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

PROCEEDINGS
(Excerpt)

Calgary, Alberta
November 9, 2018

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta
3
4
5 November 9, 2018 Morning Session
6
7 The Honourable Mr. Justice Nixon Court of Queen's Bench of Alberta
8
9 R. De Waal For PriceWaterhouseCoopers
10 L. Rasmussen For PriceWaterhouseCoopers
11 D.J. McDonald, Q.C. For Perpetual Energy Inc.
12 P.G. Chiswell For Perpetual Energy Inc.
13 S.H. Leitl For Sue Riddell Rose
14 A. Badami For Sue Riddell Rose
15 M. Neitzert Court Clerk
16
17
18 **Discussion**
19
20 THE COURT CLERK: Order in court.
21
22 THE COURT: Good morning.
23
24 MR. DE WAAL: Good morning.
25
26 THE COURT: Please be seated. Counsel, at your
27 convenience.
28
29 **Submission by Mr. de Waal**
30
31 MR. DE WAAL: Thank you, My Lord. My Lord, just to deal
32 with the release aspect that my friend Mr. Leitl raised. He refers, in paragraph 75 of his
33 brief, to the McKay-Cocker case.
34
35 THE COURT: I'm there.
36
37 MR. DE WAAL: And then he says at the top of page 18 -- well,
38 starting at the bottom of page 17:
39
40 The policy of the legislation is to regulate the conduct of directors and
41 officers of the corporation. The Ontario equivalent of section 122 (3)

1 may have retrospective effect but only insofar as it precludes officers
2 and directors from contracting out of their duties while they held their
3 positions with the corporation.
4
5 In fact, the quote in the case, My Lord, at paragraph 16 -- and this is at Tab 10 of
6 Mr. Leitl's authorities. The red binder.
7
8 THE COURT: I'm there, sir.
9
10 MR. DE WAAL: -- does not refer to contracting out of their
11 duties. It says:
12
13 In my view, the language of section 134(3) is both prospective and
14 retrospective. It is --
15
16 THE COURT: Just -- paragraph 16, did you say?
17
18 MR. DE WAAL: Sixteen, yes, My Lord.
19
20 THE COURT: I'm there.
21
22 MR. DE WAAL: Page 5.
23
24 THE COURT: Yeah, I'm there.
25
26 MR. DE WAAL:
27
28 It is retrospective inasmuch as it refers to liability for the breach thereof.
29 The policy of the legislation is to regulate the conduct of directors and
30 officers of the corporation whenever they served in either capacity.
31 Former directors and officers are equally affected by the language of
32 section 134(3). It's not open to them, for example, to contract out of
33 liability for the breach of the duty imposed by subsection 134(3) while
34 they held such a position with the corporation.
35
36 So it's not just contracting out of their duties. It's contracting out of liability, which is
37 what we say happened in this case.
38
39 And then he says in paragraph 77 -- last sentence of that paragraph of his brief, he
40 says:
41

1 The point is that where the release or grants a release with eyes wide
2 open, as was the case with the release, it must be given its intended
3 effect.
4
5 He doesn't explain what "eyes wide open" means and -- and it's -- there's no authority
6 cited for that proposition as a proposition of law, but as we said yesterday, in corporate
7 terms, PEOC's eyes certainly were not wide open in this case. And even if that were a
8 correct reflection of the law, on the facts, we know that that was not the case in this --
9 in this instance.
10
11 Then, My Lord, he refers at paragraph 147 of his brief to the *Wilson* decision of the
12 Supreme Court of Canada. And again, My Lord, I would ask you to -- well, first of all,
13 let me -- let me read what he says. He says:
14
15 The Supreme Court of Canada affirmed the two-prong test developed in
16 *Budd v Gentra* in determining whether a director personally acted
17 oppressively.
18
19 In fact, what the decision says -- it's at Tab 45 of his authorities.
20
21 THE COURT: I'm there.
22
23 MR. DE WAAL: Paragraph 46 -- or 47.
24
25 To reiterate, *Budd* provides for a two-pronged approach to personal
26 liability, not oppressive or acting oppressively.
27
28 And then he says these are the two prongs:
29
30 Oppressive conduct must properly attribute -- must be properly
31 attributable to the Director because she's implicated in the oppression.
32
33 And then the second prong, he says is:
34
35 The director must have personally benefited in the form of an immediate
36 financial advantage or increased control of the corporation or it breached
37 the personal duty owed as a director.
38
39 That's not what the case says, in my submission, My Lord. It says, in paragraph 47
40 again:
41

1 First prong requires that the oppressive conduct be properly attributable
2 to the director, because he or she is implicated in the oppression.
3
4 In other words, the director must have exercised -- and this is important, My Lord -- or
5 failed to have exercised his or her powers so as to effect the oppressive conduct. So
6 sitting back and allowing somebody else to come in and make decisions when you are
7 the responsible director, the sole director, falls under this first prong.
8
9 But this first requirement alone is an inadequate basis for holding a
10 director personally liable. The second prong, therefore, requires that
11 the imposition of personal liability be fit in all the circumstances.
12
13 That's the prong. And then the Court describes what fitness would be.
14
15 Fitness is necessarily an amorphous concept, but the case law has
16 distilled at least four general principles that should guide courts in
17 fashioning a fit order under section 241(3).
18
19 The question of director liability cannot be considered in isolation from
20 these general principles. First, the oppression remedy request must, in
21 itself, be a fair way of dealing with a situation. The five situations
22 identified by Koehnen relating to director liability are best understood as
23 providing indicia of fairness.
24
25 And then this is an example.
26
27 Where directors have derived a personal benefit in the form of either an
28 immediate financial advantage or increased control of the corporation, a
29 personal order will tend to be a fair one.
30
31 It's not a requirement. It's an example of when the remedy may be a fit one. And
32 then paragraph 50, just to emphasize that point.
33
34 To be clear, this is not a closed list of factors or set of criteria to be
35 slavishly applied, and as explained above, neither a personal benefit nor
36 bad faith is a necessary condition in the personal liability equation.
37
38 So we say the submission in paragraph 147, My Lord, is not an accurate reflection of
39 what *Wilson* says.
40
41 My Lord, the submission in paragraph 196, read with 197 and 198, is that Rose is not a

1 party, and we dealt with that yesterday, and she -- and then they -- it goes on in 198 to
2 say:
3
4 Similarly, if the trustee is alleging that Rose failed to disclose to PEOC
5 that PEOC was entering the asset transaction, that is absurd.
6
7 That's not the suggestion, My Lord. In fact, if you turn back to the previous page, you
8 will see that this -- the allegation, in fact -- paragraph 16.4.3. That's at tab -- that's at
9 page 43 of the brief. It's quoted there.
10
11 That Rose, as a beneficial shareholder and director of PEI had a material
12 interest in PEI, POT, and POC, which benefited from the transaction at
13 the expense of PEOC.
14
15 That's what she failed to disclose. Not the fact that -- which -- which is, with
16 respect -- I agree with Mr. Leitl -- absurd to suggest that PEOC should have been told
17 that it was entering into a transaction but --
18
19 THE COURT: Just -- counsel, if I can just pause you for a
20 second. What paragraph are you reading on page 43?
21
22 MR. DE WAAL: My Lord, on page 43, right above paragraph
23 194, Mr. Leitl quotes the allegations in the Statement of Claim.
24
25 THE COURT: Okay. Sorry. You're reading in the heading,
26 so to speak.
27
28 MR. DE WAAL: In the heading, yes --
29
30 THE COURT: Okay. Thank you.
31
32 MR. DE WAAL: -- My Lord. And the allegation is, in
33 paragraph 16.4.3, and he takes that to mean, if we read 198, that the suggestion is that she
34 should have told PEOC that it was entering into a transaction. What in fact is alleged is
35 that she failed to say: I have an interest in this. I'm a beneficial shareholder and a
36 director. I have a material interest in other entities that will benefit from this transaction.
37 And the suggestion that she shouldn't have been talking to herself is -- is -- is one thing,
38 but the Act allows for an entry in the minutes, for example. You have to disclose as a
39 director your interest, and you cannot simply say: There was nobody else to listen, and so
40 I didn't have to say anything. The Act does not say you have to disclose unless you are
41 the only director.

1
2 My Lord, the question was raised yesterday about these transactions or restructurings
3 happening on a regular basis and how -- how that should be done. At Tab 49, again of
4 my friend's authorities --
5
6 MR. LEITL: Sorry. 9?
7
8 MR. DE WAAL: 49, yes.
9
10 THE COURT: The *Greenlight* case?
11
12 MR. DE WAAL: Yes. *Greenlight* case, My Lord.
13
14 THE COURT: I'm there.
15
16 MR. DE WAAL: This was a -- such a situation where there was a
17 restructuring and there was a sub that was spun off, and at paragraph 79 -- and I'm not
18 going to refer to the facts in detail, My Lord. But paragraph 79, the Court eventually
19 finds that there was no -- that the directors complied with -- with their duties, and the
20 Court says:
21
22 The shareholders of a corporation may have a reasonable expectation
23 that the Board and a special committee will act in accordance with their
24 statutory obligations under section 134 to act honestly and in good faith,
25 with a view to the best interests of the corporation and to exercise their
26 reasonable business judgment with the care, diligence, and skill of a
27 reasonably prudent person in comparable circumstances.
28
29 That's the test. That's the requirement.
30
31 The totality of the evidence and the case at bar, in my view, does not
32 establish any failure on the part of the Board or the special committee to
33 comply with their duties of good faith or their duty of care in the case of
34 the challenged transactions. In the circumstances of this case, the
35 creation of the special committee and the review and recommendations
36 of the special committee with respect to the challenged transactions are
37 illustrative of what shareholders might reasonably expect with respect to
38 avoiding conflicts of interest and an independent review of related party
39 transactions.
40
41 Similarly, the deliberations of the Board and of the special committee

