

COURT OF APPEAL OF ALBERTA

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PLAINTIFF PRICewaterhouseCOOPERS INC.,
in its capacity as the TRUSTEE IN
BANKRUPTCY OF SEQUOIA RESOURCES
CORP.

STATUS ON APPEAL: APPELLANT

DEFENDANT SUSAN RIDDELL ROSE

STATUS ON APPEAL: RESPONDENT

DOCUMENT: **FACTUM OF THE RESPONDENT**
SUSAN RIDDELL ROSE

Appeal from the Judgment of
The Honourable Mr. Justice D. B. Nixon
Dated the 13th day of January 2020
Filed the 18th day of February 2020

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FIAT

~~Let the within Factum of Respondent Rose~~
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PART 1 – FACTS

(i) Introduction

1. This is the Factum of the Respondent Susan Riddell Rose (**Rose**).
2. Rose concurs with, and does not repeat, the submissions in the Factum of the Respondents Perpetual Energy Inc. (**PEI**), Perpetual Operating Trust (**POT**) and Perpetual Operating Corp. (**POC** and, collectively, the **Perpetual Respondents**).

(ii) Facts

3. The claims of the Appellant (the **Trustee**) concern a negotiated PEI transaction that occurred in October 2016.
4. At that time, PEI was (and continues to be) a public energy company with a diversified asset portfolio. The PEI board of directors oversaw the management of PEI and made its strategic decisions. Rose was (and continues to be) but one of the members of the PEI board of directors.¹
5. PEI's operating assets, including a subset known as the Goodyear Assets, were held by PEI through a wholly-owned single-purpose subsidiary, Perpetual Energy Operating Corp. (**PEOC**), and a trust, POT. PEOC held legal title in trust for POT.²
6. PEOC had no other function on behalf of PEI or on its own. It had no assets, no operations, no current financial obligations, not even a bank account.³
7. Rose was the sole director of PEOC as the nominee of PEI.⁴
8. In early 2016, the PEI board of directors deliberated over the future strategic direction of the company. Ultimately, the PEI board of directors resolved that it was in PEI's best interests to divest the Goodyear Assets.⁵ PEI had every right to do so. With the assistance of legal counsel

¹ Appeal Record, Volume 1 [Statement of Defence of Susan Riddell Rose at para 7] at P035; *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 at paras 6 and 310, [2020] AWLD 2330 [the **Reasons**] [**Appendix 1**]; Appellant's Extracts of Key Evidence (**AEKE**), Volume 5 (Cross-Examination of Paul Darby) at A0967, 89/4-27; AEKE, Volume 3 (Affidavit of Susan Riddell Rose) at A0231, para 9.

² Factum of the Appellant dated May 29, 2020 [**PWC Factum**] at para 6; Appeal Record, Volume 1, [Statement of Claim at para 1.1] at P002; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0231-2, paras 10, 13 and 15; Reasons at paras 9 and 10 [**Appendix 1**].

³ AEKE, Volume 1 (Affidavit of Paul Darby) at A0002, para 7, A0003, para 17, A0005, para 30, A0008, para 45; PWC Factum at para 6; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0966, 88/3-16; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1015-7, 5/21-7/10, A1053, 43/7-11; Reasons at para 8 [**Appendix 1**].

⁴ Appeal Record, Volume 1, [Statement of Claim at paras 3.3 and 3.4] at P002; AEKE, Volume 1 (Affidavit of Paul Darby) at A0160, Exhibit H – Resignation & Mutual Release at Recitals; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1012-3, 2/20-3/4.

⁵ PWC Factum at paras 7, 12, 14 and 16.

and investment advisors, PEI designed and implemented a sales process which included a data room and due diligence by qualified potential bidders.⁶

9. A third party, Kailas Capital Corp. (**Kailas**), made a proposal pursuant to which its wholly-owned subsidiary, 1986114 Alberta Inc. (**198Co**), would, among other things, acquire some of the Goodyear Assets and additional assets held by Perpetual.⁷ Based upon its independent assessment of the Goodyear Assets and the natural gas market, Kailas saw value and an opportunity to profit.⁸ The Statement of Claim does not challenge or question Kailas' business judgment.

