars. And just so you understand what was going on in -- and I'll refer you to paragraph 64 on this point, as well, My Lord.

THE COURT: I'm there.

MR. LEITL: And they continue on the same issue and the last sentence: (as read)

> These future obligations of the debtor become claims provable in bankruptcy when they arise, so long as they are reduced to a monetary claim and meet the other conditions set out in *AbitibiBowater*.

A word of caution when my friends cite *Redwater* as they do in their brief, the parties in *Redwater* conceded satisfaction of the first two component of the test in *AbitibiBowater*. We don't concede one of them and you'll see that at paragraph 73 if you'd like to make a reference to where that's confirmed.

THE COURT: Thank you.

MR. LEITL: So to sum up on the ARO, My Lord, a fundamental premises on which each of these ostensible causes of action are built, the ARO as a current liability as at the date of the transaction is fundamentally flawed. And if that's so, the oppression claim for that reason alone fails.

And to the extent that a director claim, as I define it, against Ms. Rose is premised on the same underlying theories it fails, as well, and I'll come to that.

So I'm going to move on to the standing of the Trustee and in our materials, in our brief, we submit that the Trustee does not have standing to sue for oppression on two bases. The first is, authority under the *Bankruptcy Insolvency Act*, two reasons, no inspector approval and the second one being, personal claims versus property, the bankrupt which I'll explain. We say the -- even if you assume the so-called AER and municipality oppression claims

can hold water, they are individual claims, they're not claims of the estate and I'll come to that.

And the second reason we submit that the Trustee does not have standing is that it does not qualify as a complainant under the *ABCA*. So it's *BIA* and then *ABCA*, and then I'll deal with them in that order.

And our submissions on the *BIA* are in our brief at page 21, paragraph 93 to 99 and if you just look briefly at paragraph 94, we quote from the decision of the Alberta Court of Appeal in *BDO* where they note that: (as read)

> Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act.*

So they have limited powers by statute. At 31, this is from the *BIA*: (as read)

> The trustee may, with the permission of the inspectors, it may sue …

And you'll see in (d) there that the suit has to relate to the property of the bankrupt. Pause there. Property of the bankrupt is the property of Sequoia as at the date of bankruptcy, not as at the time of the transaction. And the trustee offers zero evidence on that, what is the property of the bankrupt at that time. Nothing.

And this is important in terms of these temporal goal posts or bookmarks if you prefer because it's entirely possible given -- for argument sake that the AER or the municipalities may have had an oppression claim available to them as at the date of the transaction. But, that begs the question about whether that claim is still part of the estate. If the municipalities were paid, there would be no possible claim. If their claim was deferred further, they'd be no possible claim, but we don't know that because the Trustee has not shown us the status of the estate.

So over to the end of the quotation on paragraph 94 which is on page 22, you'll see the Court of Appeal saying: (as read)

> Personal claims do not relate to the property of the bankrupt.

And I'll circle back, but first I wanted to deal with the inspector approval. As I pointed out, the *Act* expressly requires the trustee can only sue with permission of the inspectors. My client's statement of defence filed in August pleaded that the Trustee does not have authority under the *BIA* to sue and we then filed evidence re cross-examinations, no time since has the Trustee put into evidence proof that the inspectors have authorized this

lawsuit.

We were able to find one case, I'll give you the reference I'm not going to read it to you, but at tab 19, there's a decision called *Houle* and there there was a dispute about the validity of an assignment of a cause of action and at paragraph 40, if you'd like the reference, the Court found that there had to be evidence of the inspector's approval of the assignment under section 30 of the *BIA*.

Bear in mind the admission of Mr. Darby on cross-examination that the lawsuit against Ms. Rose in this case is extraordinary.

Now, our submissions in our brief on personal versus claims of the estate or actually in an oppression section, I'll give you the references, paragraphs 123 to 127 and the reason for that, My Lord, is that the issue has come up under both the *BIA* and the *ABCA*. And you'll see for example at paragraph 123, the case law on trustees suing for oppression requires that the underlying claims refer to collective claims of the creditors. Again, they can't, wearing the trustee hat, advance individual creditor claims.

And one obvious reason, My Lord, is that on the theories of the AER claims and municipal oppression claims before the Court, either one of them could sue today, but they haven't. They haven't assigned their causes of action to the Trustee. The Trustee hasn't told them about this lawsuit according to Mr. Darby, the Trustee hasn't interviewed them about their interest at the time, he doesn't know. So on what basis could an Officer of the Court just sue in their name in a complete vacuum of evidence?

Bearing in mind that oppression claims are individualistic, they're approved on the basis of reasonable expectations and nowhere in the evidence from the Trustee will you see anything about the reasonable expectations of the AER or the municipalities as at the time of the transaction.

But, I can tell you with confidence what they should've been because this is objectively determined as at the date of the transaction, the AER would've not expected to be a creditor of PEOC. The AER's position and current position in the *Redwater* proceeding is that it is not a creditor. The municipalities as you've seen from the evidence and we'll get to this in a bit more detail, were either paid or they're three who agreed to defer. So I ask rhetorically, a municipality has a tax claim that it agrees with Sequoia to defer to a subsequent date, what is its reasonable expectation as at October 1, 2016? The only reasonable expectation would be that it gets paid on the deferral date and do we know whether they got paid? No, because the Trustee hasn't come forth with that evidence.

You'll see in *BDO* and this is conceded in my friend's brief that a trustee under the *BIA* and

the oppression remedy cannot advance personal claims. You'll also see reference -- and this is at paragraph 63 of my friend's brief, the Trustee's brief, to the decision in the Trustee's brief to the decision in *Dylex* and we agree that claims brought for the benefit of the estate with respect to property of the bankrupt can be advanced by the Trustee, but that's not the case here.

The kind of collective claims that trustees can bring in oppression claims are the kind of claims that you would see in the decision in *BDO* and similar cases where there is asset stripping because in *BDO* and that's at tab 16, for your notes, My Lord, of our materials at paragraph 12 the Court of Appeal expressly found that fraudulent preference claims as against insiders, which is not the claim against Ms. Rose, are collective claims. So that's the kind of claim that a trustee might be able to show is property of the bankrupt.

So on those basis, My Lord, assuming that there are viable oppression claims there and we don't concede that for a moment, but even assuming so, we say that if anybody's going to make those claims it has to be the AER and or the municipalities sue directly. Those claims have not vested in this Trustee.

So I'll move to the Trustee's standing as complainant and beginning at page 24 of our brief, My Lord, you'll see in paragraph 101 -- I mean it still continues today that *BCE* is the leading Supreme Court of Canada decision on oppression generally and in most cases, the general framework for the test for oppression is whether the evidence, note evidence, establishes that the complainant had reasonable expectations of the defendant and whether they were violated causing damage.

And at the risk of repeating myself, there is not one iota of evidence about the reasonable expectations of the AER or the municipalities. In many cases, I'm sure Your Lordship has seen some, the complainant's status is not challenged, if it's a former shareholder, an existing shareholder, a current director, I mean it's just not debatable. But, where it's a creditor and you'll see in paragraph 104 where we quote section 239, where it's a creditor there's a gatekeeping mechanism, not all creditors get to be complainants.

And why is that? Because creditors can sue on their creditor rights. If you have a loan agreement and it's breached, you sue for breach of agreement. As Your Lordship may recall in *BCE* there was a restricting of *BCE* and there were debenture holders. The debentures were publicly traded. *BCE* was going to recognize the legal rights of the equity holders and the debenture holders said, wait a minute, that's going to negatively affect the market value of our debentures. And the Court, I'm obviously paraphrasing, at the end of the day said, these debentures are many, many pages long, you negotiated the terms, you could've provided for change of control, you didn't do it. So you don't have the right to sue for oppression as a creditor.

But, here we're talking about the Trustee's seeking the Court's exercise of its discretion to find that it's a proper person. And before I move onto the complainant issue, I just want to draw your attention to something I've alluded to at paragraphs 105 through 107, and that is the proposition that debt claims cannot be converted into oppression claims.

Oppression claims are not an opportunity for parties to change their contractual rights after the fact. Oppression claims cannot confer upon creditors the rights of equity holders. So a creditor who comes to the Court seeking it to exercise its discretion has to say, I've got something special here, I've got a special situation that warrants me being given access to this extraordinary remedy.

Now, the first point we make is one of procedure. The statement of claim alleges that the Trustee is a complainant who qualifies as a proper person and in my submission, My Lord, when you allege something, you put it in play, it's an issue. Our statement of defence denied that the Trustee is a complainant. We raised this on August 30 before Justice Jeffrey and my friend told Justice Jeffrey that he didn't need to take any further steps. We applied to dismiss the claim on the basis that they had not sought and obtained standing and Ms. Rose swore evidence in that regard, they did not put in rely evidence, they didn't file an application to cover this off, they didn't cross-examine on the issue.

As I read my friend's submissions, they say we are a complainant because we alleged it. But, that's not what the law in Canada and Alberta says in my submission. We quote *Peoples* at paragraph 110, where the Court said: (as read)

> Creditors may apply for the oppression remedy by asking a court to exercise its discretion and grant them status as a complainant.

And then over the page we quote from *First Mortgage* where the Court there said: (as read)

> It makes sense to have that determined at an early stage for efficiency.

Because if you don't have standing and you go through an expensive trial and it's determined at trial you don't have standing, that's an enormous waste of resources, the Courts and the parties.

Now, at paragraphs 48 through 56 of the Trustee's brief, they argue that my position is novel; my position as stated by the Court of Queen's Bench and the Alberta Court of Appeal. Instead of referring to that authority My Lord, they refer to a couple of cases that deal with derivative claims and their argument is that my position is absurd because they say if you accept that there should be a preliminary hearing on a complainant's status, if it's

disputed they say, that means to quote them "people in a derivative claim would have to file two originating applications". And in my submission that makes no sense, because in a derivative application where a party's status as a complainant is disputed, the Court would determine that at the same time as the question of leave to proceed.

In the cases cited by my friends in the derivative field about complainant status, the status wasn't disputed. We do agree with my friends that the law and the general proposition states that when a trustee in bankruptcy seeks status as a complainant in respect of a creditor based claim, the trustee is neither barred from being a complainant, but here's the important part, nor automatically entitled to that status and that's from my friend's brief.

So we submit that there was a fundamental, procedural due process flaw in the way that the Trustee proceeded in never seeking its status and that of itself should be enough, but we're not going to hang our hat on that and I'll go onto the substance.

And if I can begin, this will flip around a bit, but paragraph 127 of our brief, My Lord, page 29.

THE COURT: I'm there.

MR. LEITL: The general framework for the determination as to whether a creditor should be granted status as a complainant and this is in addition to all the factors I dealt with earlier, about whether a trustee can do it, but this is how -- if there was a creditor, the AER is before the Court today, this is the frame that the Court would follow.