1 were focussed on consideration of the business objectives and the
2 possibility of alternative structures for the transactions, were based upon
3 independent legal and financial advice and detailed information about
4 the transaction provided by MID Management.
5
6 There was separate legal representation. There was a separate financial advisor.
7 There was a special committee. And that, the Court says, is what a shareholder can
8 expect. So that's how you avoid a conflict of interest situation where the parent
9 simply says to the sub -- in fact, doesn't even tell the sub, but just uses the sub as a
10 tool, essentially -- yesterday I said a vehicle -- but essentially as a tool to achieve the
11 objectives of the parent.
12
13 My friend says there's no law against a director benefiting, and that, of course, is true.
14 However, there are safeguards, and you cannot benefit without disclosing that, and
15 you cannot benefit at the expense of the corporation that you control as a director, and
16 if those safeguards are in place, of course, then that statement holds.
17
18 My Lord, I'm just cleaning up a few points, so I'm jumping around a bit. I apologize
19 for that.
20
21 I should refer you to the case at Tab 13, again in the red binder. The Supreme Court
22 case dealing with the forestry situation and -- and --
23
24 THE COURT: *Daishowa*?
25
26 MR. DE WAAL: Yes, My Lord.
27
28 THE COURT: I'm there.
29
30 MR. DE WAAL: And -- and the point I want to make -- and it
31 appears from paragraphs 29 and 30 and again summarized in 37. But the point is that
32 these future obligations are -- and the Court finds -- are not existing separate debts for
33 these purposes but are in fact -- in fact, maybe I should read paragraph 37, the second line
34 there.
35
36 They are not a liability that can be separated from the forest tenure, the
37 assumption of which would form part of the sale price of the tenure.
38
39 In other words, whether you have this as a separate debt is not the issue. If the -- in
40 the section 96 context, the trustee has to consider the consideration given and
41 consideration received, and as part of the consideration given, the value -- whatever

1 you want to call it. Whether it's a liability or not, as -- as you asked me yesterday --
2 the value of those obligations that were undertaken or the amount or the contingency
3 that those obligations will arise, that is something that the trustee should take into
4 effect -- into account in determining what consideration was given by PEOC in the
5 asset transaction, even -- even if it's not a separate distinguishable debt or a claim.
6
7 THE COURT: How far do you go?
8
9 MR. DE WAAL: I beg your pardon, My Lord?
10
11 THE COURT: How far do you go? Where -- where is your
12 boundary?
13
14 MR. DE WAAL: My Lord, the consideration eventually will be
15 determined by the Court, so the trustee takes a position and says this is a transfer at
16 undervalue for these reasons, and I believe the consideration provided was 'X' and the
17 consideration return was 'Y', and the Court says: I think those are not -- and the test is set
18 in section 96. Those are not so glaringly different that I would set this aside. But the
19 trustee has to make that case and persuade a court.
20
21 THE COURT: How far do you go?
22
23 MR. DE WAAL: In -- in -- in considering what would constitute
24 consideration, My Lord?
25
26 THE COURT: You're touching on liabilities here or suggesting
27 there's liabilities that are not yet crystallized, if I can use that term. If I am understanding
28 your point correctly -- and perhaps I'm not -- how far does one go -- how far does a
29 director go in their efforts to comply with what you're suggesting?
30
31 MR. DE WAAL: My Lord, if -- if this is an issue of a few
32 thousand dollars, then that question will arise. So I'm not trying to avoid the question,
33 but what I'm saying, My Lord, is that the evidence in this case suggests that -- in fact is --
34 that 71 percent of the Perpetual liabilities were simply given to PEOC, that that amounted
35 to anywhere between --
36
37 THE COURT: What do you mean given?
38
39 MR. DE WAAL: They were transferred to -- to PEOC.
40
41 THE COURT: Are you saying they were assigned to PR?

1
2 MR. DE WAAL: No, My Lord, but the -- the assets, as in the
3 forestry case, those assets were associated with that amount of potential future contingent
4 liability.
5
6 THE COURT: Yeah, I understand what you're saying. I'm just
7 asking how did -- how did they end up in that entity? Were they assumed? The
8 terminology you used suggested they were assigned. Were they -- okay.
9
10 MR. DE WAAL: No.
11
12 THE COURT: So they weren't assigned. Were they assumed?
13
14 MR. DE WAAL: My Lord, they go along with the asset by
15 definition. That is just the way --
16
17 THE COURT: Okay. I'm not disputing that.
18
19 MR. DE WAAL: Yes.
20
21 THE COURT: I'm asking a question, and the question is: Were
22 they assigned? Your answer was: No. Were they assumed?
23
24 MR. DE WAAL: It's not a separate debt in the sense that it has to
25 be assigned or assumed.
26
27 THE COURT: Okay, but let's -- let's leave that. I'll take that
28 under advisement. How far does a director go in dealing with this? And just to go back
29 on one of your comments. You said: If there was a few thousand dollars. If there is a
30 few thousand dollars of contingent liabilities, what was your point? Just so I understand
31 that.
32
33 MR. DE WAAL: My Lord, I'm saying that -- that arguably a
34 director might say: If there is a difference between the value of the assets or the value of
35 the consideration given by PEOC in this transaction and the value of the consideration
36 received by PEOC, in my judgment, that is not something that should concern anyone.
37 When the trustee comes along and shows that that difference is a few thousand dollars,
38 then presumably the Court is going to say that issue does not arise. The section 96
39 inquiry is going to have no result.
40
41 THE COURT: So just pause there and make sure I understand.

1 If you are a few thousand dollars under water, the trustee shouldn't mind.
2
3 MR. DE WAAL: No, I'm not saying that, My Lord. I'm saying
4 that it has to be conspicuously -- that's -- that's the word, and that's why I'm saying it's
5 not -- there's no line, there's no dollar amount, but --
6
7 THE COURT: We're going down a slightly different track than
8 I asked, but let's -- I would like you to provide the Court with the answer.
9
10 MR. DE WAAL: My Lord, the -- what I -- what I wanted to refer
11 you to was the definition of transfer at undervalue, which is what we're dealing with, and
12 that's what the consideration is for the trustee and that, we say, is what the director should
13 consider. It means a disposition of a property or provision of services for which no
14 consideration is received by the debtor or for which the consideration received by the
15 debtor is conspicuously less than the fair market value of the consideration given by the
16 debtor.
17
18 THE COURT: So you're -- I'm just going to pause you for a
19 couple minutes here. Your position is that there was a -- there was a circumstance where
20 this body corporate had less value than the assets that came.
21
22 MR. DE WAAL: Yes.
23
24 THE COURT: If that's the case, why did an arm's length third
25 party buy it and not request some type of additional consideration?
26
27 MR. DE WAAL: My Lord, that is, in essence, what section 96
28 addresses. Even in arm's length --
29
30 THE COURT: No, no. I'm asking you the question.
31
32 MR. DE WAAL: And I'm --
33
34 THE COURT: Why -- why would a third party buy this?
35 Just -- just put section 96 aside for a second. Why would a third party buy it in
36 circumstances where there's this inherent liability? We used to have take or pay in
37 Canada, in Alberta, and you would have a liability there, and on the conveyance of assets,
38 you have to deal with that.
39
40 I think what you're saying -- and I'm just trying to understand the context -- is we have a
41 conveyance into a shell corporation. My term not yours. You called it a vehicle. We

1 have a conveyance where the assets are not worth as much as the -- and I'll call it, for
2 narrative purposes, a contingent liability right now. And yet a third party, that's arm's
3 length, took that company. Why would an arm's length third party that's represented by
4 sophisticated professionals take that company when it's under water?
5
6 MR. DE WAAL: Because, My Lord, there was no risk. It
7 assumed that the gas price would rise and that these assets will become, in fact, worth a
8 lot more than the liability, and if it didn't --
9
10 THE COURT: So -- just to pause -- so there was no risk at that
11 point in time?
12
13 MR. DE WAAL: No risk for -- I'm saying there's no risk in -- in
14 considering whether to buy these assets, if I am the purchaser, I would say to myself: I'm
15 buying this in a separate entity -- separate entity. PEOC. And if the gas price goes up,
16 then I benefit because I have these assets. And if the gas price does not rise, I walk away.
17 Which is where we are. So you convey that -- there are a number of reasons. That's not
18 the only reason. There are a number of reasons. They -- they were speculating. They
19 thought that they could make this work. Maybe they weren't well advised on the
20 financial side. So they took a risk. They said: We can -- we can buy this, and if it
21 doesn't work out, we just walk away. That's one situation.
22
23 However, coming back to section 96, My Lord, if there is a bankruptcy, then section 96
24 intervenes. It's all very well to say to 198: You cannot complain because you bought --
25 you bought this at an exorbitant price, inflated price. You can't complain. You bought
26 this at an arm's length -- in an arm's length deal at a price that you were prepared to pay.
27 That's all very well.
28
29 But when, in a bankruptcy situation, you're affecting the interests of others, and you are
30 suddenly looking at a 200 million dollar plus liability that somebody else is now going to
31 be responsible for, that's different. That's why section 96 is there --
32
33 THE COURT: Okay. So --
34
35 MR. DE WAAL: -- even for arm's length transactions.
36
37 THE COURT: Thank you for that. I'll just post one more
38 question and then I'll turn it back to you. So let's use a hypothetical, tracking these facts.
39 A vehicle is utilized to place assets in that have -- and again, I'll use the term contingent
40 liability. You use the word or the phrase: There was no risk in that. I think you're
41 referring to the purchasers. They can walk away.