10. The Kailas proposal required that PEOC own the legal *and* beneficial interests in the Goodyear Assets so that Kailas could acquire control by purchasing PEOC's shares from PEI. To that end, Kailas and PEI negotiated a series of interrelated transactions.⁹ The reasons of Justice Nixon define the ultimate overall transaction as the **Aggregate Transaction**.¹⁰

11. Two components of the Aggregate Transaction were the **Share Transaction** (completed pursuant to the **Share Purchase Agreement**)¹¹ and the **Asset Transaction** (completed pursuant to the **Asset Purchase Agreement**).¹² Pursuant to the Share Transaction, PEI would sell the shares of PEOC to 198Co with PEOC owning the combined legal and beneficial interests in the Goodyear Assets. To facilitate that, POT would convey beneficial ownership of the Goodyear Assets to PEOC pursuant to the Asset Transaction.¹³

⁶ PWC Factum at para 8; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0233, para 17, A0234-5, paras 25-29; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0918, 40/2-18, A0938-9, 60/26-61/10, A0941-2, 63/7-64/24, A0943, 65/2-12; Reasons at paras 11-13 [**Appendix 1**].

⁷ PWC Factum at para 8; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0233, paras 18-20; A0235-7, paras 30-40; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A095-6, 17/18-18/6, A0916-8, 38/7- 40/1; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1208-9, 18/22-19/6, A1084, 74/10-22; Reasons at paras 55-6 and 59 [**Appendix 1**]. For simplicity, and for consistency with the Reasons, the assets acquired by the Kailas Group via the Aggregate Transaction are referred to herein as the **Goodyear Assets**, notwithstanding that additional Perpetual assets were also acquired.

⁸ PWC Factum at para 11; AEKE, Volume 2, (Affidavit of Mark Schweitzer) at A0211-4, para 17, A0218-20, para 24; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0232, para 16; The Trustee's Response to Requests from, and Questions for, the Parties, December 17, 2018 (the **Trustee's Answers**) at Question No. 5(c) [**Appendix 2**]: The Trustee submitted that a "reasonably prudent purchaser" would take into account the ARO associated with properties in assessing their value; Reasons at paras 14-6 [**Appendix 1**].

⁹ PWC Factum at para 10; AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A0209, para 10; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0885, 7/1-20; Brief of the Respondent PriceWaterhouseCoopers Inc., Lit (November 8, 2018) (**PWC November Brief**) at para 14 [**Appendix 3**]: "The sale of the Goodyear Assets was effected in steps, through a restructuring of the Perpetual corporate group and a number of agreements."; Reasons at para 17 [**Appendix 1**].

¹⁰ Reasons at para 17 [**Appendix 1**].

¹¹ Reasons at para 17(c) [**Appendix 1**]; AEKE, Volume 1 (Affidavit of Paul Darby) at A0080-140, Exhibit E; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0238-9, paras 41-3.

¹² Reasons at paras 3 and 17(a) [**Appendix 1**]; AEKE, Volume 1 (Affidavit of Paul Darby) at A0048-79, Exhibit D; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0239-41, paras 44-53.

¹³ PWC Factum at paras 8 and 10; Reasons at paras 6, 8-10, 17, 58, 92 and 287-8 [**Appendix 1**]; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0918-21, 40/22-43/7; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1022, 12/10-8, A1026, 16/8-16, A1067-8, 57/10- 58/2; (POC would replace PEOC as the trustee of POT with respect to assets not sold to Kailas.)

12. The Asset Transaction had no independent purpose; it would *not* have been contemplated by PEI but for the Aggregate Transaction.¹⁴ The Trustee does not challenge or question the Aggregate Transaction.