1) Is the plaintiff in fact a creditor at the time of the impugned conduct, October 1, 2016?

2) Should the Court exercise its discretion, that's the something special alluded to, to designate that plaintiff as a proper person?

This requires, I submit that you think about and understand the nature of the actual oppression theory before the Court, all oppression theories are fact specific and unique. So we talk about that beginning at paragraph 114 on page 26 and we quote the statement of claim at paragraph 115 and you'll see that the oppression theory, over to page 27 specifically alleges that the oppression was in relation to the interests of the creditors of PEOC.

The only creditors we even hear about, 'cause there's no evidence about any creditors at the time other than, is the AER and the municipalities and we explain that in paragraph 116, further paragraph 20 from the statement of claim.

There are no allegations about the nature of the debt at the time, the amount of the debt, there are no allegations about any reasonable expectations or how they were formed. There are no allegations about how those reasonable expectations were violated which caused any harm.

And here you'll see at paragraph 118 we quote the only evidence in quotation marks because of its opinion nature, proffered by the Trustee on oppression and this is Mr. Darby in particular, "The inability of PEOC to pay the ARO and municipal property taxes". There's no evidence that they were never paid. There's no evidence that they are creditors and curiously if you've read the Darby affidavit and the statement of claim as a whole, they allege that prior to the transaction PEOC was insolvent. So if PEOC was insolvent, what could have its affiliates or its director have done to prejudice its creditors?

Paragraph 119, we wanted to be absolutely clear and Mr. Darby confirmed that the oppression theory relates solely to the asset transaction, which begs the question, what were the reasonable expectations of the AER? What were the reasonable expectations of the municipalities with respect to the combination of the legal and beneficial interest in PEOC? Why would they have a beef with that?

PEOC goes from owning legal interest only to now owning interests outright because that's the parameters of their oppression claim, asset transaction only. Who could complain about that?

And in the case of my client, Ms. Rose, they not only have to show that they had reasonable expectations of PEOC, they have to show that they had reasonable expectations of Ms. Rose personally. And there is nothing there, not even enough to guess.

And now I'm going to not spend a lot of time, but draw your attention to paragraphs 128 through 135 and here we address the evidence that shows in my submission that neither the AER nor the municipalities were creditors at the time of the asset transaction, nor creditors of PEOC. I've covered, I believe, the ARO, the concept of ARO to establish that it doesn't mean it's a liability. It wasn't a liability at the time of the transaction. There was no AER enforcement proceedings as at the time of the transaction.

The AER has not come forth with evidence that it was a creditor at the time of the transaction. The municipalities we deal with beginning at paragraph 131 and whereas Mr. Darby at first opined that there was $10 million in unpaid taxes he was forced to admit that he just took that from the data room and it referred to 2015. Mr. Schweitzer explained how the number was $6 million and then how that was covered off and now my friend's brief relies on three municipalities who agreed to defer receipt of payment post-closing. That

then became Sequoia's problem at the agreement of the municipalities.

But, pausing there, let's assume for argument sake, which is only for argument sake, let's assume that three municipalities got left out to dry, hung out to dry, they were unpaid, $1.5 million my friends say. They have remedies. They don't get oppression claims because they're owed money.

So now moving to paragraph 136, though I should -- let me pause -- I want to circle back to draw your attention to one thing, My Lord, reasonable expectations and the AER. If I can take you back to *Redwater* you may still have that open. If not, I'm taking you to tab 14 of our authorities and paragraph 83 and before I read from it or paraphrase it, just to put this case in context and this may be obvious to Your Lordship already, but the position of the AER in *Redwater* is we are not a creditor, we don't have to file a proof of claim, our environmental enforcement orders have a different kind of priority, they're not monetized.

And the Court rejected that and you'll see at paragraph 83: (as read)

> The Alberta Energy Regulator argues that "there is no entitlement under the Bankruptcy and Insolvency Act to maximize sale proceeds at the expense of compliance with a public duty".

The same kind of public duty argument you see in the pleadings that my friend, Mr. McDonald, addressed in the policy claim. (as read)

> This argument overlooks that regulatory orders can become "provable claims" if reduced to monetary terms, and that regulators can be "creditors". If those tests are met, then the "public duty" is converted into a claim provable in bankruptcy, and it is only entitled to the priority accorded to all other claims.

And then I financial could take you down to paragraph 88 where they continue on this theme, second -- third sentence: (as read)

> However, if the environmental obligation is provable in bankruptcy, it cannot be enforced indirectly outside the bankruptcy regime under the Regulator's licensing scheme: …

And the last sentence in that paragraph: (as read)

> The Regulator cannot establish a parallel process to collect claims.

So the relevance to this case, My Lord, is this; if my friends are right that the AER was a creditor and is still a creditor, then it has to prove its claim in the bankruptcy and it gets in line with the others. That's one. Two, this clearly shows that the Court was -- the Supreme Court or the Alberta Court of Appeal was entirely unsympathetic to the kind of argument that the AER had any special expectations and in my submission, evidence that it would've had no reasonable expectation that it would be anything other than an ordinary creditor in the insolvency of Sequoia.

So now I'd like to move, My Lord, to why we say the Court should not -- if we get this far, don't accept any argument I've made so far, now you get to the point, okay now I'm going to consider whether the Trustee should be granted standing as a complainant and this argument begins at paragraph 136 through 142.

THE COURT: I'm there.

MR. LEITL: A creditor may qualify as a complainant in two situations, where the plaintiff alleges and establishes a prima facie case that the corporation was used as a vehicle for committing fraud. Those are the asset stripping cases. Fraud is not alleged in this case. And secondly, where there was a case made out about breach of reasonable expectations.

And you'll see in paragraph 138, when the Courts consider the kind of expectation that they will considerable reasonable for the purposes of granting complainant status to a creditor, the Court say that that creditor has to be in a position analogous to that of a minority shareholder who had a legitimate interest in the manner in which the affairs of the corporations are conducted.

No evidence about that. And if I may, My Lord, I'll ask the Court to just zoom way back and look at the big picture. PEOC is a special purpose, single purpose, wholly owned subsidiary of Perpetual. How on earth could any creditor of PEOC, assuming there was a creditor of PEOC, have a reasonable expectation that amounted to them thinking that they had the rights of a minority shareholder? It's just crazy.

Now, you'll see in determining that question about the reasonable expectations and I'm now over to paragraph 139, this comes from *BCE*, these are the non-inclusive list of factors that the Supreme Court of Canada said the Court should consider in terms of reasonable expectations, Trustee offers no evidence on any of this. And I've just -- and (b) there you see the nature of the corporation, key in this case when you consider a single purpose, wholly owned subsidiary.

And when I ask you to zoom out and look at the big picture, I did so and that referenced to

paragraph 141 and this is from a Supreme Court of Canada decision in *Wilson*, where the Court said: (as read)

> Courts considering claims for oppression are instructed to engage in fact specific, contextual inquiries, looking at business realities, not merely narrow legalities.

So at the time of the transaction, even assuming PEOC had a creditor stakeholder, which I say it didn't, single purpose wholly owned subsidiary, 100 percent of its shares owned by Perpetual, what would any creditor have expected -- possibly expected? They could only have expected that that company would be used for the purposes of Perpetual and my friend's brief takes great umbrage with that and I'll come back to that.

But, before I do, I want to emphasize the extraordinary claim in this regard insofar as it sues my client, Ms. Rose, and the additional layer of consideration and juris prudence that applies to personal liability of directors in oppression claims. And while my friend's brief said the leading case is - I forget the name -- actually, the leading case is the Supreme Court of Canada decision in *Wilson* which we cite beginning at paragraphs 144. And you'll see at paragraph 147 the Supreme Court of Canada rationalized the law of personal director liability.

Sir, do you need a break? You're okay?

THE COURT: I'm okay.

MR. LEITL: Rationalize the law of personal liability in Canada and as you may recall, prior to that time there were cases like *Budd v. Gentra* and *Scotia MacLeod* where the Court struggled where directors are sued personally.

What's the test for liability? And if it's going to be a tort claim, the test for liability, you have to show that the directors actually engaged in independent tortuous conduct, something outside of their -- the ambit of their role as director. And in *Wilson* the Court said in an oppression claim you don’t have to do that; that's different from a tort claim, but here's what you have to do. In part, the plaintiff has to show that the oppressive conduct is properly attributable to the director. In this case, Ms. Rose was the only director of a single-purpose wholly owned subsidiary of Perpetual. As my friend submitted to Justice Jeffrey, the deal was Perpetual selling the assets. This decision making is not attributable to Ms. Rose.

Then you have to show that the director personally benefited and not in any form but in the form of an immediate financial advantage or increased control of the corporation. You

would have seen from our brief and if you've read the transcript of Mr. Darby, he opined that she personally benefited from this transaction - he didn't say how much, what kind of benefit, when. He admitted that when he had decided to sue her and was sitting across a table from her and didn't tell her about this, he didn't even ask her, didn't put it -- remember, he's an officer of the Court -- didn't say I think you personally benefited. What do you have to say about that? He didn't think it was necessary. And in her affidavit, she explained why she didn't personally benefit.

The only theory as I understand it of the Trustee - and this is how Mr. Darby explained it - was that she would have benefited by an appreciation in the value of her shares in Perpetual. Now, bearing in mind the Supreme Court of Canada's direction that the advantage has to be immediate, we showed Mr. Darby the trading price of Perpetual over the 30 days following the closing of the transaction. The price went down. There was no personal benefit. And that for your reference, My Lord, is addressed at paragraph 155 and following including Ms. Rose's responding evidence.

THE COURT: I'm there.

MR. LEITL: So, in summary on the oppression claim and this applies to the oppression claim against -- as against the Perpetual defendant as well as Ms. Rose, we say there's no authority under the *BIA*. These claims are not property of the bankrupt. There's no authority from the inspectors. There's no authority under the *ABCA* generally because they are not collective claims. And even if they would hold water conceptually, the trustees should not be granted standing as a complainant for the reasons I've just gone through in some detail. If the AER for these municipalities think they've got an oppression claim, we will hear from them.

So, I will move on to the last part of my submission, My Lord, subject to any questions you have in that the application to strike what I defined as the director claim.

THE COURT: I'm there.

MR. LEITL: So, this claim is not derivative in the sense of the Trustee purporting to sue on the rights of creditors. This claim is the Trustee suing in the name of PEOC. And my friend's brief for some reason argues that I've taken the position that a trustee can never do that and I've never taken that position.

You'll see in our brief beginning at paragraph 36 we concede that a trustee in bankruptcy may sue a bankrupt corporation's directors for breaches of duties owed to the corporation and the obvious proposition that the Trustee stands in the shoes of the corporation; it has no greater claim. So, when you consider these claims for breaches of duty, there's no magic

of the Trustee suing. You have to look at them as if is this PEOC still suing? That's the duties owed to PEOC.