1
2 MR. DE WAAL: Yes.
3
4 THE COURT: So if we do that at time zero and gas prices go
5 up over the next six months. We've got a vibrant company. And at the end of the six
6 months -- we'll call that time T1. Solvent. We go another two years and gas prices go
7 down. What's your position on that? I'm just trying to understand the context.
8
9 MR. DE WAAL: Section 96, My Lord, deals with the situation as
10 it existed in October, 2016. You cannot -- it does not provide the trustee, with the benefit
11 of hindsight, to say it's now --
12
13 THE COURT: Okay. Thank you. You have answered my
14 question. Thank you.
15
16 MR. DE WAAL: I'm not sure whether that is the right answer, My
17 Lord, but.... So you look at the transaction in the context, and we say in that context, the
18 sole director of PEOC acknowledges that these contingent liabilities were not a few
19 thousand dollars but this was significant. In fact, we -- we quote the evidence. Perhaps I
20 should take you to that. Paragraph 126 of our brief, My Lord.
21
22 THE COURT: I'm there.
23
24 MR. DE WAAL: So perhaps the first reference should be to the --
25 to the exhibits and -- and Your Lordship would have seen this, but in the affidavit of
26 Mr. Darby, he attaches the press release that refers to -- that describes these assets. I
27 should start there, My Lord. This is Mr. Darby's affidavit, and it's Exhibit O.
28
29 THE COURT: Just give me two seconds here, sir. Page
30 number, sir?
31
32 MR. DE WAAL: My Lord, it's Tab O or Exhibit O to Mr. Darby's
33 affidavit.
34
35 THE COURT: Yeah, I'm looking at Darby's affidavit -- oh,
36 sorry, it's --
37
38 MR. DE WAAL: Transcript, My Lord.
39
40 THE COURT: -- transcript.
41

1 MR. DE WAAL: Yes.
2
3 THE COURT: You said Tab O?
4
5 MR. DE WAAL: Exhibit O. Yes, My Lord.
6
7 THE COURT: I'm just looking at --
8
9 MR. DE WAAL: My Lord, I --
10
11 THE COURT: Sorry.
12
13 MR. DE WAAL: -- do have a clean copy if --
14
15 THE COURT: No, that's fine. I'm just grabbing the wrong
16 document. If you have an extra copy -- for some reason I don't seem to have it with me.
17 Thank you. Tab O? Perpetual Energy Inc. Analysis?
18
19 MR. DE WAAL: Yes. Yes, My Lord. This --
20
21 THE COURT: Sorry. I did have that. I just -- I thought you
22 said -- I'll hand this back. Madam Clerk?
23
24 THE COURT CLERK: M-hm?
25
26 THE COURT: That way I can mark it up. Go ahead, sir.
27
28 MR. DE WAAL: So this is the public description of the
29 transcription from the Perpetual perspective. It says there was the strategic -- third line --
30 the strategic disposition of a large percentage of its high liability mature shallow gas
31 properties. It says it will continue to benefit -- in the second paragraph --
32
33 ... continue to benefit from the shallow gas properties for close to two
34 years because it has this contract in place.
35
36 And the paragraph -- the third paragraph towards the end:
37
38 At year end 2015, Perpetual forecast the undiscounted cost of future
39 asset retirement obligations for the shallow gas properties at 133.6
40 million.
41

1 Last paragraph:
2
3 Perpetual funds flow is expected to be positively impacted by the
4 disposition as the shallow gas properties continue to operate on negative
5 cash flow basis as a result of depressed natural gas prices, combined
6 with high fixed operating costs which include extremely high municipal
7 property taxes.
8
9 And then right at the end, third last line:
10
11 The company estimates that the transaction increases its net asset value
12 discounted at 10 percent on a pro forma basis, and McDaniel Inc. will
13 want 2016 commodity price forecasts by 28.5 million.
14
15 This is the flip side of the coin. This is -- this is the benefit to the recipient of the
16 benefit, and this is what -- Perpetual got the other side of the coin.
17
18 Then in the transcript of Ms. Rose, the cross-examination -- and you don't -- don't
19 need to refer to that, My Lord. I'm just going to -- the numbers change. From the
20 133, it becomes 131. In a subsequent press release on November --
21
22 THE COURT: Sorry, counsel. What are you referring to
23 there?
24
25 MR. DE WAAL: It's the transcript of the cross-examination of
26 Ms. Rose filed on November 1, 2018. And it has five --
27
28 THE COURT: What page?
29
30 MR. DE WAAL: -- tabs, My Lord. It's -- this is Tab 6 that I am
31 referring to. Exhibit 6.
32
33 THE COURT: I'm there.
34
35 MR. DE WAAL: And all I'm referring you to, My Lord, is in the
36 third line of that paragraph under the heading "Production and Operations", the ARO
37 number is 131 million.
38
39 THE COURT: I'm there.
40
41 MR. DE WAAL: And at the next tab, that is in March -- on March

1 15, 2017, again you have -- towards the end of that first paragraph $128 million in
2 discounted decommissioning obligations. It says the positive impacts of future -- so it's
3 the same message over and over. And then the next tab, My Lord, Tab 8 --
4
5 THE COURT: Just -- if I can pause you there. On -- the one
6 under Tab 7, where is that number again?
7
8 MR. DE WAAL: My Lord, in the first --
9
10 THE COURT: I see it. I --
11
12 MR. DE WAAL: -- first bullet? Yes. Towards the end.
13
14 THE COURT: Yeah. I think it's -- yeah. Thank you.
15
16 MR. DE WAAL: Yeah. So again it stays a substantial number.
17 And then the next tab is a newspaper article. Tab 8.
18
19 THE COURT: M-hm.
20
21 MR. DE WAAL: And second-last paragraph:
22
23 Sue Riddell Rose, Perpetual's president and chief executive, said the
24 assets involved in the transaction are a major drain on the company
25 because all of the cash they generate is swallowed up by municipal
26 taxes.
27
28 And then in quotes:
29
30 We rid ourselves of what has become a negative cash flow property for a
31 long time, not just with the recent collapse in the commodity price.
32
33 So this is the sole director of PEOC describing this transaction and the benefits to
34 Perpetual. She was cross-examined about that, and we quote some of that evidence in
35 paragraph 126 of our brief, My Lord.
36
37 THE COURT: I'm there.
38
39 MR. DE WAAL: She said:
40
41 The ARO obligation represented by the properties on Perpetual's

1 September 30, 2016 balance sheet was 133.6 million, but this is only
2 how it was represented in Perpetual's financial disclosure to the market,
3 not what they believed to be the actual liability.
4
5 Which raises another question, of course.
6
7 The 133.6 million figure did not address the full context of the future
8 liabilities.
9
10 Next subparagraph:
11
12 The actual ARO number that Perpetual landed on for the ARO for
13 Goodyear was higher than the $52 million number estimated in June,
14 2016 and was about $87 million. This $87 million ARO figure,
15 however, may still have been a good aspirational number but was not an
16 auditable number.
17
18 So when you look at the consideration given by PEOC in the assumption of --
19 whatever this means, the conclusion, we say, on the section 96 consideration is that
20 this was a transferred undervalue. And it raises all kinds of questions, of course,
21 about the decision and the business judgment of the sole director of PEOC in entering
22 into this transaction.
23
24 THE COURT: So presumably -- and your theory -- if there had
25 been a direct transfer of these assets -- and again I'll use the term assumption of the
26 ARO -- we wouldn't be here today.
27
28 MR. DE WAAL: Indeed, My Lord. If there was a direct transfer,
29 presumably it would have triggered -- which is what this is set up to avoid, we allege -- it
30 would have triggered the intervention by the regulator, and you could do this kind of thing
31 if you pay the deposit and show that there's somebody going to be -- at the end of the day,
32 there's somebody going to be responsible for this. Not a bankrupt estate.
33
34 THE COURT: Continue.
35
36 MR. DE WAAL: My Lord, there was a submission that because
37 this is a derivative claim or this is really a derivative claim and it should, therefore, not
38 also be an oppression claim. That's dealt with in the *E & Y* case which is at Tab 13 of --
39 13 of our authorities, My Lord.
40
41 THE COURT: Of your authorities?

1
2 MR. DE WAAL: Yes.
3
4 THE COURT: Just pause for a second, sir. I'm there.
5
6 MR. DE WAAL: Paragraph 128. There is a heading "Derivative
7 Or Oppression Action", and it then says:
8
9 In addition to attacking the standing of the Monitor to bring the action,
10 the appellants also submit that the Monitor was precluded from bringing
11 the action in the form of an oppression remedy proceeding pursuant to
12 section 241 of the *CBCA*. In their view, the action could only have been
13 brought as a derivative action.... They say the claim asserted is a
14 corporate claim belonging to Algoma, if anyone, and the stakeholders,
15 on whose behalf the Monitor asserts the claim, were not harmed directly
16 or personally but only derivatively through harm done to Algoma. I
17 disagree.
18
19 And then paragraph -- there is a -- there is a discussion of the *Wildeboer* case, My
20 Lord, and the Court finds -- and I'm just looking for that reference, My Lord, that --
21 beg your pardon, My Lord. I had the reference, and I made a note, but it's the wrong
22 paragraph. I had the right paragraph. 131, My Lord.
23
24 The *Wildeboer* decision must be read in that context. It does not stand
25 for the proposition that in all cases where there has been a wrong done
26 to the corporation, the action must be brought as a derivative action.
27 Consistent with a number of other authorities, this court expressly
28 reaffirmed the principles that the derivative action and the oppression
29 remedy are not mutually exclusive and that there may be circumstances
30 giving rise to overlapping derivative actions and oppression remedies
31 where harm is done both to the corporation and to stakeholders.
32
33 MR. LEITL: My Lord, I may be able to save some time. I
34 have never argued they are mutually exclusive.
35
36 MR. DE WAAL: My Lord, the case -- my friends cite the *Knight*
37 decision of the Supreme Court, which is at Tab --
38
39 UNIDENTIFIED SPEAKER: It's 8.
40
41 MR. DE WAAL: Yeah. I'm sorry, My Lord. Maybe just to -- to

1 address Mr. Leitl's point, paragraph 37, the heading in his brief says: Director Claim
2 Duplicates Oppression Claim. We understood that to say, well, you can either have one
3 or the other. You can't have both, and maybe we misunderstood, but that's.... So I
4 apologize, My Lord. I -- did I say paragraph 37?
5
6 THE COURT: You did.
7
8 MR. DE WAAL: It's paragraph 163, page 37. Apologize, My
9 Lord. Page --
10
11 THE COURT: So give me -- I've got paragraph 37. Give me
12 that again?
13
14 MR. DE WAAL: It's page 37.
15
16 THE COURT: Okay.
17
18 MR. DE WAAL: Paragraph 163. And the heading is: Director
19 Claim Duplicates Oppression Claim.
20
21 Superficially, the director claim appears to concern the interests of
22 PEOC. However, in substance, the director claim is a duplication of the
23 oppression claim.
24
25 My Lord, I'm just looking for that *Knight* decision, and I thought I --
26
27 UNIDENTIFIED SPEAKER: Tab 8 of our authorities.
28
29 MR. DE WAAL: Tab 8. Sorry. Thank you. So this is on
30 striking, My Lord.
31
32 THE COURT: I'm there, sir.
33
34 MR. DE WAAL: And I want to refer you to paragraph 21 of that
35 decision, which the Supreme Court says deals with --
36
37 THE COURT: I'm there.
38
39 MR. DE WAAL: -- with a remedy. It says -- paragraph 21:
40
41 Valuable as it is, the motion to strike is a tool that must be used with