13. The Aggregate Transaction was a PEI transaction, and the Asset Transaction was part of the Aggregate Transaction. In the words of Trustee counsel, this “was [PEI] doing this transaction through a subsidiary.”¹⁵ Each of the components of the Aggregate Transaction, including the Asset Transaction, was approved by PEI by resolution of its full board of directors.¹⁶ The Trustee does not question or challenge the judgment of the PEI board of directors.

14. The ultimate structure of the Aggregate Transaction was designed in light of a variety of factors, including Kailas’ desire to acquire the Goodyear Assets on a turn-key basis, PEI’s desire to minimize conveyances and manage existing ROFRs, the requirements of applicable regulations, and tax planning.¹⁷ The Aggregate Transaction was negotiated by the parties with the assistance of legal counsel.¹⁸

15. The Share Purchase Agreement provided for “deliverables” by each party, including that PEI provide PEOC (under new ownership) with a release of all possible claims against PEOC by PEOC’s directors and officers (Rose)¹⁹, and, reciprocally, that PEOC provide PEOC’s directors and officers (Rose) with a release of any possible claims regarding Rose’s conduct as an officer and director of PEOC. In accordance with the Share Purchase Agreement, the incoming directors of PEOC executed a negotiated form of release in favour of Rose (the **Release**).²⁰ The Trustee does not challenge or question the judgment of the new PEOC directors in agreeing to the Release.

16. Following closing of the Aggregate Transaction, PEOC, now under new ownership, control and management, changed its name to Sequoia²¹; independently devised and implemented a new

¹⁴ Appeal Record, Volume 1, [Statement of Claim at para 9] at P004; Acknowledging that the transactions were related; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0240, para 47; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0897-902, 19/3-24/19, A0937-8, 58/14-60/25, A0944-5, 66/16-67/14, A0945, 67/2-14; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1080-1, 70/14-71/3.

¹⁵ Proceeding Transcript (August 30, 2018) at 21/33 [**Appendix 4**]; Reasons at para 312 [**Appendix 1**].

¹⁶ AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0248, para 80.

¹⁷ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1023-4, 13/60-14/16.

¹⁸ Reasons at para 57 [**Appendix 1**]; AEKE, Volume 1 (Affidavit of Paul Darby) at A0136, Exhibit E, Share Purchase Agreement, cl. 17.1; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0931-2, 53/21-54/2, A0935, 57/13-25; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1030, 20/12-8; Appeal Record, Volume 2, [Proceeding Transcript, November 8, 2018 at 73/32-3] at 075: Trustee counsel stated to the Court that “we don’t take issue with the competency obviously of all the lawyers involved and all the negotiators involved”.

¹⁹ AEKE, Volume 1 (Affidavit of Paul Darby) at A0005, para 28; A0122-3, Exhibit E; Share Purchase Agreement, cls. 8.1(xvii) and 8.2(xiii); AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0243, paras 56-8.

²⁰ Reasons at paras 18 and 287-293 [**Appendix 1**]; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0961-3, 83/6-85/5.

²¹ Appeal Record, Volume 1, [Statement of Claim at para 1] at P002; AEKE, Volume 1 (Affidavit of Paul Darby) at A0005, para 29; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0915, 37/15-21.

business plan; managed its finances; reduced operating and other costs; acquired additional assets; executed capital investment activities including recompletion and workover programs; accelerated abandonment and reclamation activities for shut-in wells; and operated the company's assets, including the Goodyear Assets - generating revenue with a view to profit.²² The Trustee does not challenge or question the judgment of Sequoia's management and directors in pursuing that business strategy.

17. At first, Sequoia's new business plan was a success. Sequoia was one of the most active companies in Alberta, including in abandoning and reclaiming wells. Unfortunately, the natural gas market later collapsed, and Sequoia failed in 2018.²³ The Trustee does not suggest that Rose had anything to do with Sequoia's failure.