THE COURT: Just on that last point, did I hear you say paragraph 36?

MR. LEITL: No, page 36.

THE COURT: Page -- thank you.

MR. LEITL: Of our brief beginning at paragraph 161.

THE COURT: I'm there

MR. DE WAAL: Thank you.

MR. LEITL: And I'm going over now to 163 page 37.

THE COURT: I'm there.

MR. LEITL: In my submission, when you consider an application to strike, you have to read the pleading as a whole and when you read this pleading as a whole, the complaints against Ms. Rose about ostensible breaches of duties to the company are all founded on the same ARO municipality theory that founds the oppression claims. It's a duplication. So, it's suspicious in that context.

But I'll deal with each of the ostensibly pleaded causes of action beginning with paragraph 164 and there -- to give you the context there is an allegation that Ms. Rose breached her fiduciary duty to PEOC at the time of the transaction and there's an allegation that Ms. Rose breached her duty of care both under section 122 of the *ABCA*.

Now, the fiduciary duty, if the Court's in *Peoples* is better described as a duty of loyalty. No conflicting interests. In my submission when you read the statement of claim there is no possible theory of a breach of loyalty. Panning out again to the big picture, Perpetual, a public company, has a single-purpose wholly owned subsidiary in which it holds some assets. There's nothing wrong with that. Everybody in this room has seen that done a thousand times. That's how companies manage risk among other things.

When Perpetual, the owner of the subsidiary, decides that it's going to sell those assets and the arm's length purchaser says I want to buy those assets by way of the shares of PEOC, how is it disloyal for the director of PEOC to sign off on that?

You'll see over to page 38 quoting from *BCE* in paragraph 40 the judgment, not my brief, and this is where the Court talks about the business judgment rule and the policy that courts will generally defer to the business judgment of directors where there's evidence that they considered - reasonably considered - possible alternatives. And this argument applies to the fiduciary duty and duty of care. The business judgment rule applies to both.

If you were going to sue a director for breach of fiduciary duty or duty of care, the onus is on you to show the alternatives that were available to the director that were not pursued. That's not in the statement of claim. It's not in the Darby affidavit. It's not in my friend's brief. A single-purpose wholly owned subsidiary of a public company, the public company wants to sell the assets.

What other alternative I asked my friend to speak to when he was up? What alternative should Ms. Rose have pursued? It had an arm's length buyer saying we want to buy those assets. We can make more money off them than you can and we want them in that company and we want to buy the shares and things were structured accordingly.

Duty of care. The plaintiffs -- there's a bald pleading of a breach of duty of care and we quote from *Peoples* on the nature of the duty of care and again, the Court's discussion there about how the courts are ill-suited to second guess business judgment.

An important point at paragraph 169, an application to strike, is that the Court -- Supreme Court of Canada in *B.C.* emphasized that the duty of care in section 122 of the *ABCA* does not create an independent cause of action. Instead, applying the principles of *Saskatchewan Wheat Pool*, another Supreme Court of Canada decision which Mr. McDonald spoke to, you have to plead a duty of care and that duty of care may be different in different circumstances - the duty of care of the director. Nothing pleaded, no evidence.

If you accept my proposition that the underlying theory of the director claim is the same as the oppression claim, that even additional factors apply and they're cited at paragraph 171 that a third party who seeks to rely on the duty of care has to show that the conduct was of itself tortuous. And again, no such allegations.

And just so Your Lordship knows, I'm probably about 15 minutes away from being done.

THE COURT: Just while you're pausing on that, I'm still open to go till 5:00 if that works for the parties?

MR. DE WAAL: Yes. Thank you, My Lord.

THE COURT: Thank you.

MR. LEITL: Paragraph 120 -- and now this begs -- it takes us to the question of what were the interests of PEOC? And I'm going to take the risk of beating a dead horse, but in paragraph 174 you'll see our submission that the best interests of PEOC were perfectly aligned with the best interests of Perpetual.

There are cases out there, of course, where a subsidiary's interests may not be aligned with the parent, but that's not the case here. It was a single-purpose company and as my friend submitted to Justice Jeffrey, this is Perpetual doing this transaction through a subsidiary. There is no evidence and no allegation about any independent interests that PEOC might have had.

Now, we pleaded section 122(4) of the *ABCA* and I won't read it, I'll paraphrase it, but basically it says if there are one or more classes of shares, a director who's appointed by one of those classes of shares can have special regard to their interest but not exclusive regard for the proposition that there is express contemplation in the act of directors having regard to the interests of shareholders. My friend's argument in the brief is that doesn't apply because Perpetual had 100 percent of the shares, but that just makes it more obvious in my submission, My Lord, that if Perpetual had 100 percent of shares, then you can have total regard for their interests.

Now, in the oppression world, if there were creditors, they might have had to have regard for the interest of the creditors, but that is not what we're talking about here. Here, we're talking about the fiduciary duty and duty of care owed to PEOC. So, you have to say to yourself, ask yourself and you'll get a headache, what PEOC, this notional entity, what did it expect of Ms. Rose that she did not do, a single-purpose wholly owned subsidiary?

But to be fair to my friends, I think we should go through the actual allegations in the statement of claim and that begins at paragraph 177.

THE COURT: I'm there.

MR. LEITL: Oh, I -- one note. To go back for a moment, in addition to *Saskatchewan Wheat Pool* on the duty of care I recommend to Your Lordship the decision of Justice Slatter in *Hogarth* which is at tab 52 of our brief simply for some nice, contextual discussion about the problems involved in trying to impose personal liability on directors.

THE COURT: Fifty-two of your authorities, right?

MR. LEITL: Tab 52 of our authorities.

THE COURT: I'm there.

MR. LEITL: Unless my notes are wrong.

THE COURT: No, you're right. You say of your brief. I just wanted to put it on the record.

MR. LEITL: Oh, yeah. Of course, yeah.

THE COURT: Thank you.

MR. LEITL: Just let me double-check. In that case, like in *Saskatchewan Wheat Pool* noting that the duty of care itself does not create a cause of action, both courts emphasize that a plaintiff suing under the duty of care has to plead and make out a claim showing how the duty of care arose just like you would in a negligence claim. You have to plead facts in relation to proximity, you have to plead facts in relation to foreseeability, and as Your Lordship knows, the other component of the test through duty of care and tort is a policy about, you know, floodgates - where are we going to stop this?

None of that is before the Court and none of that's in the statement of claim. And I'll hopefully illustrate that by looking at the particular allegations. And beginning at paragraph 180, we go through them one by one. The first, they're simply conclusory allegations with no particulars. (1) she broached -- she breached her fiduciary duty, (2) she breached her duty of care.

So, you have to go down to -- and we're now on page 42 paragraph 187.

THE COURT: I'm there.

MR. LEITL: The specific -- what I take is particulars of the allegations and the first one is: (as read)

Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear assets.

Now, remember, the allegation from them is that that was the case before and after the transactions. So, what? The allegation has nothing to do with her duties to PEOC. If you're the director of a company that can't meet its obligations, that doesn't mean you breached

your duty to the company. It means the company doesn't have enough assets to satisfy its obligations. What that complaint's really about -- is really about -- is the interest of creditors. It has nothing to do with PEOC's interests.

The next particular at the bottom of page 42 "Rose is aware that PEOC was insolvent or would be rendered insolvent by the asset transaction." That's just a duplication in substance to the one I just addressed. I mean if they're saying that any time a company becomes insolvent that means the directors have breached their duties, then there are a lot of directors out there who are in trouble.

Page 43 under paragraph 190, "Rose would benefit personally from the asset transaction including as a beneficiary shareholder of PEI. On the face of the claim there is no theory about how she benefited, no particulars. And more importantly, under the law there is no law against a director benefiting from a transaction. You saw from *Wilson* the analysis goes much beyond that.

16.4 there are allegations about section 120 of the *ABCA* and as Your Lordship probably knew and knows from our brief section 120 which is quoted over on page 44 concerns disclosure by directors where they personally have a material interest in a contract. You have to put that on the table to the company. First, we say it doesn't apply because Ms. Rose personally was not a party to any contract. And if the section can be somehow interpreted that it would apply because of her other roles, what my friends are saying is that Ms. Rose failed to disclose something to PEOC. Remember this is a PEOC claim. So, how could the only director of a single-purpose wholly owned subsidiary fail to disclose something to the company where she is the repository of all knowledge of the company? It's just so artificial it's bizarre.

The last particular in this duty of care claim is that Rose caused PEI to require 198 to agree to the release. On the face of the claim only looking only at the pleadings, it is pleaded that Rose was the director of a subsidiary; on the face of the claim it would be impossible for Rose to cause the parent company to do anything and there is no pleaded theory as to how that could possibly happen.

The last part there, and I won't spend a lot of time on it - I can leave it with you, My Lord - is we talk about the relief claimed in relation to these alleged breaches of duties and some of the obvious overreach where you'll see in paragraph 206 where we note that some of the damages that they claim, "damages" are the costs that the Trustee's incurring in satisfying its duties under the *BIA*. Somehow, they say that's damages to PEOC.

So, in conclusion, My Lord, when you read the claim as a whole, and when you consider what the fiduciary duty and duty of care really mean, there is nothing pleaded. There is no

reasonable cause of action pleaded. And unless you have any questions, I'm done.

THE COURT: I likely will have questions later in these proceedings. I'd like to hear from your friends first.

MR. LEITL: Thank you. I'll just clear out. May I ask if you have a plan for today? If we're going to go tomorrow, what time will ...

THE COURT: Someone slid a transaction in at 2:00, so I'm having it investigated right now in terms of whether we can sit in the afternoon. I certainly have the morning available for you from 10 until 12:30.

What's your expected time, Mr. de Waal?

MR. DE WAAL: I note I may or may not finish at 5, if that's clear enough.

THE COURT: That's okay.

MR. DE WAAL: I'll do my best, My Lord.

THE COURT: Let's see where we get to the end of today and what you expect your time frame to be. And on the assumption we need tomorrow morning, we will sit at 10:00. I may -- just to put this on the table, I was thinking about this briefly at lunch time. Adjourn and reflect on the matters with the view to coming back with a number of questions. I've got a bunch of questions, but I want to think about things. And I'll have to look at my calendar, but I certainly want to address those questions this month is what I'm wanting from my perspective.

So, let's continue on. Does anyone want to take a break for five minutes? I'm fine. Proceed, sir.

MR. DE WAAL: I'm good, thank you. Thank you, My Lord.

Submissions by Mr. de Waal

MR. DE WAAL: My Lord, I propose to change my schedule and just address the comments of my friends at the outset. I will then go back to my notes and see how far that goes and how much of that I'll actually cover. So, with that, My Lord, again, I don't propose to read my brief to you, but I'll just start with where Mr. McDonald started this morning.