1 care. The law is not static and unchanging. Actions that yesterday
2 were deemed hopeless may tomorrow succeed.
3
4 And then there are references to the *Hedley Byrne* and other decisions. And then in
5 the middle of that paragraph:
6
7 The history of our law reveals that often new developments in the law
8 first surface on motions to strike or similar preliminary motions, like the
9 one at issue in *McAlister*. Therefore, on a motion to strike, it is not
10 determinative that the law has not yet recognized the particular claim.
11 The Court must rather ask whether, assuming the facts pleaded are true,
12 there is a reasonable prospect that the claim will succeed. The
13 approach must be generous and err on the side of permitting a novel but
14 arguable claim to proceed to trial.
15
16 We are not conceding that any of the claims -- there is no law to support any of the
17 claims we make. We just say that in striking, you should apply the consideration --
18 generous considerations and not strike something because you have some question
19 about the merits of the claim.
20
21 Just a minute, please.
22
23 My Lord, there is one aspect, again relating to that question you asked me yesterday
24 about whether this is a liability -- whether the ARO claim is a liability or not, and the
25 *Downtown Eatery* case that I referred to yesterday stands for the proposition that even
26 a potential judgment creditor -- in other words, not even somebody who is a
27 shareholder or has any other relationship with the company -- even a potential
28 judgment creditor has an interest to be a complainant and has expectations on how the
29 directors should act with respect to the assets of the defendant corporation and that
30 asset stripping in those circumstances, My Lord, will not be permitted. And there is
31 that decision -- the *Haas* decision --
32
33 THE COURT: Sorry. Just give me that last sentence again?
34
35 MR. DE WAAL: That if you asset strip a corporation so that the
36 potential judgment creditor will not have any assets to -- to enforce a judgment on, that is
37 oppression. And that's the same that -- in the *Haas* decision, My Lord. In the *Haas*
38 decision, which I should find --
39
40 THE COURT: So how far do we go in sweeping in potential
41 judgment creditors? That's your phrase. I just -- if I have misstated it, tell me.

1
2 MR. DE WAAL: No, My Lord. I'm not -- I'm not suggesting
3 that. In fact, what I should refer you to is that statement Justice Shelley --
4
5 THE COURT: Did I misunderstand that phrase? Did you use
6 the term, phrase "potential judgment creditors have an interest"?
7
8 MR. DE WAAL: Yes, My Lord.
9
10 THE COURT: Thank you.
11
12 MR. DE WAAL: And --
13
14 THE COURT: How far -- sorry. Go ahead.
15
16 MR. DE WAAL: I should hear the question before I answer it, My
17 Lord.
18
19 THE COURT: Oh. The question was how far -- how do I
20 identify -- how does society identify a potential judgment creditor, and when it comes to
21 the Court, how do I deal with it?
22
23 MR. DE WAAL: My Lord, the potential judgment creditor will
24 make an application under the section of the Act and say: I should be recognized as a
25 complainant, and the Court will say: Your claim is not likely to succeed, or it's not
26 material, or I don't accept your facts, or for any other reason I do not find that you are a
27 proper person to be a complainant. Or the --
28
29 THE COURT: So --
30
31 MR. DE WAAL: -- Court may say: In these circumstances, I
32 recognize your interest. There's merit in your claim, perhaps, or the amount involved
33 is -- is significant, or the actions of the directors were clearly determined to frustrate your
34 claim. Any of those circumstances potentially in the -- in the evidence before you would
35 lead you to say: I think I should recognize this potential judgment creditor as a
36 complainant, and the Court does not -- has an unfettered discretion.
37
38 THE COURT: Well, the Court has a lot of inherent jurisdiction,
39 but when -- when would I entertain that? And when I say "I", I'm referring to the Court.
40 When would I entertain an application by a potential judgment creditor? On the day after
41 the transaction?

1
2 MR. DE WAAL: Not necessarily the day after, My Lord, but if --
3 if there is a potential -- it depends on the -- on circumstances. Again --
4
5 THE COURT: But -- but isn't that the relevant date? I'm just
6 trying to understand the --
7
8 MR. DE WAAL: Oh.
9
10 THE COURT: -- context here in --
11
12 MR. DE WAAL: Oh, not when would you entertain, but when
13 would you consider his position with respect to the potential claim? What's the relevant
14 date for that consideration? If -- if that's the question, yes, My Lord, on the day that -- I
15 mean, there could be a variety of actions jointly constituting the oppression. So it
16 depends on the circumstances. If there were a number of transactions over a number of
17 months, and perhaps you look at all the circumstances. There could be one specific
18 action where the one single asset is sold. It could be that.
19
20 THE COURT: So are we now -- given your last couple of
21 phrases, are we now looking at the big picture or are we just looking at one transaction?
22
23 MR. DE WAAL: No, My Lord. I'm -- what I'm -- what I'm
24 arguing, My Lord, is that in -- in considering the standing of someone to be a complainant
25 or the ability of someone to be recognized by this Court as a complainant, you're not
26 looking solely at someone who has a direct interest like a shareholder. You're even
27 looking at people beyond that, and --
28
29 THE COURT: Well, I understood that. That's why I am asking
30 you the question, because I'm -- I'm struck -- and I'm not saying that negatively or
31 positively. I'm struck by this phrase "potential judgment creditor has an interest".
32
33 MR. DE WAAL: If -- if he was a complainant, if -- if the facts --
34 if he was a complainant at the time of the oppression. Not subsequently. But at the time
35 of the oppression. You have to say -- and that's what the Act says. You have to say that
36 you meet one of those tests for oppression, and you have a direct interest, and you are --
37 you are to be recognized as a complainant with respect to those facts.
38
39 THE COURT: Okay. Thank you. Continue.
40
41 MR. DE WAAL: My Lord, in the -- in the *Haas* decision, that I

1 finally found. It's at Tab 25 of our authorities.
2
3 THE COURT: Of your authorities? Thank you.
4
5 MR. DE WAAL: Yes.
6
7 THE COURT: I'm there, sir.
8
9 MR. DE WAAL: Paragraph 51.
10
11 THE COURT: I'm there, sir.
12
13 MR. DE WAAL:
14
15 In the case before me, the restructuring of leasing and ACT left the
16 corporations unable to pay a potential judgment for the breach of
17 contract actions which have been commenced by the applicants.
18
19 So again, this is where there is a debt claim or a -- or a contract claim, and there is
20 related oppression -- and I think that's another submission that my friend Mr. Leitl
21 made yesterday -- is you cannot have oppression arising from a simple debt claim.
22
23 *Haas,* as director, did not maintain any reserve for this potential liability.
24 Such failure disregarded 864789's and Gibson's reasonable expectation
25 that in terminating the business of leasing and ACT and transferring all
26 of their assets, a reasonable contingency fund would be maintained to
27 cover this liability. The effect of not maintaining such a fund is itself
28 oppressive regardless of whether, as the applicants claim, the
29 respondents deliberately planned to impede the successful recovery on a
30 judgment.
31
32 So again, potential judgment creditor.
33
34 I think those are my submissions, My Lord.
35
36 Just one more thing, My Lord. The *Downtown Eatery* case --
37
38 THE COURT: Just -- can I just pause you on paragraph 51?
39 When it says, on the second sentence of that paragraph:
40
41 *Haas*, as a director, did not maintain any reserve for this potential

1 liability.
2
3 Is he referring -- are they referring to a reserve that would be on the face of the
4 financial statements?
5
6 MR. DE WAAL: I don't -- I don't think so, My Lord. That's not
7 how I remember the facts. It's not -- it's just that if -- there was a disposition of assets
8 which led the defendant to be in a position where it would not have been able to satisfy
9 any judgment.
10
11 THE COURT: The reason I ask the question is did this liability
12 exist at the time?
13
14 MR. DE WAAL: It was a potential --
15
16 THE COURT: When I --
17
18 MR. DE WAAL: -- potential liability only, My Lord.
19
20 THE COURT: Just pause. Let me finish the question. The
21 reason I am focussed on it is it says.
22
23 ... did not maintain any reserve for this potential liability.
24
25 What -- what's the nature of the liability? I'll read the case, but....
26
27 MR. DE WAAL: My Lord, there was -- there was a breach of
28 contract -- there were breach of contract actions commenced, and it's a --
29
30 UNIDENTIFIED SPEAKER: It's an application by a shareholder, My Lord.
31
32 MR. DE WAAL: Yes. It was a breach of employment contract,
33 My Lord, and -- and -- breach of employment contract, and then I think the --
34
35 THE COURT: I'll take your comments under advisement,
36 counsel, when I review the case.
37
38 MR. DE WAAL: Thank you, My Lord. The *Downtown Eatery*
39 case, My Lord, by --
40
41 THE COURT: Pardon me?

1
2 MR. DE WAAL: The *Downtown Eatery* case. When my --
3 Mr. Leitl says this is a shareholder act -- claim. But *Downtown Eatery* was a straight
4 claim. There was no shareholder relationship at all. And the last point I wanted to make
5 is that that case is cited with approval in the Supreme Court decision in *Wilson*. Mr. Leitl
6 again made a -- made a comment about the fact that the authority really is *Wilson*.
7 Supreme Court decision of *Wilson* instead of *Downtown Eatery,* but it is, in fact, referred
8 to with approval in *Wilson*.
9
10 THE COURT: Okay. Thank you, sir.
11
12 MR. DE WAAL: Thank you, My Lord.
13
14 THE COURT: Thank you. Did you want to take a few minute
15 break or are you prepared to --
16
17 MR. CHISWELL: We're ready.
18
19 THE COURT: Thank you.
20
21 MR. MCDONALD: Mr. Chiswell will be doing the reply on behalf
22 of the Perpetual defendants.
23
24 THE COURT: Thank you.
25
26 MR. CHISWELL: And I am ready, sir.
27
28 THE COURT: At your convenience, counsel.
29
30 **Submission by Mr. Chiswell**
31
32 MR. CHISWELL: Thank you. Sir, I have five points in reply.
33 The first one is to address or perhaps clear up some of the confusion about the proper
34 subject of a section 96 analysis when you are talking about arm's length. Mr. McDonald,
35 in our -- yesterday in our brief suggested that it would be the transaction as a whole or the
36 share purchase agreement that is the proper subject of a section 96 analysis, especially
37 when you're looking at arm's length between the parties, and in this transaction, that's got
38 to be true. You will recall Mr. Donald (sic) listed there was three reasons why that
39 should be true. The restricted approach was rejected in *McLarty*. It accords -- two, it
40 accords to the commercial reality, and three, the parties themselves considered the -- all
41 the contracts -- all the agreements as the entire agreement.