18. Sequoia was assigned into bankruptcy on March 23, 2018 – approximately 18 months after the closing of the Aggregate Transaction.²⁴ The Appellant was appointed as trustee in bankruptcy of the estate of Sequoia at that time.²⁵ Less than five months later, the Trustee sued, seeking to set aside the Asset Transaction and, alternatively, damages, full indemnity costs and interest totaling over \$225 million.

(iii) The Trustee's Untenable claims

19. For the purposes of each of its claims against Rose, the Trustee asks the Court to consider the Asset Transaction in a factual vacuum; to ignore the circumstances and commercial reality of the Aggregate Transaction. On that footing, the Trustee asks the Court to find that PEOC - a wholly-owned, single-purpose corporation with no assets that PEI could have used for any lawful purpose it wished – had unspecified inherent, special interests and rights, untethered to the interests and rights of its parent corporation, which were somehow harmed by the Asset Transaction, despite the success of Sequoia that immediately followed.²⁶

20. Rose asks the Court to consider what actually happened. The Aggregate Transaction was a negotiated deal pursuant to which sophisticated industry participants advanced their respective

²² AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A0218-9, Exhibit A – Sequoia Letter; Reasons at para 19 [**Appendix 1**].

²³ AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A2013-4, para 24; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0973, 95/3-9; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1034-5, 24/17-25/16. AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A0212-4, paras 24-5, and A0221-2, Exhibit B, Trustee's Preliminary Report at 1-2.

²⁴ AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A0212-4, paras 24-25, A0219-20, Exhibit A; AEKE, Volume 1 (Affidavit of Paul Darby) at A0002, para 9.

²⁵ Appeal Record, Volume 1, [Statement of Claim at para 1.2] at P002.

²⁶ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0947, 69/22-5; A0948, 70/9-16.

business strategies. The deal required the combination of the legal and beneficial interests in the Goodyear Assets under PEOC. There was no legal or other reason PEI and Kailas could not negotiate a change of PEOC's function to facilitate the deal. PEOC was not harmed at the time of the Asset Transaction but rather flourished. Its ultimate failure was caused by the subsequent collapse of the natural gas market; it had nothing to do with the Asset Transaction or the conduct of Rose.

21. Moreover, there is the Release, which the Trustee does not seek to set aside. The Release expressly bars all claims against Rose regarding her role as an officer and director of PEOC prior to the Aggregate Transaction. It is a complete answer.

(iv) Reasons of the Chambers Justice

22. The Trustee's Factum frequently cites the preliminary oral reasons of Justice Nixon given on August 15, 2019.²⁷ However, the oral reasons were expressly superseded by the written reasons dated January 13, 2020.²⁸

23. On February 14, 2020, Justice Nixon gave additional oral reasons regarding the Release.²⁹ On August 26, 2020, Justice Nixon gave oral reasons regarding costs.³⁰ The written reasons of Justice Nixon concerning costs were filed on September 24, 2020.³¹

PART 2 – THE GROUNDS OF APPEAL

24. The Factum of the Trustee sets out the following Grounds of Appeal³²:

- (i) that the Chambers Judge erred in law in finding that a release executed by Ms. Rose was a complete defence to the Trustee's breach of directors duty claims against her;
- (ii) that the Chambers Judge erred in law in finding that Ms. Rose was not the directing mind of PEOC;

²⁷ PWC Factum at paras 52.2, 58, 66, 71, 77, 78, 80, 87-8, 92, 94, 97, 107, 121, 122.1, 122.2, 124-5, 147, 148.1, 152-3, 155, 164 and 167.

²⁸ Reasons at para 1 [**Appendix 1**].

²⁹ Proceeding Transcript (February 14, 2020) [**Appendix 5**]. His lordship adopted the written submissions of Norton Rose Fulbright as his reasons for decision on the application to settle the terms of his order; those written submissions are attached hereto as **Appendices 6 and 13**.

³⁰ Proceeding Transcript (August 26, 2020) [**Appendix 7**].