Of course, we were not -- we filed the briefs at the same time, so we were not able to respond directly to anything -- any submissions by my friends and they were likewise not in a position to respond to ours, so there may be issues arising from there.

What my friend says first of all on issue 3 the arm's length question, he says you have to look at everything and even if PEOC -- if you just look at the PEOC asset sale and the parties were related, they were doing it each -- with each other at arm's length. And then he says in my submission, "it's wrong to isolate a part of the transaction."

Now, there's no authority for that and I don't know on what basis you would then -- or where you would draw the line in a conflict transaction like this. Would you -- if you look at the first two transactions or the third or fourth or where would you start? And then he refers to the *McLarty* case, the commercial reality and the fact that the parties should consider everything together.

My submission, My Lord, first of all is that when you're dealing with a section 96 claim, we should start with the section and section 96 says:

> On application by the trustee [this deals with a stay application, but there's an application contemplated - not an action, not a trial necessarily] on application by the trustee, a court may declare that a transfer at undervalue is void as against the trustee.

So, we're dealing with a transfer at undervalue. That's what we're looking at, not a transaction. Now, in some cases there may just be one transaction and that may constitute a transfer; in other cases, we may have more than one transaction constitutes a transfer or there may be more than one transfer.

So, in this context, when the Trustee looks at section 96, it's limited to a transfer at undervalue. It's also limited by the fact that it is the Trustee for PEOC only, not for Perpetual or anybody else. It has nothing to say frankly except in the general context about the share transaction. It looks at the transfer and undervalue by PEOC and then it continues and it's all consistent. If you look at the difference between the value of consideration received by the debtor, not by anyone else for a share transaction but by the debtor, and the value of the consideration given by the debtor and again, the parties were not dealing at arm's length with the debtor.

So, we're not talking about other surrounding transactions, the whole spectrum of transactions that were put together. We're just dealing with the transfer where the debtor was a party and that's why we say the Trustee is limited and section 96 is limited to the one

transaction in this case which constituted that transfer of undervalue which was the asset sale.

I'm going to be jumping around a little bit, My Lord, because I'm responding to my friends' arguments, but I don't want to deal with every single one of them. But my friend mentioned repeated requests to meet, by Perpetual to meet with the Trustee. There was one request. There was one meeting when the Trustee provided its preliminary view of the transaction or the transfer. There was another request for a meeting. The Trustee said give me anything you want me to consider in writing; that was acknowledged but never provided, so there was no number of requests or repeated requests to meet which were refused. Now, it doesn't go anywhere except that to the extent that my friends seem to make something of the fact that the Trustee in this case allegedly did not act properly.

Paragraph 75 of the Perpetual brief it's alleged that article 4 of the share purchase agreement argued that article 4 of the share purchase agreement effectively gave 198 control over PEOC following the execution of the share purchase agreement on September 26th, 2016.

Now --

THE COURT: Sorry, when you said paragraph 75 of the Perpetual brief, are you referring to your brief?

MR. DE WAAL: No, My Lord, I'm referring to the brief of Mr. McDonald page 22 paragraph 75.

THE COURT: I'm there, thank you.

MR. DE WAAL: And if you look at that share purchase agreement which is Exhibit E to the affidavit of Mr. Darby, and you go to paragraph 4.1, it says: (as read)

> Assets to be maintained in the proper manner from the date hereof until the closing date. The vendor shall cause the business of the corporation to be conducted in accordance with past practice. The vendor shall or shall cause the corporation to pay and shall be liable for all costs and expenses incurred or accruing prior to the closing date and relating to the assets and the vendor shall -- or shall cause the corporation to perform and comply in all material spaces -- with all material covenants, et cetera, et cetera.

I don't see anything and perhaps I'm missing something, but I don't see anything in

paragraph 4 that puts 198 in control of PEOC between the execution of the share purchase on September 26th and a closing on October 1st as is stated in this paragraph.

My friend referred to the *Stalt* case, *National Telecommunications Inc. v. Stalt*. That's at tab 33 of the new cases. And --

THE COURT: When you say your friend, you've got to --

MR. DE WAAL: Mr. McDonald. I apologize.

THE COURT: Mr. McDonald? Okay. Thank you.

MR. DE WAAL: Mr. McDonald. And this is a point I want to make generally, My Lord, but he specifically said that this the test. This explains what you have to look at in cases to determine whether parties were acting -- were dealing with each other at arm's length.

The point I want to make, My Lord, is in paragraph 33: (as read)

> There is no evidence that NTI and Stalt Telecom or its principals are related to each other and the parties agree that the two companies are not “related persons."

The point I'm making generally, My Lord, and I'll come back to this, the only reason I'm pointing this out now is because it wasn’t mentioned at the time, but all the cases referred to by the defendants with respect to the arm's length issue deal with unrelated processes and I'll point that out to you. And we say that is a completely different situation. And when you look at the *Act,* and when you look at section 4, and you look at the deeming provision, whether the parties are related or unrelated determines whether the *McLarty* case and the *Piikani* case and those tests apply because they only apply, we say where you have unrelated parties.

The only decision that you have before you, dealing with that amendment that Mr. McDonald referred to when --

THE COURT: Are you talking about amendment section 4(5)?

MR. DE WAAL: Exactly, 4(4), My Lord, where you say the presumption is qualified. The only case you have is the *Pricewaterhouse v. Legge* case which sets out what to look at to determine whether despite that you can rebut the presumption. There is no authority to present it by the defendants to say what you look at

in that case.

Mr. McDonald said that consideration considered by Mr. Darby is highly suspect and his evidence is of no assistance. Now, there are three points I could make on that, My Lord:

(1) Mr. Darby says nothing except what he got from Perpetual. So, they're quite right. He has no independent knowledge of the affairs of Perpetual or PEOC and he makes -- he swears his affidavit on the basis of the records provided by Perpetual. That's number 1.

(2) No other values have been presented. They say that the consideration considered by Mr. Darby is highly suspect, but they don't produce anything else and they say that the reserve report is outdated, but they don't preserve -- they don't present a new one. So, whether Mr. Darby's evidence is of assistance or not, it is the only evidence.

On issue 5, the striking, Mr. McDonald said there's no cause of action which would give rise to a claim for damages and then he criticizes the pleading and I supposed Mr. Leitl did exactly the same by saying it's not clear from the statement of claim what the theory is or what the evidence will be. There's no evidence and therefore, it's not clear what the case is. And by the same token, My Lord, I would argue that if that is in fact the case, and I don't necessarily agree with that, but if that is the case, it's not clear that these claims cannot succeed and should therefore be struck. If the question is particularity or details or even evidence, that is another matter altogether. That's not a summary dismissal application ground.

My friend, Mr. McDonald, said that you cannot put the parties back in the positions that they were because it's practically impossible. We've addressed that in our brief, My Lord. The one case I do want to refer you to is the case dealing with the enforcement or alleged enforcement of an illegal contract and the *Sidmay* decision that Mr. McDonald referred to that we quote in our brief. In that case, that's an exception. That's the exception. That's the exception, My Lord, which is what we're doing. It's at tab 28 of the second volume of our authorities, My Lord.

THE COURT: Your second volume, did you say? What's the name of the case again?

MR. DE WAAL: *Sidmay*. S-I-D-M-A-Y. It's a -- do you have a volume like this?

THE COURT: Yes, I've got it. I'm there.

MR. DE WAAL: So, at tab 28 at the bottom of the page again the highlighted portions are all there, but I just want to refer you to the quote of the decision of Justice Parker. The usual rule is that in the case of a transaction --

THE COURT: Okay, what -- sorry, what page are you on?

MR. DE WAAL: Page 15. I beg your pardon, My Lord, paragraph 45.

THE COURT: I'm there.

MR. DE WAAL: Bottom of page 15: (as read)

> "The usual rule is that in the case of a transaction void for illegality neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the illegality of the contract has been created, and in the authorities I have mentioned it has been held that in the case of loan transactions void under the *Act of 1900* the borrower is within that exception. The illegality of the transaction, therefore, does not preclude the plaintiff from maintaining this action.

And then over the page in the second paragraph there, My Lord, again in the middle: (as read)

> That proceeds on the basis that the application was an appeal to the equitable jurisdiction of the court, that it was an application by somebody who was a party to an illegal contract, who, ordinarily speaking, would not have been heard to come into court at all, but who, by reason of the exceptions in the provisions in the statute in question, being a statute passed for the benefit of the protection for borrowers, was entitled in that case to come to court, but, if he did so, could come to the court only on certain terms. That is the position with regard to an illegal contract.

So, My Lord, finally, at the bottom of page 17.

THE COURT: I'm there.

MR. DE WAAL: Paragraph 52.

THE COURT: I'm there.

MR. DE WAAL: (as read)

> In the case before us the attack is upon the legality of the contract and if it be held to be illegal the result would be that the Courts would not lend their aid with respect to any remedy arising out of the illegal contract unless the respondents can bring themselves within the class of person for the benefit of whom the debilitating legislation was enacted.

Paragraph 53: (as read)

> It was submitted that access to the Courts is denied only where the rights sought to be enforced or the relief secured must depend on an illegal contract; that an action [this is the argument] that an action for a declaratory judgment as to the invalidity of a mortgage due to illegality did not constitute resort to this Court in reliance on an illegal transaction and therefore does not fall within the class of actions where the Court will refuse to assist the parties.

Then there's a reference to the *Chapman* case that my friend points out is not authority generally but in the specific circumstances of this case. And then over the page. My Lord, I'm not reading everything, but over the page, page 19, first paragraph four lines down: (as read)

> Since it was necessary that Chapman, in order to discharge his duties as trustee, should be able to rely on a decision of the Court as to the legality or illegality of the transaction, it was held that Chapman could properly come before the Court to seek the declaration. It was pointed out that the declaration of the Court did not deal with the relevant rights of the parties consequent upon the declaration. In that case the plaintiff who was not a party to the illegal loan, had no direct personal interest in supporting or attacking the contract which was declared to be illegal and was not seeking to benefit by any relief ancillary to the declaration he sought.

So, in this case, My Lord, what we're seeking, and you can look at the statement of claim, you can look at the application. What we're seeking is not damages. We don't seek to rely

and enforce an illegal contract. What we're seeking as the Trustee is a declaration to determine the status of that contract, not relying or enforcing it or seeking the Court to enforce an illegal contract.

That, My Lord, is the law in Canada and in the authorities cited by my friends, Professional Fridman's text, if you -- and it's -- my friend Mr. McDonald referred to this, if you go and you won't have this because it's not part of theirs --

THE COURT: Do your friends have that - Mr. McDonald in particular?