1
2 Now, Mr. De Waal said: Well, if you read section 96, sir, it requires isolating one
3 transfer, and you only look at the debtor. And although those words do appear, that you
4 look at a transfer and you look at the debtor, that doesn't necessarily mean that you have
5 to take a myopic view and not look at all the circumstances. So I think it misunderstands
6 section 96. And one of the ways to demonstrate that is part of considering the transfer at
7 undervalue section that my friend brought you to this morning. You have to consider all
8 the consideration given or received by the debtor, and part of the consideration that PEOC
9 received here was -- was not just what's set out in the asset transaction but was set out in
10 the share purchase agreement as well. So it received an office lease. It received
11 employees. It received a gas marketing contract, and -- and those all had a lot of value.
12 And so just to look at one corporate document would -- would be to take a very narrow
13 approach to section 96.
14
15 And the same is true when you come to arm's length. It would be a misleading view just
16 to look at one corporate document in isolation to the rest. So you have -- at the lower
17 level of abstraction, you have the asset purchase transaction between PEOC and POT.
18 But at a higher level of abstraction, the real deal that's happening is between Perpetual,
19 the public company, and the arm's length unrelated parties, the strangers to the deal, 198,
20 Kailas, and the purchaser group. And to ignore that that -- that larger transaction was the
21 deal ignores how PEOC and POT actually dealt with each other. They dealt with each
22 other through the vendor team and the purchaser team.
23
24 And so if you don't look at it from that -- that larger transaction perspective, you miss the
25 commercial purpose as to why the whole scheme -- the whole transaction is occurring,
26 why 198 is -- is -- has the commercial interest of looking out after PEOC, as to what
27 assets would be in PEOC, what liabilities and what assets, and you also ignore the
28 whole -- the whole commercial purpose for the transaction itself. And, of course,
29 Mr. Donaldson yesterday suggested even if we are wrong on that point, sir, and even if
30 you just want to look at the asset transaction by itself, there's still convincing evidence,
31 sufficient for summary judgment that that transaction itself was an arm's length
32 transaction. And the -- the evidence, sir, is in --
33
34 THE COURT: Just -- if I can understand that. Arm's length
35 transaction at what stage?
36
37 MR. CHISWELL: Pardon me?
38
39 THE COURT: When you say it's an arm's length transaction,
40 which -- which event are you referring to? What transaction? What transfer?
41

1 MR. CHISWELL: So, sir, I think you have to look at the -- the
2 entire --
3
4 THE COURT: Okay. So you're looking at the big picture.
5
6 MR. CHISWELL: You look at the big picture.
7
8 THE COURT: Okay.
9
10 MR. CHISWELL: But even if we're wrong and, sir, you just want
11 to look at the asset transaction, you just want to look at that picture, how that one
12 document was negotiated, it was also negotiated arm's length, and the evidence for that --
13 the best evidence is in Ms. Rose's affidavit. But two examples, sir, are Exhibits S and T.
14 Her affidavit.
15
16 THE COURT: That's her affidavit? You said 'S' and 'P'?
17
18 MR. CHISWELL: 'S' and 'T'.
19
20 THE COURT: And 'T'? Thank you.
21
22 MR. CHISWELL: 'S' as in Sierra.
23
24 THE COURT: Yeah. 'T' as in Tom. I'm there.
25
26 MR. CHISWELL: Correct. So, sir, on page 2 of Exhibit S, you'll
27 see there's an e-mail from Xiaodi Jin, who is the lawyer at McCarthy's, and they were
28 representing 198, and they are specifically negotiating, you'll see, the P & S, which is the
29 purchase and sale agreement, the deal or the one document that's the asset transaction.
30 And if you go up one more e-mail, sir, you'll see that -- well, pardon me. That
31 correspondence between Carolyn Wright --
32
33 THE COURT: I see that.
34
35 MR. CHISWELL: -- who is a lawyer at BD & P. And you'll see
36 Wentao Yang, who was there for Kailas Capital, and Harold Wang, who was there for
37 also Kailas Capital, and they became directors of 198 and -- or NPI as well, when it
38 became Sequoia. You'll see then there's -- Carolyn Wright sends Mr. Gin a revised
39 version of the purchase and sale or the asset transaction agreement. And then, sir, on the
40 first page, you'll see further comments in regards to the purchase and sale agreement and
41 then negotiating it. So it's not that PEOC and POT are negotiating between themselves.

1 There's arm's length parties negotiating the agreement.
2
3 And, sir, if you flip to Exhibit T --
4
5 THE COURT: But again, just to be clear, arm's length parties
6 in terms of the continuing transaction, not arm's-- there's not arm's length, is there,
7 between Perpetual and PEOC in the first instance. Correct?
8
9 MR. CHISWELL: Well, sir, you'll see that even though they might
10 be related parties, the negotiations are happening between parties at arm's length.
11
12 THE COURT: No -- thank you.
13
14 MR. CHISWELL: And these are the negotiation of that arm's
15 length --
16
17 THE COURT: But again, you're -- you're looking at the
18 continue -- in the transaction.
19
20 MR. CHISWELL: In -- in this case, sir, we're looking just at the
21 asset transaction.
22
23 THE COURT: Right. But there's two components to the asset
24 transaction. I think Mr. De Waal, on behalf of PWC, is saying he can isolate the
25 transaction between Perpetual and PEOC in the first instance.
26
27 MR. CHISWELL: I'm -- I'm not sure I follow, sir.
28
29 THE COURT: If you look at the isolated transaction where the
30 asset -- go down into the body corporate, the vehicle, as your friend has phrased it, by
31 itself, then to bring your approach into it, you've got to look beyond that and look to who
32 ultimately acquires this. Correct?
33
34 MR. CHISWELL: I -- I don't think you do. I think you should, but
35 I don't think you have to.
36
37 THE COURT: Okay.
38
39 MR. CHISWELL: And -- and so our first argument was you
40 should, because that's how the transaction happened and that's the commercial reality.
41

1 THE COURT: And -- and I understand that. I just wanted to
2 make sure that we were on the same wavelength. Continue.
3
4 MR. MCDONALD: My Lord, I hesitate to rise, but I just do to make
5 sure we're clear on the terms, because maybe I misunderstood that exchange, but the --
6 Perpetual is the owner of the shares of PEOC.
7
8 THE COURT: Right.
9
10 MR. MCDONALD: PEOC is the trustee of POT.
11
12 THE COURT: Yeah, I -- and I misstated myself.
13
14 MR. MCDONALD: I know. And you're -- I think your question was
15 about a transaction between Perpetual and PEOC, but I think you intended to refer to the
16 transaction between PEOC and POT?
17
18 THE COURT: Yes.
19
20 MR. MCDONALD: And that indeed is the asset transaction that
21 Mr. Chiswell is referring to that is an attachment to these schedules and was negotiated on
22 the buyer's side, PEOC, by the McCarthy lawyers and Mr. Wang and Mr. Yang, and on
23 the seller's side, POT, by Ms. Wright and the -- Ms. Rose and the representatives on the
24 seller's side. And I just thought the exchange between the two of you --
25
26 THE COURT: Yeah.
27
28 MR. MCDONALD: -- mixed those terms and might have caused
29 some trouble --
30
31 THE COURT: And I misstated myself. I appreciate the
32 comments of both. I've got a corporate chart up on my desk, and I will be looking at it
33 carefully over the next few days. But continue, sir.
34
35 MR. CHISWELL: Thank you, sir. And so all I was saying is even
36 if you have to isolate the asset transaction, as my friend suggests, it was still negotiated by
37 198 and the purchaser team on behalf of PEOC. And those negotiations were still at arm's
38 length, and Exhibit S and Exhibit T are evidence of that.
39
40 Sir, when we talk about related parties, there is a suggestion in my friend's brief, and then
41 Mr. De Waal raised it again yesterday, that 198 and Perpetual related parties, by virtue of

1 section 4(3)(c) of the *Bankruptcy & Insolvency Act* -- before we get there, sir, everyone is
2 sort of -- start on a presumption that PEOC and POT are related parties, but we disagree
3 that 198 and Perpetual are related parties. And so for authority for the proposition that
4 they are related, sir, my friend brought even *Green Gables,* and in the *Green Gables* case,
5 sir, although the Court finds that certain parties are related, the Court doesn't go as far as
6 saying that the two shareholders of *Green Gables* were related parties. It's not a finding
7 that the Court makes there.
8
9 And then to bolster that, sir, there's the *Income Tax Act* folio, which is at Tab 17 of our
10 authorities --
11
12 THE COURT: I'm there.
13
14 MR. CHISWELL: And it's example 6, sir, which is on page 11 of
15 20.
16
17 THE COURT: I'm there.
18
19 MR. CHISWELL: And there's an example here where there's -- 'S'
20 owns the majority of the shares of B & A -- Corporations B & A and therefore has control
21 of A & B. Similar to, in this case, Perpetual having control of POT and PEOC.
22
23 And then the second sentence says: 'J, who controls Corporation C -- so 'J', for our
24 purposes, could be 198 -- has an option to purchase the controlling shares in Corporation
25 A. And then if you flip the page, sir, there is a list of related parties, for the purposes of
26 the *Income Tax Act,* and you'll see right at the top of the page, sir, S & J are not related,
27 and there's no conclusion here that S & J are related. So, in our submission, sir, it just
28 doesn't happen that Perpetual, the public company, and 198 are related.
29
30 Either way, sir, we get to section 4(5) of the *Income Tax Act* -- and this is my third point
31 is the -- that everyone seems to agree that there is a presumption of non arm's length
32 because the related party aspect, but we also seem to agree that it's a rebuttable
33 presumption, and the only disagreement seems to be about how it can be rebutted. Our
34 submission, sir, is it's any evidence to the contrary. That's consistent with *Piikani*, that's
35 consistent with *McLarty,* where they suggest you should look at all the circumstances to
36 determine whether parties were arm's length or not. And that's perfectly sensible.
37
38 One example we were discussing yesterday was, sir, you might think that if you sold your
39 car to your sister or if I sold my car to my sister that that might be a related party
40 transaction and, therefore, it might not be at arm's length. But if you found out that we
41 both had agents who negotiated the agreement, and they both had lawyers, that that might,