MR. DE WAAL: Yes.

MR. MCDONALD: Yes.

THE COURT: Thank you.

MR. DE WAAL: I gave it to them during the break, My Lord. And I'm not going to spend much time on this, but the point that I'm making, My Lord, is at page 420 Fridman discusses this as an exception and he says at -- and I'm not going to read the highlighted portion, My Lord, but he says over the page at page 421, "The same approach applies in Canada in such circumstances" and he refers to the *Sidmay* decision.

So, where you seek a declaration on the basis of an illegal contract, that's not seeking to enforce an illegal contract. That's something that the courts will not do. In fact, particularly in the case of a trustee who is not a party to that illegal contract, the Court will in fact provide that declaration that's certainly to the Trustee on how to proceed.

One comment on tab 34 of Mr. McDonald's authorities, that's the new cases?

THE COURT: I'm there.

MR. DE WAAL: Paragraph 16.

THE COURT: This is --

MR. DE WAAL: He referred you to this and the reason I want to refer you to this is to say that this is exactly we think the situation that we're dealing with with respect to PEOC. Now, PEOC is not a natural person of course, so in the commercial or corporate context, we say this applies.

Turning to unconscionability, the test on unconscionability was recently stated in this Court as requiring grossly unfair or improvident transaction. We say the facts are there that PEOC went from a non-operating company with no assets and no activities to a company with substantial operating assets and everything that goes along with that. Do the victims lack independent legal advice or other suitable advice? Now, in this case, although there were lawyers involved, we know that everyone is looking out for their own interests and the question is which is raised on the pleadings, who is looking after PEOC in all of this? And we've heard Mr. Leitl's submissions that PEOC was just something that had to go along with whatever Perpetual wanted. So, we say that applies, number 2.

Number 3, an overwhelming imbalance --

THE COURT: Just a minute on that. If you look at the aggregate transaction, wasn't there a competent law firm on the other side?

MR. DE WAAL: On which side, My Lord?

THE COURT: On the purchaser's side?

MR. DE WAAL: Was there a law firm representing PEOC is the question and I don't know that there was.

THE COURT: So you're being narrow just to look at the entity and the transaction in a small segment?

MR. DE WAAL: We're looking at the --

THE COURT: Full stop?

MR. DE WAAL: The debtor in this case is PEOC and the transfer at undervalue allegedly is the PEOC transaction, the share purchase -- the asset purchase only. And although everyone else was represented and we don't take issue with the competency obviously of all the lawyers involved and all the negotiators involved, the question is which of those were looking after PEOC? That's the essence of the case essentially. How did PEOC end up where it did in the context of their transaction? And although they had lawyers involved, if they're not looking after PEOC and they're looking after their own interest, that makes it even worse for PEOC.

So, to Your Lordship's question, I'm not sure that I know that PEOC was represented not by the director 'cause she said somebody else was negotiating on behalf of PEOC, not by the other side because she eventually signed the agreement. I'm not sure that there was

separate -- there was certainly no independent lawyers and we know that the sole director's position was as stated by Mr. Leitl quite eloquently, whatever Perpetual wanted, that was in PEOC's best interest. It just had to go along. What else could it expect?

So, that lead us to number 3, an overwhelming imbalance in bargaining power caused by the victims' - and again, we're not talking about a natural person - victims' ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, similar disability. Of course, that doesn't apply directly, but when you have a corporation that's being pushed around and being told what to accept and what to do and where to sign, that's essentially what you're dealing with in a corporate sense.

THE COURT: So, when you say a corporation's being pushed around, what do you mean by that?

MR. DE WAAL: We have PEOC simply being told what to accept in this deal, how the asset purchase would work. It had no say in which assets to accept, which assets to refuse, whether it was good for it or not. It was simply presented with a transaction that was essentially done and negotiated between Perpetual and 198 as well-represented adversaries in their own self-interest. It was simply a vehicle.

THE COURT: Sorry, simply a what?

MR. DE WAAL: A vehicle.

THE COURT: A vehicle?

MR. DE WAAL: To make the transaction work.

THE COURT: Okay, and don't anyone take my questions at this juncture as an indication of the -- that I've decided anything, but it is a vehicle as you've just stated. In multiple transactions that occur in this city and indeed in this country, we go through a series of steps and we use, to use your term, vehicles. So, if I accept your proposition, where do I draw the line?

MR. DE WAAL: My Lord, I will try and convince you that it's not my proposition, that this is the proposition that many cases have stated. If you have a corporate entity --

THE COURT: It's never your proposition. It's the proposition of your client, but I'm listening very carefully.

MR. DE WAAL: If you are a corporation, if you're dealing with a corporation and it has its own director ...

THE COURT: Corporation exists and is governed by, if you will, individuals like you and I.

MR. DE WAAL: Indeed, My Lord.

THE COURT: So let --

MR. DE WAAL: Except in this case we know the directing mind is another corporation allegedly, but that's aside.

THE COURT: Continue.

MR. DE WAAL: So, we say, My Lord, if a corporation is acting on the basis that its directors is making decision for it or its sole director is making the decisions, that corporation has its independent interests and existence and it cannot simply serve the interests of its shareholders or its director or anybody else. And the director is in a position of trust as a fiduciary obligation to that company and that corporation -- and she has to act in the best interests of that corporation. And to simply say somebody else wants me -- wants this corporation to do 'X' or ' Y' and therefore, the corporation will do 'X' or 'Y,' is not good enough.

And that's what happened in this case. And if the result then is a bankruptcy where we have implications for creditors and for employees and for other people, other parties, then section 96 intervenes and in particular, if there was as in this case we say a transfer undervalue, which rendered at that time PEOC insolvent if it wasn’t insolvent already.

Then you engage more than just the interest of the corporation, but it's not simply to be used as I've just said as a vehicle. It's not simply just a tool. It's an entity with its own rights and obligations and interests and expectations of directors.

THE COURT: I'm listening.

MR. DE WAAL: My Lord, moving on to Mr. Leitl's comments, and I'm again just jumping around and then I'll get to a more structured presentation, Mr. Leitl says that we allege that the -- this transaction, which is really a transfer, was the cause of the bankruptcy of PEOC 18 months after this transaction. That's not what we say. We're not concerned with the reasons for the bankruptcy eventually to bring us here. What section 96 in particular is concerned with is the solvency of PEOC at the time.

THE COURT: Yes, at what time?

MR. DE WAAL: At the time of the transaction in October 2016, not the bankruptcy events that happened in the beginning of this year.

Mr. Leitl says that it's significant that the validity of the share purchase agreement is not challenged. First of all, there are two answers to that, I think. One is that does not make it valid or doesn't say anything about the share purchase transaction and secondly, as far as the Trustee is concerned as the Trustee of PEOC, it really has nothing to say about what the share -- who owns it and whether those shares are sold or not. The only context in which allegations are made with respect to the share purchase agreement is in the context that this was a scheme of different transactions that were void. We're not seeking any relief to declare the share transaction void, but in the statement of claim, the allegations do go broader than just the asset purchase agreement because in the context of the oppression claim and the director's claim, the context is irrelevant, and we say these are the contracts, these are the transactions were a part of -- of that context.

Mr. Leitl says that Ms. Rose was not asked about the release. I'm not sure what she should have been asked. The release is clear. The circumstances are clear and really, there's nothing sinister about the fact that there's nothing more to ask her about that except her opinion about whether it's legal, I suppose, but ...

The Gestion case referred to by Mr. Leitl which is in their authorities at tab 44, I believe.

THE COURT: I'm there.

MR. DE WAAL: My Lord, in this case the complainant was a creditor who had sued, not even obtained a judgment yet, and in the circumstances of the case, the Court found that that was a proper person to be the complainant. The only point I'm making, My Lord, is that -- because I may not remember to make this point when I get there -- is that there is no limit to what or who could be a complainant. And in that case as we say, it's not even -- it's not a shareholder. It's not a stakeholder directly. It's a creditor who has not even proved his claim yet.

Mr. Leitl referred somewhat indirectly to the fact that standing of the Trustee was contested and that there's no evidence that the inspectors authorized this particular lawsuit. Now, first of all, there's no indication anywhere in the materials that that's the basis on which standing is disputed; that the Trustee allegedly did not seek the instructions of the inspectors or the approval of the inspectors. Secondly, he raised that with me before this hearing and I said to him, I confirmed that, the inspector's approval was in fact obtained.

MR. LEITL: My Lord, I got an email from my friend yesterday representing that. They sent me an email back within the hour saying reserve my client's rights. Can you show me the evidence of that and I didn't get a response, that's what happened.

MR. DE WAAL: Well, I'm not sure what evidence, whether the -- if the Trustee writes down that on a piece of paper that whether that would satisfy my friend, the fact that inspectors are present in court, whether that does anything. The fact is we brought an application that was not challenged openly in any way except through this email yesterday or the day before -- not yesterday, my -- it was my email.

But that was not challenged and the application that we filed is an application to stay that. So, if this eventually becomes an issue, I was present at the meeting and I would have to perhaps testify, My Lord.

THE COURT: So, you're going to give evidence tomorrow?

MR. DE WAAL: If that's required, My Lord.

MR. LEITL: My last interruption. I apologize. The stated position of my friend since August 30th is they do not require any other evidence for any purpose.

MR. DE WAAL: And that, My Lord, was on the basis of what was in contention at that time. And as I said, I think when I started this line was there was no suggestion anywhere in the statement of defence or in the application that the defendants take issue with the position of whether this lawsuit was in fact authorized by inspectors.

As far as standing goes, My Lord, and this reference to a so-called standing order, my friends referred to the case of *Boychuk* - that's at paragraph -- tab 30 of their authorities. And I think the quote starts at paragraph 25.

THE COURT: I'm there.

MR. DE WAAL: Sorry, the quote starts at paragraph 24, not 25, but 24 is the one I want to refer you to. That's at page 8 of the decision: (as read)

> I am satisfied that even if the Plaintiff should have sought leave of the court prior to the commencement of this litigation the Plaintiff should not at this stage be precluded from the continuation of its action on

> the basis that it did not do so. I note that the *ABCA* does not make leave of the court a precondition to filing a statement of claim but does provide the court the discretion to determine whether the Plaintiff is a proper complainant.

And that all happened in due course in this case, My Lord. We are seeking an order to pursuant to Part 19 of the *Rules.* It's not a precondition for having filed the statement of claim. There's no suggestion, and we'll get to the other arguments, but there's no suggestion that before the Trustee can even file a statement of claim it has to make an application to say can I please make a statement -- make a claim based on oppression.

My friend says that the Trustee has to say not to just that creditors had reasonable expectations of PEOC, but that they had reasonable expectations of Ms. Rose personally. And, again, My Lord, the *BCE* case I think, not my submission, but the *BCE* case in paragraph 66, this is at tab 20 of Mr. Leitl's authorities.

THE COURT: I'm there.

MR. DE WAAL: So it's the middle of that paragraph on the right-hand side:

> However, the directors owe a fiduciary duty to the corporation and only to the corporation.

That addresses the only point that we had made.

> People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

There was an expectation of the sole director of PEOC.

Mr. Leitl refers to the position of the AER in *Redwater* decision. The Trustee, for the purpose of this action, takes no position on that. What we say is the law is, at the moment, is *Redwater*. That says that if you have a proof -- if you have a claim provable in bankruptcy

like an ARO claim that is in fact -- that makes you a creditor of the debtor, in this case.

THE COURT: So you're saying an ARO is liability?

MR. DE WAAL: Not a liability in the sense -- it's not a present liability. Again, that's something Mr. Leitl kept saying, where's the current liability? We're not saying that. All we have to prove is -- all we have to show is that with respect to the ARO claims, those were claims provable in bankruptcy. And that's what the Court held in the *Redwater* decision.

THE COURT: So what would be the ARO claim that's provable in bankruptcy here?

MR. DE WAAL: It's depending on what happens, My Lord. It's the -- the proof of claim is in the evidence. It's somewhere between $1 and $220 million.

THE COURT: So if we select $1, just hypothetically, where are we at?

MR. DE WAAL: At $1. But it's claim provable in bankruptcy. I'm not citing that for the proposition that there's a huge amount of money at stake. It's to address the point in principle that there were no creditors and there are no creditors at the time of this deal. And that, therefore, the trustee has no standing. That's, as I understand, the argument on behalf of the defendants. And yet it's conceded on the evidence by Ms. Rose that the ARO claim is somewhere -- she says it's not $1, she says at that time it was somewhere between -- the one exhibit shows 52 million, she says it's closer to 78 or 87 million. The financials show 130 or 133 million, press releases show anything between 131, 133 million, 128 million. So, it's not $1.

THE COURT: The reason I'm pausing is I was just looking at the pleadings again. I thought you made a reference, and maybe I misunderstood you, sir, in respect of a creditor and you had connected it with the ARO. Did you say creditor?

MR. DE WAAL: I can't remember, My Lord. I said creditor, yes. That's the definition in the *Bankruptcy and Insolvency Act.*

THE COURT: So who's the creditor?

MR. DE WAAL: The AER will have a claim provable in bankruptcy.

THE COURT: That's your position.

MR. DE WAAL: That's my position. In fact, that's not the only creditor and I can refer you to municipalities because there was some submission about --

THE COURT: I'm just asking about the ARO at this point.

MR. DE WAAL: Yes.

THE COURT: See the phrase in paragraph 5, I'm just going to comment and then we'll move on, paragraph 5 refers to: (as read)

> Pursuant to the purchase and sale agreement dated October 1st, 2016 ...

Then it defines it.

> ... PEOC as trustee for POT purchased the good year assets which had a significant associated abandonment and reclamation liabilities.

I'm reading verbatim.

> Defined as the ARO from POT for $10 which had significant associated abandonment and reclamation liabilities.

We have a liability here?

MR. DE WAAL: It wasn't a current liability, no, My Lord.

THE COURT: I asked the question, do we have a liability here?

MR. DE WAAL: No, My Lord.

THE COURT: We don't.

MR. DE WAAL: No.

THE COURT: Thank you.

MR. DE WAAL: The definition of "creditor", My Lord, this is in tab 16 of our authorities is, "A person having a claim provable as a claim under this *Act."*

We say we don't have a liability, but we certainly have that.

MR. LEITL: Sorry? I didn't hear, certainly have what?

MR. DE WAAL: That.

THE COURT: If you can just take me back there. Sixteen?

MR. DE WAAL: Yes, My Lord. Tab 16, our authorities, page 2. Well the page is numbered 2 but it's the third page, at the bottom of the page.

THE COURT: Thank you.

MR. DE WAAL: On that same point, My Lord, there were a number of submissions made about the municipalities. If I can refer you to Mr. Leitl's brief at paragraph 134.

THE COURT: I'm there.

MR. DE WAAL: It says: (as read)

> Moreover, all 2016 municipal taxes associated with the Goodyear Assets were paid in full by either PEI or Sequoia with the exception of only three municipalities which had, subsequent to the closing, agreed upon request by Sequoia to a voluntary deferred payment plan to allow for higher investment in their respective jurisdictions.

In other words, as of the date of the closing, these taxes had not been paid. Subsequent to the closing, it was a deal to extend the payment deadline. In fact, Ms. Rose was cross-examined about that which explained that although in the schedule to the shared purchase agreement referred to current liabilities, and that's quoted in our brief and the whole table is there, she said those are not current liabilities because they agreed to defer the payment date on payment of a penalty. The point is, that agreement to defer was made subsequent to the closing date. So at least on the closing date, there were municipal taxes outstanding in the region of $5 million. Some of which was never paid according to Perpetual evidence.

UNIDENTIFIED SPEAKER: Sorry, did you say never?

MR. DE WAAL: Yes.

My Lord, my two related points I think my friend, Mr. Leitl, said, it's not disloyal for a

director of PEOC to do what Perpetual wanted her to do. And I suppose, My Lord, what he meant was it's not disloyal to PEOC to do whatever PEI or Perpetual wanted her to do, and I don't know that that's true, My Lord. If, and I've -- we've referred to the *BCE* case and paragraph 66 in that decision. It says she had a duty to PEOC. PEOC specifically. And so her duty to -- duty of loyalty to PEOC is not dependant on what the owner of PEOC - the sole shareholder - wants her to do.

The other related point, as I said, the business judgment role applies to both duties of -- duties of care and fiduciary duties. And again, My Lord, he doesn't cite any authority for that proposition. I'd be somewhat surprised if you can override a fiduciary obligation to PEOC by simply saying well I think it's -- I think it's better for PEOC. So, in my business judgment, although I owe this fiduciary duty, I'm going to act against that because in my judgment that's best for PEOC.

He says that in order to make this claim the trustee has to plead a duty of care. Nothing pleaded, no evidence. In fact, paragraph 15.3 of the statement of claim --

THE COURT: I'm there.

MR. DE WAAL: -- says: (as read)

> At all material times, unless the resignation as director of PEOC following the closing of the transactions, Rose owed PEOC a duty of care including a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances in accordance with section 122(1)(b) of the *ABCA*.

And I think that's as clear as it can be stated.

And then paragraph 16:

> Rose breached her duties to PEOC inter alia by ...

And then all the particulars are pleaded.

My Lord, one case I should refer to now perhaps out of order because it touches on what we've been discussing is at tab 27 of volume 2 of our authorities.

THE COURT: I'm there.

MR. DE WAAL: This is *Horsehead Holding Corp.* at the Ontario

Superior Court of Justice. I want to refer you to the last page, paragraph 40. This concerned directors appointed -- some of the directors appointed by the parent company in the US and the role that they have to play in their duties to the subsidiary corporation. Now that's not part of the decision, but in paragraph 40, Justice Newbould cites a decision of Justice Farley and he says:

> ... the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:
>
> It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, it must be the way that he conscientiously believes after a reasonable review is the best for the corporation. The nominee director's obligation to his "appointing" shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, although likely initially unwelcome, may well be valuable to the appointer in the long run. The nominee director cannot be a "Yes man"; he must be an analytical person who can say "Yes" or "No" as the occasion requires (or to put it another way, as the corporation requires).

So in this case, I think, My Lord, this goes directly against any suggestion that just because Perpetual wanted this deal done in a way that would involved PEOC, the question still was for the sole director of PEOC, what is in the best interest of PEOC? And if it meant that the transaction would not be approved because they've saddled PEOC with all these claims or would expose PEOC presumably to insolvency, then that is what the director had to decide.

THE COURT: When you say all of these claims, I assume from the previous answer you're referring to claims as at October 2016?

MR. DE WAAL: Yes, My Lord. And I'm -- when I say all these claims, what I mean is it had nothing on day 1; and on day 2, the very next day when it woke up, PEOC suddenly owned 2,500 wells, it had operations to run, people to pay. So it was in a different position and the question is whether that was good for it or not. And that

was the -- what the sole director of PEOC had to decide the night before or when (INDISCERNIBLE) decide. Not whether it was good for Perpetual.

THE COURT: So anytime you're doing a corporate reorganization for purposes of sale or not, you've got to ask that question?

MR. DE WAAL: Yes. And to say this is the way it happens everyday in town, does not make it so, make it right.

THE COURT: Okay. But we're only looking at the deal as at the date of the transaction.

MR. DE WAAL: Yes, My Lord.

THE COURT: Was it, just explore for a minute, was it solvent the day after the transaction? Because you've gone to the next day, I think.

MR. DE WAAL: It's not just solvency, My Lord. But, yes, that's the consideration. Is this good for the stakeholders in the corporation? Initially, the corporation itself, but then the stakeholders in the corporation including creditors and others would say we --

THE COURT: Just want to probe one thing. You said not just a particular party. Who are you referring to?

MR. DE WAAL: My Lord, I'm saying it's not just the corporation. Initially, the director looks at the best interests of the corporation. But stakeholders, that's paragraph 66 again of the *BCE,* says stakeholders expect the director to act in the best interests of the corporation. And that means promoting the interest of the corporation. So it's more than just whether this is good for the corporation. If it means -- it's a broader consideration.

And, in fact, that *Horsehead* case, if a director is nominated by and, Mr. Leitl referred to this section, it's nominated by a particular group of shareholders, then it has the right to take that into account. What do these shareholders want me to do? But always subject to the best interests of a corporation. So it's not a simple consideration black or white decision in every case, it's a complex decision. But, essentially, you cannot simply do what the shareholders want you to do whether you're appointed by them or not, or whether you're the sole director or not, or whether they're the sole shareholder or not.

THE COURT: But you're focussed on the best interests of the

corporation. What should we take into account on a deal that we're going to do tomorrow? I'm just trying to understand -- let's go back to paragraph 66 of the *BCE* case. Are you suggesting that we fall in there or are you suggesting we need to move some lines? Are you broadening the concept?

MR. DE WAAL: No, My Lord. I say we fall right there.

THE COURT: Okay. Didn't *BCE* deal with debenture holders?

MR. DE WAAL: It did. But it was, again, a fully owned, wholly owned subsidiary situation.

THE COURT: But debenturesholders had a pretty thick agreement. I remember when they were doing that deal. (INDISCERNIBLE) partner was taking it through the process in dealing with it in the best fashion he could. I'm just telling you the stuff that's in the news. But they had an agreement, they had -- I'll use the term a liability was owed by the body corporate and it was well documented. If I'm thinking about the ARO, we don't have a stakeholder that has a documented entitlement in the form of a current liability or even, I don't think, a long-term liability, do we?