1 at the end of the day, be an arm's length transaction.
2
3 Our friends suggest that you have to look at the *Legge* case, and that's determined and
4 binding on you, and that's the one that requires you to consider or suggest, at least, that
5 you have to consider, sir, the consideration is appropriate, normal course of business, and,
6 three, that there is no view of insolvency to determine whether -- or to rebut the
7 presumption of arm's length.
8
9 But there is four reasons why that case is not -- is incorrect, sir. The first is, if you just
10 read section 4(5) of the *Bankruptcy & Insolvency Act*, it says: In the absence of evidence
11 to the contrary. What kind of evidence? Evidence of arm's length. Any evidence of
12 arm's length. Nowhere does it say you're limited to those three criteria. And I see you're
13 going there, sir. I'll give you a moment. And so it's section 4(5).
14
15 THE COURT: Just bear with me for a second here. I'm there.
16
17 MR. CHISWELL: And it's the second sentence that we rely on, sir,
18 for the purposes of -- or purpose of paragraph -- and then section 96(1)(b).
19
20 The persons are, in the absence of evidence to the contrary, deemed not
21 to deal with each other at arm's length.
22
23 So that should be any evidence, sir. Any evidence that would contradict arm's length.
24 Not just those three criteria set out in the *Legge* case.
25
26 The second reason *Legge* has to be wrong, sir, is it -- is those words aren't implied by
27 necessary implication. It just doesn't make sense to -- to narrow it to those three criteria
28 when you are looking at section 4(5). Any evidence, of course, that the parties are
29 operating at arm's length is evidence to the contrary, and the inquiry under section 96 is
30 about whether the parties are at arm's length or not. So that's the alternate inquiry. The
31 fact that there is a factual presumption shouldn't change the ultimate end inquiry.
32
33 And, sir, to -- the other reason that can't be the case, sir, is if you look at section 96 itself.
34 It's at Tab 10 of our materials, sir, but I see you're going in your --
35
36 THE COURT: Yeah, I'll just --
37
38 MR. CHISWELL: -- in your annotated book.
39
40 THE COURT: So the tab -- yes, I'm there, sir.
41

1 MR. CHISWELL: Yeah. And so you'll see, sir, that the first
2 element that the trustee would have to prove is in the first sentence:
3
4 On application by the trustee, a court may declare that a transfer at
5 undervalue --
6
7 So the first element is a transfer at undervalue, and that's when you look at the
8 consideration, and if there is a finding that there's an uneven consideration or
9 inappropriate consideration, it's only then that you begin to the second element of the test,
10 which you'll see at 96(1)(a), is whether the parties were dealing at arm's length or (b) the
11 parties were not dealing at arm's length. And if you're at the second step -- not arm's
12 length -- and our friends suggest that the consideration is again whether or not there was
13 appropriate consideration, you've effectively neutered that second element of the test
14 because you have already considered that as part of the first element, and you've already
15 also lost.
16
17 And that's why, sir, Mr. McDonald brought you yesterday to both the *National Trust*
18 case -- or *National Telecom* case, sir, at Tab 17 of our materials, and then again the
19 *National Telecom v Stalt* case at Tab 33, specifically paragraph 37. I don't need to bring
20 you there, sir, but those were the cases that said it doesn't make sense to consider just
21 consideration by itself.
22
23 THE COURT: I remember them.
24
25 MR. CHISWELL: So, sir, the *Legge* case is not binding on you.
26 It's not persuasive either. It's a decision of a Registrar in New Brunswick. It was the
27 first case to consider section 96, and it didn't have any precedent to follow or -- to follow,
28 and it itself hasn't been followed, sir. There's no analysis in it. There is no reasoning,
29 and the trustee doesn't provide a reason as to why it should be followed, as to why that --
30 that statement of law would be correct.
31
32 And, sir, the last reason -- the fifth reason why the *Legge* case shouldn't -- it can't be right
33 is it's inconsistent with *Piikani*. My friends suggest that *Piikani* is distinguishable on the
34 fact that it's not a related party case, but that's not what the Court of Appeal says. That
35 doesn't factor into their decision-making, and it's not clear why that should matter, given
36 the wording of section 96.
37
38 The -- if there is any ratio of the *Piikani* case, sir, it's that the definition of arm's length
39 has to be consistent throughout parliament's statute book, and that's when I looked at the
40 *Income Tax Act* and the BIA and said arm's length should mean the same thing, and it
41 should be -- all the circumstances should be considered. If that's true, sir, throughout the

1 Parliament statute book, it should be true throughout the *Bankruptcy & Insolvency Act*.
2
3 Sir, the fourth point that I would like to address is the illegality claim. Really paragraph
4 24 of the Statement of Claim. My friends' submissions left more questions than answers.
5 The first one that's -- that's troubling, sir, is that paragraph 24 of the Statement of Claim
6 pleads transactions plural are void but that they are only seeking relief in the prayer for
7 relief against the asset transaction. It would seem strange, sir, to have a lawsuit about
8 numerous transactions being illegal and then only to seek one to be set aside. And in our
9 submission, sir, Rule 3.68 is to strike claims that -- that not only have no merit but that
10 are -- are not really in issue. And, sir, part of the authority for that is at Tab 9 of our
11 materials. It's the *Grenon v CRA* case from the Court of Appeal. And, sir, you'll see
12 at --
13
14 THE COURT: I'm there.
15
16 MR. CHISWELL: You'll see at paragraph 5, they quote Rule 3.68,
17 and then at paragraph 6, they refer to the *Knight v Imperial Tobacco* case, and at
18 paragraph 7, sir, they say that:
19
20 The rule to strike is consistent with the underlying philosophy of the
21 Rules of Court, including the rules are intended to be used to identify the
22 real issues in dispute and to facilitate the quickest means of resolving a
23 claim at the least expense.
24
25 Sir, while I have our authorities open, I do want to point out the provision in *Knight* at
26 Tab 7 or a statement at -- by the Supreme Court in Tab 7, and specifically paragraph 22 --
27
28 THE COURT: You said Tab 7.
29
30 MR. CHISWELL: Oh, pardon me. Tab 8.
31
32 THE COURT: Thank you. I'm there.
33
34 MR. CHISWELL: So it's paragraph 22, sir, and right in the middle
35 of paragraph 22, the Supreme Court of Canada says:
36
37 It is incumbent on a claimant to clearly plead the facts upon which it
38 relies in making its claim. A claimant is not entitled to rely on the
39 possibility that new facts may turn up as the case progresses.
40
41 So, sir, when you are considering this paragraph, 24 of the Statement of Claim, appreciate

1 that it was really incumbent upon the plaintiffs to plead the facts which they are relying
2 on.
3
4 So the second point as part of the legality claim, sir, that I would like to address is my
5 friends' suggestion that there is an exception that they fit in as to a class of persons, the
6 regulatory regime or the legislation is designed to protect. Our friends haven't suggested,
7 sir, is how Sequoia itself fits in within the class of persons the legislation is designed to
8 protect, and I think there was maybe a little bit of a nuanced argument that it was: Well,
9 really it's the creditors of PEOC that were the ones that -- the class of persons that the
10 legislation is designed to protect, but I don't think that's good enough, sir. I don't think
11 that's what the cases say. And, in fact, it doesn't make sense, because it's a claim based
12 off of contractual legality, and it makes sense only that the parties to the contract would
13 be able to set aside a contract or to have it declared void based solely on the -- on the
14 basis of the contractual legality, not third parties, not other stakeholders, or not people
15 that might, at the end of the day, be interested, and there's certainly no authority for that
16 proposition.
17
18 The third one, sir, is in terms of the remedy that our friends are suggesting or that the
19 trustee is seeking, the trustee hasn't explained how a mere declaration that a contract is
20 void, and really, what courts mean by that is unenforceable, entitles the trustee to -- what
21 is effectively they're seeking is a section 96 remedy. Sir, if I go to section 24 of the
22 Statement of Claim --
23
24 THE COURT: I'm there.
25
26 MR. CHISWELL: -- or paragraph 24. You'll see that they're
27 trying to say that the transactions are void. And yesterday, my friends suggested that
28 they're just asking for a declaration. They're not asking -- a declaration as to being void.
29 They're not asking for damages. Well, of course, paragraph 2, they are seeking damages,
30 but even if you -- in paragraph 2, the remedies sought. Even if you ignore paragraph 2 of
31 the remedies sought, under paragraph 1, they're not seeking merely a declaration that the
32 contract is void that is unenforceable. They are trying to have it -- the asset transaction
33 set aside and have it void as against the trustee, which is a completely different thing.
34
35 In -- in -- the two cases that they relied on for the proposition that they could have a -- just
36 a mere declaration of void, sir, were *Sidmay* and *Chapman*. In both cases, the contracts
37 weren't fully performed. There had been money lent, but the question remained whether
38 the borrower had to repay that money. And even if you can say, sir: Well, the Court in
39 those cases where the -- where the contracts haven't been fully performed, the courts
40 might declare what future obligations are. Do you have to repay the money? Is there a
41 contractual obligation to repay the money? That's not the same thing as saying that the

1 courts are prepared to make a declaration when the contract is fully executed as it is here.
2
3 And fourth, sir, it's not so much a reply, because our friends didn't bring it up, but
4 Mr. McDonald raised it in his submissions, and it's in our brief, and our friends still
5 haven't suggested how the contracts here are illegal. I would have expected them to
6 bring you to some sort of provision in the *Oil and Gas Act* and show you how it's illegal.
7 I would have expected them to show you perhaps a provision in the directive 6 and
8 explain how it's illegal, but they haven't done that. I suspect it's because they can't, sir.
9
10 The fifth point I would like to reply on is -- is just to clarify a couple of evidentiary points.
11 So one, sir, our friends raised the suggestion that this was a scheme in the pejorative
12 sense, and there's no evidence of that, sir. The evidence was that it was a legitimate
13 commercial transaction between two strangers, and it was a necessary structure, and it
14 was a necessary structure because there had been a trust arrangement set up since 2002
15 where the legal interest was -- was separated from the beneficial interest.
16
17 And then, sir, the second part that -- the second piece of evidence that suggests that this
18 was a necessary structure was the number of transactions that would have been required
19 for a pure share -- or asset sale, and that's set out in Ms. Rose's affidavit, specifically at
20 Exhibit A, where she sets out the number of transactions that would have been required if
21 this had been done as a pure asset transaction.
22
23 And the third piece of evidence, sir, that suggests that this was a necessary structure or
24 necessary way of setting up the transaction was that it was what the buyer offered. That's
25 what the letter of intent set out. It was -- it was always intended by the purchaser to be a
26 share transaction.
27
28 And finally, sir, I would just like to address the suggestion yesterday made by our friend
29 that Ms. Rose only requested a meeting with the trustee once. That's not how I read the
30 evidence, sir. I think it's pretty clear that she requested at least three times in writing, in
31 the e-mails exhibited to her affidavit. And, sir, I won't bring you there, but I'll just
32 reference them. It's Exhibits X and Y of her affidavit.
33
34 And unless Mr. McDonald has any additional comments on that --
35
36 MR. MCDONALD: No, I don't.
37
38 MR. CHISWELL: -- or you have any questions for me, sir, I'll pass
39 it over to Mr. Leitl.
40
41 THE COURT: Thank you.