MR. DE WAAL: Are we talking prior to October 1st, My Lord?

THE COURT: Talking on October 1st.

MR. DE WAAL: Well, we have a significant stakeholder in the sense that you have potentially $220 million at risk if -- if the AER becomes a creditor in terms of the *Bankruptcy and Insolvency Act.*

THE COURT: Okay. Well just -- your friend, Mr. Leitl, said AER doesn't become a creditor. What's your comment to that?

MR. DE WAAL: *Redwater* says it does.

THE COURT: Going to take that under advisement. What are we going to do with *Redwater* if the Supreme Court comes out in the next short while?

MR. DE WAAL: My Lord, I don't think, and again I -- I thought about this for about ten seconds, but I don't think that'll affect the outcome because you have the --

THE COURT: I just want to make sure we're at least alive to the

issue.

MR. DE WAAL: Yes. But I don't think that changes anything from our perspective or from a trustee's perspective.

MR. LEITL: My Lord, so my friend -- I don't mean to say that the AER will not become creditors. The AER was not a creditor but could become through the bankruptcy process. But prior to that, there's no presumption that it will be a creditor. That's what I (INDISCERNIBLE).

THE COURT: No presumption as at the date of the transaction.

MR. LEITL: Yes.

THE COURT: Yes.

MR. DE WAAL: Yes. And I'm not making anything of that.

Mr. Rasmussen reminds me, My Lord, that the *Peoples* decision also says that the best interests of the corporation include consideration for the environment, employees. So it's a broader -- broader set of background considerations, if I can put it that -- that way to determine what is in the best interests of the corporation. So it's not just financial, not just dollars and cents. It's what is best for the corporation in the broader perspective. But it is for that corporation, not for some other corporation.

THE COURT: I'm listening.

MR. DE WAAL: My Lord, I think I've run through my notes here. I may find something else, but if I can just go back to my original notes, My Lord, and I'll not make any submissions on the stay the Court's (INDISCERNIBLE) this morning.

I'm going to make submissions about the transaction and whether that encompasses all these different components or whether we should be focussing on the transfer which is the section 96 language. My friends say that the asset purchase agreement was simply an embedded step in the process and they say it's just a technical step required by 198 as if it's nothing more than that. And I've made submissions and we represent the Estate of SRC or PEOC only. We're applying to set aside a specific transfer. And then in the language of section 96, if you look at the language of section 96 and you take as background what my friend suggests the whole transaction being from beginning to end, it is not clear to me what the transfer would be. Which grants were we talking about? It's clear where the debtor is. But in that case, why would PEOC only be considered in the context of a broader

transaction? The section 96 language, My Lord, does not work if you apply the definition of "transaction" to all these transactions taken together.

So, again, I've alluded to this, when you look at the circumstances, you have to take into account that there were these other transactions because that reflects on the director's decisions, the commercial context, whether there was oppression, what the objectives were, what the role of PEOC was in all of this. So you have to look at the broader transactions in those contexts. In the context of oppression, for example. But not with respect to the section 96 claim.

Okay. And if I can look at the statement of claim, you'll see more that the second last paragraph I believe -- or the last paragraph, 24, says that the transactions are void. And it refers to all the transactions because we say there was a scheme, and it was deliberately structured in a way -- in fact, paragraph 11 we deal with the retained interest agreement. We say: (as read)

> The objective of the transaction contemplated by the retained interest agreement was to support the LLR rating for PEOC as determined by the AER to determine the asset transaction and share transaction to be completed without regulatory intervention of the AER.

So if you look at the broader background, we say all these transactions are void for those reasons. And if you look at the remedies sought, we are seeking an order setting aside the asset transaction and declaring the asset transaction void as against the trustee. That's the only transfer. Nothing else.

My Lord, there are a few issues of what we say are fundamental corporate law principles raised in particularly Mr. Leitl's brief that do reflect on the -- on the argument generally. In paragraph 165, he says -- I should find it and not just make this up. Paragraph 165, he says, "PEOC's interests were Perpetual's interests." Now, I -- that's simply not correct.

THE COURT: Sorry, you said 165. Is that of Mr. Leitl's?

MR. DE WAAL: Brief. Yes, My Lord.

THE COURT: Brief.

MR. DE WAAL: Page 37.

THE COURT: I'm there.

MR. DE WAAL: Paragraph 165, last --

THE COURT: Yes.

MR. DE WAAL: Sorry, last sentence, My Lord. "PEOC's interests were Perpetual's interests."

THE COURT: Okay. I'm with you now.

MR. DE WAAL: Yes, I apologize, My Lord. It's the last sentence on there. That simply is a matter of law and is a matter of fact that was not correct.

Paragraph 174, PEOC had only --

THE COURT: Just -- let me just pause there. Is he not saying, sir, that -- and I'll read the last two sentences as opposed to just the last sentence:

> PEOC was a single purpose, wholly owned subsidiary of Perpetual. PEOC's interests were Perpetual's interests.

Don't you have to read those two sentences together?

MR. DE WAAL: Yes, My Lord. You can read them together. The point with respect, My Lord, and maybe I'm not being clear, is that to quote PEOC, and perhaps this is where we should start. If we go one step back, to call PEOC a single purpose corporation simply means that it had, at the time prior to the closing of either of these two deals, had one objective and that was to act. And one purpose, and that was to act as the trustee for POT. It was just the trustee. Nothing else. Single purpose. That changed prior to the closing even of the asset purchase agreement, and certainly before the closing of the share purchase agreement. So while Ms. Rose was the sole director, it was no longer a single purpose subsidiary of PEI. It was now an operating company, essentially. And I think she conceded that in cross-examination. It had 2,500 wells.

Then it says it's a wholly owned subsidiary. Again, there's no magic in that. Whether they have one shareholder or ten shareholders, the owner of PEOC does not determine what PEOC does. PEOC has its own interests. And if the owner says, I want you to take on these toxic assets, the shareholder -- the director is supposed to say, I don't know whether that's good for us. But making it or calling it a single purpose wholly owned subsidiary does not contain any magic. There's no exclusions or exceptions, or anything about that that would make this a different corporation, a corporation in *BCE* or in *Peoples* which were both wholly owned subsidiary cases.

THE COURT: I'm listening.

MR. DE WAAL: Again, Mr. Rasmussen, My Lord, refers to the -- to Mr. Leitl's brief and there's a quote in paragraph 166 at the bottom of that page. From -- it's a *BCE* quote, it then quotes *Peoples.* And you'll see at the bottom of that page: (as read)

> We accept as an accurate statement in law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate given all the circumstances of a given case for the board of directors to consider inter alia the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

And just before that quote, second line up, it says:

> There's a distinction to consider the impact of corporate decisions on shareholders or particular groups of stakeholders.

It's not just shareholders. You have to take other things into account, too. But these are the kinds of interests that you have to consider as a director. And, again, to come back to what I was referring to in paragraph 165, whether this is a single purpose wholly owned subsidiary or not, PEOC's interests were not Perpetual's interests. And in some cases they may be aligned, but in some cases they may not be. We say in this particular case, taking it from a corporation with no debt and single purpose just acting as a trustee to a corporation, was -- that owned 2,500 wells that Perpetual wanted to get rid of or was not in the best interests of PEOC.

The presentation that's Exhibit 3 to Mr. Darby's affidavit says the Goodyear presentation says that in that Goodyear transaction, Perpetual expected to get rid of 71 percent of its corporate liabilities. So, that 71 percent went to PEOC.

In paragraph 174 of Mr. Leitl's brief, he says: (as read)

> As PEOC was a wholly owned single purpose subsidiary of Perpetual at the time ...

And, again, I say that has no significance.

> ... the theory is entirely untenable. PEOC had no stakeholder other

than Perpetual.

Which is not correct.

The best interests of PEOC were the best interests of Perpetual.

That is a statement that is also not correct.

> As (INDISCERNIBLE) admitted by the trustee's counsel, this was Perpetual doing this transaction through a subsidiary. The proposition that PEOC had an independent and different set of interests is artificial and commercial absurd.

My Lord, with respect, it's also the law.

Paragraph 188, and Mr. Leitl repeated this submission orally, he says, "This allegation has no" -- sorry, My Lord, this is the allegation that Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear assets.

> This allegation has no relevance to Rose's duties to PEOC. There is no allegation that Rose had a personal duty in relation to PEOC's balance sheet. This complaint is really about the ability of creditors to collect from PEOC.

In other words, if PEOC is unable to pay its debts as a result of this transaction, then the director has nothing to do with that. That's the creditor's problem. And with respect, My Lord, that's -- I don't know that there's any authority for that. Certainly be surprised. But it seems to be consistent with the cases that we've referred to.

Paragraph 197, and it's repeated in paragraph 203 I think, My Lord. Mr. Leitl says: (as read)

> Section 120 is entirely inapplicable because Rose is not a party to the asset transaction.

And yet, where section 120 is quoted just above, it says in paragraph 120 -- section 120(1)(b):

> A director or officer of a corporation who is a director or an officer of or has a material interest in any person who is a party to a material contract or material transaction.

So if she was a director of Perpetual, this applies. So she may not have been a party so she doesn't qualify under (a), but (b) certainly applies.

My Lord, I'm not sure whether when you went through the inventory this morning, you didn't mention the case that we'd sent you yesterday. Don't know whether you got that.

THE COURT: I believe I did, sir.

MR. DE WAAL: *Gainers v. Pocklington Holdings.* The appeal decision.

THE COURT: Yes.

MR. DE WAAL: Well there was a --

THE COURT: November 7th is your letter?

MR. DE WAAL: Yes. It was yesterday --

THE COURT: And it's tab 53. I do indeed have that.

MR. DE WAAL: The only reason I'm referring to that, My Lord, because this is referred to -- the trial decision of Justice Clarke is referred to by Mr. Leitl, not the appeal decision. But you'll see that although Justice Clarke held that whatever the shareholders -- essentially, whatever the shareholders want is what the company wants, on appeal at paragraph 25 the Court of Appeal deals with this in very clear language:

> The reasons say that he was their sole owner, his interests were their interests, and any retroactive allocations of money among them which he might choose to make were proper and effective. If that proposition were correct, a trial would not even be a swearing contest, but a soliloquy, for only Mr. Pocklington could testify about unwritten agreements which he made with himself.
>
> The spectacle becomes risible. Indeed, a number of fallacies in company law and logic lurk there. We are not aware of any authority which makes the interests of the sole shareholder identical to the interests of the company. If that were so, a shareholder could always plunder the company to the creditors' detriment, and plainly he cannot.

I'm not going to refer you to the rest of the highlighted terms. But that, essentially, is I think my friend's submission. If it turns out that PEOC cannot pay its creditors, that's not the director's problem. She's not responsible for the balance sheet, as he says.

THE COURT: So where are you measuring that? On the day the transfer first occurred?

MR. DE WAAL: I beg your pardon, My Lord?

THE COURT: What -- on what date are you making that comment? On what date is that measurement to be considered?

MR. DE WAAL: It's -- it's on the closing of the asset sale - October 1st.

THE COURT: I just want to make sure we're still focussed on --

MR. DE WAAL: Yes. I'm still focussed on that. In fact, as I said before, whatever happened subsequent to that and in March this year or whenever the bankruptcy -- formal bankruptcy occurred, My Lord, has no relevance in section 96 context. And all the oppression and other allegations relate back to the decisions made by the director at the time prior to her resignation.

THE COURT: Thank you.

MR. DE WAAL: My Lord, one other point I should make which I did not make earlier, is when you look at transfers at under value, it is important to remember that it's not just a case where there is a non-arm's length transaction where this could be set aside. Certain transfers could be set aside even in an arm's length transaction in certain circumstances. We don't say those apply here, but the point is that the *Act* concedes of a situation where the trustee, because it represents other interests, the trustee could say that deal, even though it was an arm's length deal, was not a good deal for the debtor and, therefore, we apply to set it aside. And there's a matter of perspective on how to interpret section 96. We think that's a valid submission.

My friends say that this is all negotiated at arm's length and then they talk about the involvement of 198. And at some point, whether 198 represented PEOC in the negotiations when Ms. Rose was still a director, what that means I don't know, but they say all that happened and that made the negotiations arm's length negotiations. What is important

though is that it was still required for the sole director of PEOC to sign off on the deal. In fact, she signed both sides of that deal - as trustee for POT and then again on behalf of PEOC. The reason she had to sign was because she was a sole director and she had the ability to say at that point still "yes" or "no". Wasn't a done deal, wasn't as if 198 could force her or compel her to sign. She had the opportunity to make that decision. And there are legal implications from the fact that she then said "yes" instead of "no". And that's what this is about.

So, timing wise, it's not as if Ms. Rose and Perpetual stepped out of the picture and then everything happened on an arm's length basis after that. Even if it's accepted that 198 was involved in the discussions, the eventual decision was made at a point where Perpetual, in this case Ms. Rose, was still in control of PEOC.

My Lord, on the arm's length issue, if I could just take you to section 4 of the *Bankruptcy and Insolvency Act.* And that is at tab 16 again of our authorities.

THE COURT: I'm there.

MR. DE WAAL: And we say, My Lord, that this is -- this is fairly simple --

UNIDENTIFIED SPEAKER: We lost you. Where?

MR. DE WAAL: Section 4 of the *Bankruptcy and Insolvency Act.* Tab 16 of our authorities.

So, My Lord, it defines in 4.1 (sic), it says, "Entity means a person other than an individual," "related group," "unrelated group", and then we get to (2), definition of related persons and for the purposes of this *Act,* and it sets out the number of categories of persons that are related. I don't think there's any suggestion in this case that POT and PEOC, the two parties to the asset purchase agreement, were not related. PEOC was the trustee of POT, they were both controlled by Perpetual.

Then (3) at the bottom of page 9, "Relationships".

> For the purposes of this section:
>
> (a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;
>
> (c) a person who has a right under a contract, in equity or otherwise,

> either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests.

So there's that *Green Gables* case that I think Mr. McDonald referred to that we cite which says that if two shareholders have the right to buy the other one out, two shareholders in a corporation had the right to buy the other one out, they're both deemed to be in control of the company for the purposes of the section. So, you can have -- one share can be in two different positions with respect to the application of this section. Don't have to -- if somebody is -- owns the share, it doesn't mean that somebody else can also -- cannot also have the same rights. That's what this section says.

Now, in the context of this case, My Lord, I'm not sure where this takes us, but if 198 had the right to buy these shares, presumably it also became a non-arm's length party.

Subsection 4, "Question of Fact":

> It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

If you say it like that, My Lord, it sounds very simple. The point though is, and this is where I think my friend's cases all go wrong, is it says, "The question of fact whether persons not related to one another." So if they are related, this does not apply. It's not a question of fact pursuant to this subsection if they are in fact related.

So the test for whether somebody is related when the -- so the test for when -- whether somebody was dealing at arm's length where they're not related is set out in *McLarty,* and it's referred to in *Piikani,* and it's referred to in all these other decisions, *Juhasz.* But those all apply where the parties are not related.

Subsection 5 applies:

> Where persons who are related to each other are deemed not to deal with each other at arm’s length while so related.

For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are in absence of evidence

to the contrary deemed not to deal with each other at arm's length. So that's the deeming provision.

So what my friend's arguing about is that in any case, doesn't matter whether they're related or not, although they don't say that, but they say every single case it's a matter of fact. You look at the facts and it's a question of fact to determine whether they are acting at arm's length or not. Then they want to apply the test that's designed and applied in cases where they are note related. We say if the intention with the introduction of in the absence of evidence to the contrary in (5) was simply to make everything a matter of fact, a question of fact, that presumption subsection would've been removed and you could simply say it's a question of fact in every case whether people are dealing at arm's length or not. That's not what happened.

In fact, the reason why the absence of evidence to the contrary provision was inserted in the amendment, My Lord, was the B.C. case *Skalbania,* and it's referred to in the *Piikani* decision, My Lord, and it's also in our authorities. Beg your pardon, My Lord. I don't even need to hand this up. But in that case -- perhaps I should.

THE COURT: Your friends have a copy?

MR. DE WAAL: Now they do. The only point I want to make, My Lord, is paragraph 20 where the B.C. Court of Appeal says:

> This is not a case of Parliament declaring white to be black. What it has done, perhaps unnecessarily, is to eliminate the possibility that there can be a kind of grey area in which related persons deal at arm's length. That result could have been achieved without employing the word "deemed". But Parliament has used it and, in my view, has used it in the sense of conclusively deemed.

In other words, once you are related, you are conclusively deemed not to deal in arm's -- at arm's length. That's what *Skalbania* said. And all the amendment has achieved is to say you deem but it's a rebuttal of presumption.

So then the question becomes not as a question of fact were these people dealing with each other at arm's length or not, the question becomes what do the defendants do to rebut that presumption? And the only case that you've been referred to is our case of *Pricewaterhouse v. Legge* which says even if you're dealing -- even if parties are related, you could still say that there was proper consideration going both ways, that the transaction was not with the view to bankruptcy, and that this was a transaction in the ordinary course. And if you comply with those tests -- that test - those three elements of the test - and even though you

were not dealing with each other, even though you were related, the Court will accept that you were dealing at arm's length.

So, that's the background. No test from the respondents. In fact, that's the only case we could find. So the rebuttable presumption applies in this case between POT and PEOC. Question is whether there's anything to rebut that. And applying that test, the three elements of that test, in this case the trustee says, and the only evidence before you suggests, that there was no proper consideration given. And I would also say, in addition to what we have in our brief, this is not an ordinary course transaction where you have a single purpose, specific purpose corporation, acting only as the trustee winding up 2,500 wells overnight. That's not ordinary course.

So, that --

THE COURT: Sorry, what was that again?

MR. DE WAAL: That's not a transaction in the ordinary course of business. So we say that the fact that they were related triggers the presumption and that those facts mean that this is not an arm's length transaction.

And that's -- that's the section 4 analysis, My Lord. And if you look at the cases, one case in particular I think that's useful is, and *McLarty* says that they're not -- the parties are not related, *Piikani* the parties were not related. *Juhasz* is a useful one, My Lord, because it says very clearly, if I can find it. It's in the Perpetual -- Perpetual authorities, My Lord, tab 12.

THE COURT: I'm there.

MR. DE WAAL: So, paragraph 38.

THE COURT: I'm there.

MR. DE WAAL: (as read)

> The Trustee concedes that Juhasz and Cordeiro are not "related" for purposes of the presumption of a non-arm's length relationship in section 4(5) of the *BIA*. In particular, there is no evidence that Juhasz and Cordeiro were in a common-law relationship (sic). Accordingly, section 4(4) of the *BIA* governs the issue of whether the parties dealt at arm's length on the date of the Transfer. It is therefore a question of fact whether or not these parties were at arm's length at the time of

the Transfer.

So the triggering fact is the fact that they're not related and that's what makes it a question of fact pursuant to (4). And that's the case, My Lord, consistently throughout all the cases cited by my friends.

My Lord, I'm going to go into a new topic and I'm almost done with my normal notes so I don't think I'll be too long tomorrow morning. No promises, but perhaps this is a convenient time.

THE COURT: Certainly. When you say not too long, can you give us an estimate? Then I'm going to ask your friends the same questions in terms of reply.

MR. DE WAAL: Well I'd like to think it's half an hour or less.

THE COURT: Okay. So, just for planning purposes, 30 minutes.

Gentlemen, what do you expect?

MR. MCDONALD: Will you want to hear the argument on the stay which arises only if our application is dismissed? Or, sounds like there's a possibility we may be back here before you --

THE COURT: Yes. I'd like to ask a number of questions and maybe let's defer that. I'm just thinking of timing tomorrow because we only have the morning. And I didn't get a chance to -- I left my judicial assistant a voicemail but I thought I would have five minutes and make the inquiry. So I'm probably -- I know I'm sitting on a matter at 1, I see that I was scheduled for 2 also, and I've got it really tight because I've got another judicial obligation tomorrow at 4 and I need to deal with a preparation issue on that.

I have another application in the morning, too. That's from 8 to 10 but that's --

MR. MCDONALD: Well, the stay application is very discreet and we can deal with it at your convenience.

THE COURT: Yes. Let's deal with that in due course. I'll give you a date tomorrow because I want to think about things before I -- and I'll have questions for both parties. All parties, I should say. Let's circle on that tomorrow. But I will just hear from Mr. de Waal in terms of his -- the remainder of his submissions, then I'll hear from

you gentlemen, then we'll adjourn to a little later in the month.

MR. MCDONALD: Extrapolating from what I've heard, I'll be very short.

THE COURT: Okay. Thank you.

Any other business we should deal with today before we adjourn?

Hearing none, madam clerk, if we could adjourn until 10:00 tomorrow morning.

UNIDENTIFIED SPEAKER: The question I have, I think it's maybe for madam clerk, is can we leave all our stuff here?

THE COURT: There will be -- we'll be locking it up right after?

THE COURT CLERK: Yeah.

THE COURT: My other matter at 8 to 10 is not in this courtroom so you're welcome to leave everything.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Okay. Thank you.

Madam clerk.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 10:00 AM, NOVEMBER 9, 2018

Certificate of Record

I, Aixa Gault, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, in courtroom 1702, at Calgary, Alberta, on November 8th, 2018, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Su Zaherie, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: 1001-8936
Dated: November 13, 2018