1
2 MR. CHISWELL: Thank you, sir.
3
4 MR. LEITL: Good afternoon, My Lord.
5
6 THE COURT: Good morning.
7
8 **Submission by Mr. Leitl**
9
10 MR. LEITL: Is it? Okay. Thank you. I don't even know
11 what day it is anymore. Thank you for that clarification.
12
13 My overarching comment in reply, after hearing my friends' submissions, is that they're --
14 in my submission, the Trustee's position is based on an utter divorce of reality, the
15 commercial realities here. They want the Court to rely on the legal technicalities and to
16 ignore commercial reality. And that is absolutely important in the context of an
17 oppression claim, and to illustrate that, I'll just remind the Court what I took you to
18 yesterday at paragraph 141 of our brief, which is a quote from the Supreme Court of
19 Canada in *Wilson*.
20
21 THE COURT: I'm there, sir.
22
23 MR. LEITL:
24
25 Courts considering claims for oppression are instructed to engage in
26 fact-specific contextual inquiries, looking at business realities, not
27 merely narrow legalities.
28
29 So I don't know if -- in the arm's length argument if the trustee has any case based on the
30 request that you divorce all consideration from what really happened here. I don't know if
31 that works. That's for you to decide. But that never works in oppression.
32
33 My second submission is in reply to my friend's argument yesterday that Ms. Rose simply
34 took orders from Perpetual and did not think independently. I think he went so far as to
35 say that PEOC -- this fictional blob -- was pushed around. I think I heard him suggest
36 that Ms. Rose didn't think about the interests of PEOC going forward, and I don't accept
37 that that's relevant in the context of a creditor-based oppression claim where there is no
38 theory and no evidence as to reasonable expectations, but just to clarify and deal with the
39 suggestion that she didn't do that, and I'll give you the references. This is at pages 61
40 through 62 of the transcript. I'm not going to read it all aloud. I'm just going to give you
41 a few highlights to illustrate this.

1
2 There's just some selected quotes from Ms. Rose's evidence. And before I get there, I
3 should -- a contextual point. You'll recall, My Lord, yesterday early in my submission I
4 said I was surprised to see the trustee's submission that they don't rely on anything
5 essentially but the information proffered by the defendants, and I said, well, that must
6 mean that they have to also rely on the evidence of the defendants, including the affidavit
7 and cross-examination of Ms. Rose, and I said I would look forward to hearing from my
8 friend if that's not the case, and there was not a word.
9
10 So what I'm reading to you is also part of the trustee's case, and this is from Ms. Rose.
11
12 I definitely had a view that this was a good transaction for Kailas as
13 well. This was not an easy decision for our company. The assets had a
14 lot of production and a lot of reserves and a lot of potential. In fact, this
15 is about half of the reserves of Perpetual being sold.
16
17 I felt quite good that Kailas was -- with the business plan that they had --
18 these would be good assets for that and that they were also getting a very
19 good team to execute on that, and we'd set them up nicely to be
20 successful.
21
22 As Your Lordship may have seen, this is not simply an asset transfer. There were
23 arrangements for employees to go over, office space.
24
25 I think that I -- I did already tell you that I believe that the transaction in
26 its whole, the deal, was positive on both sides. It was a win/win for the
27 business strategies that we had.
28
29 I'm saying that with the business plan that PEOC was moving into,
30 PEOC was going to be well suited to execute that business plan.
31
32 I did not believe that this was a negative transaction for PEOC.
33
34 Q And you qualified that, I think, five minutes earlier, by saying
35 it was a good one for 198 and therefore, by implication, a
36 good transaction for PEOC.
37 A Not just 198. All the stakeholders that would become
38 stakeholders of PEOC are employees, future suppliers.
39
40 It was never put to Ms. Rose on cross-examination that she should have done anything
41 else. It was never put to her that there were alternatives that she should have

1 considered. It was never put to her that this was wrong.
2
3 And, My Lord, you asked the question of my friend this morning, and I -- it was
4 something to the effect about what would a -- I've lost my note -- but why would a
5 third party do this?
6
7 THE COURT: Why would they purchase -- why would they
8 take on this entity?
9
10 MR. LEITL: The answer definitively is at paragraph 9 of our
11 brief where we quote from Sequoia, who told their stakeholders after the fact what had
12 happened.
13
14 THE COURT: I'm there.
15
16 MR. LEITL: This was cited by the trustee in the trustee's
17 preliminary report:
18
19 And despite the fact that the trustee has access to all of Sequoia's records
20 and has interviewed Sequoia's principals, offered no evidence to the
21 contrary.
22
23 So paraphrase what you see there, Sequoia said we had a different business strategy.
24 We -- we thought the gas market had bottomed out, as did many people. We had a plan.
25 And you'll see here that not only did they just have a plan, they executed on that, and at
26 one point, they were the fifth largest reclaiming entity in Alberta, if I can use that term.
27 From October 1, 2016 to December 31, they abandoned and reclaimed 150 wells and
28 received certificates for 91. This is a new business with a new plan, and that's why they
29 did it. They thought it was a money-maker and they -- you'll see over on page 3 of our
30 brief, the second full paragraph, in the words of Sequoia:
31
32 These strategies were successful and on target through to the end of the
33 summer of 2017. Sequoia steadily increased its production and reduced
34 its overall environmental liabilities. And then what happens? Gas
35 prices fall.
36
37 To accept my friends' theory, you'll have to find that Ms. Rose should have known that
38 was going to happen. And if you know what gas prices are going to do in a year from
39 now, then you are a genius.
40
41 You'll also see, while I'm here, My Lord -- and to digress -- near -- there is a paragraph

1 beginning "Ultimately"?
2
3 THE COURT: I'm there.
4
5 MR. LEITL: They do talk about dealing with the
6 municipalities through 2017. Now, my friends have offered zero evidence that the
7 municipal taxes were not paid when due as deferred, but here is some evidence that
8 everything was okay until 2017.
9
10 My friend yesterday, I believe, argued that PEOC should have had independent legal
11 counsel in connection with the transaction. That again, My Lord, is another illustration
12 of the ignorance of commercial reality. The commercial interests obviously, in
13 connection with 198 -- sorry -- with PEOC as they negotiated were the -- more the
14 concern of the potential new owners than with Ms. Rose, and she explained that. And, in
15 fact, when my friends said PEOC didn't have independent legal advice, the release, as we
16 saw yesterday, expressly recites that it did, and that was signed by the new owners.
17
18 I mean, the implication of the trustee's submission is that in these commercial transactions
19 when you're dealing with these wholly-owned sub, special-purpose entities, every one of
20 them has to have their own lawyer. And all of this would be very interesting, My Lord, if
21 my friend had given evidence or even made a submission as to what independent counsel
22 would have said differently. Would independent counsel say to Ms. Rose: I think PEOC
23 shouldn't do this? I don't think so.
24
25 In that -- in that regard, I just want to remind the Court in *BCE* -- and it's in our brief.
26 They set out a number of factors that the Court should consider in determining
27 oppression, and *BCE* is at Tab 20 of our authorities. At paragraph 74, My Lord, one --
28 one of the factors the Court should consider is the nature of the corporation, and you'll see
29 in the concluding sentence under that paragraph:
30
31 Courts may accord more latitude to the directors of a small, closely-held
32 corporation to deviate from strict formalities than to the directors of a
33 larger public company.
34
35 I mean, that makes commercial sense.
36
37 Now, just to revert back to the issue of municipal taxes for a moment. I think I heard my
38 friend say that Ms. Rose admitted that taxes had not been paid when due, and that's not
39 when she admitted. What she said was -- and this is in our brief, and this is at paragraphs
40 131 to 135. All the cites are there. But, for example -- and I'm not going to read it to
41 you, but I'll give you the reference. At page 50 of her cross-examination, she said that the

1 contracts with the municipalities allowed them to go into what she called penalty in order
2 to defer the payment. In other words, you have a contractual right to defer payment if
3 you are willing to pay a bit more. That's not a default. And then the evidence is the new
4 owners of Sequoia took over, and the municipalities agreed to take the covenant of new
5 Sequoia.
6
7 And as a matter of evidence, My Lord, given that the trustee, an officer of the court, is
8 sitting on the records that would answer the question as to the status of the municipal
9 taxes, it would be entirely inappropriate, in my submission, for this court to draw any
10 inferences in its favour when it has offered nothing in that regard. It hasn't -- on the
11 evidence of Mr. Darby, he didn't even speak to the municipalities about this. And even
12 then -- even if you found -- I find that on October 1, 2016, there was $1.5 million owing,
13 there is an absolute vacuum of evidence of reasonable expectations.
14
15 You asked my friend -- I think it was in connection with *Downtown Eatery* or one of
16 those cases -- how far do we go in terms of this idea of a potential judgment? That -- the
17 answer to that is the reasonable expectations of the parties in all the circumstances.
18 *Downtown Eatery* was an employees and shareholder. They were negotiating. There
19 were things in flux, and the people in power moved strict assets out to deprive them of
20 something that he reasonably -- the Court found -- reasonably expected would not happen.
21 And that's not the case here.
22
23 My friend yesterday submitted to you that Ms. Rose admitted that some municipal taxes
24 had never been paid. She never admitted that. Never.
25
26 My friend submitted to you that there is no authority that the business judgment rule
27 applies to the analysis of the duty of care. I'll refer you to paragraph 168 of our brief.
28 Fiduciary.
29
30 MR. DE WAAL: My Lord, maybe my friend has misunderstood.
31 I said the fiduciary duty, not the duty of care.
32
33 MR. LEITL: Okay. Then in that case, I'll take you to
34 paragraph 166 which talks about the fiduciary duty, the -- *BCE,* and the -- in -- in the
35 context of the fiduciary duty, you'll see in the -- in that quote, if you go to paragraph 40.
36 This is 40 of the judgment, not in --
37
38 THE COURT: I know what you mean.
39
40 MR. LEITL: And the second sentence begins with:
41

1 Courts should give appropriate deference to the business judgment of
2 directors.
3
4 They go on. I mean, how is it possible when you're going to consider a director's duty of
5 loyalty that you wouldn't consider the director's business judgment?
6
7 And where the rubber hits the road in business judgment -- not exclusively, but
8 frequently, and you'll see this in -- in *Greenlight*, in *BCE,* and all kinds of cases. Where
9 the rubber hits the road for the directors is: Did you consider reasonable alternatives?
10 And as I said yesterday, the trustee has given no allegation -- made no allegation, given no
11 evidence as to reasonable commercial alternatives that PEOC had before it as opposed to
12 going ahead with this transaction.
13
14 And the duty of care -- my friend said that actually a duty of care was pleaded, and he
15 took you to paragraph 15.3 in his Statement of Claim. With respect, My Lord, that's
16 simply a conclusory allegation. When you plead a duty of care, as I said yesterday, you
17 have to plead the relationship that gives rise to the duty of care, foreseeability, proximity,
18 policy, and if -- I'm not going to take you to them, but I again refer you to the Supreme
19 Court of Canada decision in *Saskatchewan Wheat Pool* and the decision of our Court of
20 Appeal in *Hogarth*. If the constituent elements of the duty of care are not pleaded, it's
21 fatal.
22
23 My friend took you to the *Gainers* decision yesterday of the Court of Appeal. I just
24 wanted to note that we had cited that, the appeal reference. The reason we took you to
25 the lower court decision was it was the only reference -- the only decision we could find
26 referring to section 122(4). The Court of Appeal didn't. And if you read the reasons of
27 the Court of Appeal, they were obviously upset with the -- Mr. Pocklington. They found
28 that there was no equity in the company. The only real stakeholders were the creditors,
29 and he had dealt with them in a very unfair way. A very different case.
30
31 Yesterday, My Lord, you asked: What about the *Redwater* decision being on reserve for
32 the Supreme Court? And my answer is: It's irrelevant. It's irrelevant for two reasons. If
33 the Supreme Court affirms the decision of the Alberta Court of Appeal and finds that the
34 AER was a creditor in the circumstances of that case, then we know the outcome will be
35 that their remedies are limited to be an unsecured creditor in the bankruptcy. Get in line
36 with the others. If they are found not to be a creditor, then they have no monetary claim.
37 In this case, my friend, standing where I'm standing, agreed that the AER was not a
38 creditor at the time of the alleged oppression.
39
40 My friend this morning, in respect of the release, referred to the *McKay* decision -- which,
41 by the way, was an application to amend a pleading. They didn't rule on the

1 enforceability of the release. You know, the Court used phrases like: It would be an
2 intriguing question as to whether a release could be effective in these circumstances.
3 Things like that.
4
5 And in the context of his submission on *McKay*, my friend submitted -- and I believe this
6 is a quote -- PEOC's eyes were not wide open. And I found that surprising, My Lord,
7 because the release says PEOC's eyes have been wide open. Obviously I'm paraphrasing.
8 I took it to you yesterday. It says: We are fully informed and we had independent legal
9 counsel, and we know what you're doing, and the new owners of PEOC signed off on that.
10
11 My friend took you to the decision of *Wilson*, the Supreme Court -- in my brief, paragraph
12 147 -- and he argued that *Wilson* does not say that you necessarily have to prove personal
13 benefit of the kind that I mentioned to win, but that is what Mr. Darby said he is alleging.
14 So the Statement of Claim says personal benefit, and it doesn't say what kind, what kind
15 of amount, nothing. When I asked Mr. Darby about it, he said it was her shareholding in
16 Perpetual. I take him to the record of the share price of Perpetual, showing him it went
17 down after the transaction, and he's got nothing left. So there's no alternative theory of
18 personal benefit before the Court.
19
20 In the context of section 120 of the ABCA and these allegations that Ms. Rose somehow
21 failed to disclose something to PEOC. She's the only director. Only officer. Her
22 knowledge is PEOC's knowledge. The only illustration my friend could give you was he
23 said: The Act allows entries in minutes. So let's, for argument sake, consider that was a
24 fault. She didn't write down in the minutes what she already knew. What would that
25 change? How could that lead to a claim for damages in -- by PEOC? That's the kind of
26 example I'm focussing on in terms of divorce from realities.
27
28 My friend took you to the *Greenlight* decision, which is at Tab 49 of our materials, and
29 paragraph 79. Tab -- did I say Tab 49?
30
31 THE COURT: Yeah. I'm there.
32
33 MR. LEITL: Sorry. I have to find it here. And he talks
34 about the kind of expectations that the party in this case had. I just wanted to point out,
35 My Lord, this is a shareholder claim in *Greenlight*. Shareholders obviously have -- tend
36 to have different expectations than creditors, and in our case, the shareholder, the
37 analogue to *Greenlight*, the shareholder was Perpetual, and there is no suggestion that
38 Perpetual is aggrieved in any way.
39
40 I apologize if I'm repeating myself. You did ask the question: Why would an arm's
41 length third party buy an asset if it had negative value? At least that's the way I phrased

1 it in my notes. And I again refer you back to the Sequoia statement of what happened
2 and obviously illustrating that they didn't see it having negative value.
3
4 And then there was a discussion about assignments, and my friend said: No, there was
5 nothing assigned. And was there something assumed? And I believe he said: No, there
6 was nothing assumed in terms of the AER -- sorry -- the ARO.
7
8 THE COURT: M-hm.
9
10 MR. LEITL: Another commercial reality check, in my
11 submission, is if the party was assuming something that really was a liability, the creditor
12 would have to agree to that. They would have to get the consent of the AER and the
13 consent of the municipality. They didn't need to do that because it wasn't a liability. It
14 was just like the Supreme Court of Canada said in *Daishowa*. It's something that goes
15 into the value mix. I like those gas assets, but I know if I buy them, one day I'm going to
16 be obliged to reclaim them, and that goes into the value. It doesn't make anybody a
17 creditor.
18
19 I think that's it, unless you have any questions, My Lord. Thank you.
20
21 **Discussion**
22
23 THE COURT: Thank you. I have lots of questions. I'm going
24 to defer them until another date because I have to get ready for another application here.
25 I just received some material moments before I came down. Would the parties be
26 available on Friday, November the 30th?
27
28 MR. LEITL: At what time, sir?
29
30 THE COURT: Ten in the morning? I'm going to -- I have
31 locked down all day. I don't know how long I'm going to be on the questions, but I want
32 to make sure I've got lots of time, because I'll have questions for all parties.
33
34 MR. LEITL: I can.
35
36 MR. DE WAAL: I am available then.
37
38 THE COURT: Thank you, sir. Mr. McDonald?
39
40 MR. MCDONALD: As am I.
41

1 THE COURT: Let's book that date. And again, I have locked
2 down with the trial coordinator 10:00 and 2:00. If we don't use all the time, that's fine,
3 but I want to make sure that we've got sufficient time. There's lots of material here. I do
4 have lots of questions as I sit here. I want to go through things carefully. I have
5 benefited very much, as I always do, from oral argument, and I want to give appropriate
6 consideration to this.
7
8 Before we adjourn, any other business we should touch on today?
9
10 MR. MCDONALD: Only is there anything that we can do between
11 now and November 30th to assist you?
12
13 THE COURT: That's a good question, Mr. McDonald. Let me
14 leave that as an open point. I may give you written questions. If that -- I think that
15 would benefit everyone, including myself. Yeah. It's just a timing issue. But I will
16 give serious consideration to putting at least as much as I can in written format for the
17 benefit of all parties.
18
19 MR. DE WAAL: My Lord, that will be useful because it -- it then
20 avoids a situation where we end up saying to you: Oh, we haven't thought of that or I'm
21 sure there's a case, but we haven't found it yet, so....
22
23 THE COURT: Yeah. No, I understand that. I understand
24 that. To all parties, I will take that under advisement, and I will strive to do that.
25
26 MR. MCDONALD: And perhaps you could -- there's going to be a
27 temptation -- I welcome further questions. There's going to be a temptation to give you
28 written responses, and maybe it would be helpful if we had a few points that we -- that
29 would guide you or maybe you just -- you'd prefer that we just come in here and argue
30 orally. That --
31
32 THE COURT: Yeah.
33
34 MR. MCDONALD: If you have some thoughts on that, perhaps let
35 us know when you give us the questions.
36
37 THE COURT: Yeah. I mean, I don't mind written responses,
38 but I get a lot out of the opportunity to query all parties, and I like to have a narrative. So
39 let's keep the 30th for sure. I will put my mind to putting a bunch of questions together,
40 and again, it will be for all of the parties. And I look forward to the next session, if you
41 will. Next hearing. Anything else?

1
2 MR. DE WAAL: No. Thank you.
3
4 MR. MCDONALD: No. Thank you very much.
5
6 THE COURT: Thank you. Madam Clerk, if you could
7 adjourn.
8
9 THE COURT CLERK: Order in court.
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13 PROCEEDINGS ADJOURNED UNTIL 10:00 A.M., NOVEMBER 30, 2018
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Certificate of Transcript

I, Peggy Evans, 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 not included orally on the record.

Peggy Evans, Transcriber
Order Number: AL-JO-1001-8969
Dated: November 13, 2018