³¹ Written Judgement of Justice Nixon for Costs (September 24, 2020) [**Appendix 21**].

³² PWC Factum at para 17.

- (iii) that the Chambers Judge erred in fact and law in finding that the Ms. Rose was entitled to the protection of the business judgement rule;
- (iv) that the Chambers Judge erred in law in finding that Ms. Rose did not breach her duties as PEOC's sole director approving the Asset Transaction;
- (v) that the Chambers Judge erred in law in striking the Trustees' oppression claim for failing to disclose a reasonable cause of action;
- (vi) that the Chambers Judge erred in law in striking the Trustee's public policy and statutory illegality claims for failing to disclose a reasonable cause of action; and
- (vii) that the Chambers Judge erred in law in striking the Trustee's equitable rescission claim for failing to disclose a reasonable cause of action.

25. The response of Rose to each of these Grounds of Appeal is set out below.

PART 3 – THE STANDARD OF REVIEW

26. The Trustee makes submissions regarding the standard of review with respect to each stated ground of appeal. To the extent that Rose disagrees, her submissions are made under each ground. Generally, the standard of review for findings of fact is reasonableness.³³ The Trustee attempts to base each of its grounds of appeal on errors of law³⁴ despite the extensive underlying findings of fact and findings of mixed fact and law. These findings are entitled to deference.

PART 4 – ARGUMENT

(i) Claims of the Trustee

27. A trial judge must decide a claim based on the allegations pleaded by the plaintiff.³⁵

28. This Part overviews the claims pleaded by the Trustee and the key relevant evidence. The following Part addresses the submissions of the Trustee.

³³ *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 26, [2002] 2 SCR 35 [BOA, Tab 31]; *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53 at para 50, [2014] 2 SCR 633 [Sattva] [BOA, Tab 32]: Contractual interpretation is an issue of mixed fact and law, entitled to deference on appeal. There is a narrow exception to that rule for certain standard-form contracts of adhesion: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 [Ledcor] [BOA, Tab 18]. There has been no suggestion in this case that the Release is a standard-form contract or contains any standard-form language.

³⁴ PWC Factum at para 17.

³⁵ *Motkosi Holdings Ltd. v Yellowhead (County)*, 2010 ABCA 72 at para 20, [2010] 5 WWR 603 [BOA, Tab 1].

(ii) ARO is not a liability; the AER was not a creditor of PEOC

29. ‘ARO’ is a concept that underlies every claim pleaded by the Trustee.³⁶

30. ‘ARO’ is an acronym for ‘asset retirement obligations’. It is not a present liability but rather a contingent obligation which influences the present value of licensed assets including wells, pipelines and related facilities.³⁷ ARO refers to the future obligation of the ultimate owner of the well to perform end-of-life remediation and reclamation.

31. If the ultimate owner fails in this duty (which is not presumed), the Alberta Energy Regulator (AER) may take enforcement steps, including having a third party do the reclamation work. If so, the AER may have a monetary claim against the owner. If the owner is bankrupt, the AER may have a debt claim provable in bankruptcy. Whether all of that happens is speculative.

32. As a matter of accounting, ARO is not considered a current liability. ARO is a ‘provision’ – which means it is uncertain in both amount and timing. It depends on many variable factors that can only be estimated.³⁸

33. On the evidence, it is clear that Kailas and 198Co considered the ARO associated with the Goodyear Assets and made their own assessment as to how it affected value.

34. The Trustee, a global accounting firm, did not estimate the ARO associated with the Goodyear Assets. Instead, the Trustee tendered a hearsay estimate regarding the Goodyear Assets which was ostensibly calculated by a third party.³⁹ The third party estimate is the sole basis of the Trustee’s allegation that the ARO associated with the Goodyear Assets was \$218,958,274 at the time of the Aggregate Transaction.⁴⁰ Notably, the AER has never taken that position.⁴¹

35. Regardless of the quantum of the estimated ARO, the decision of the Supreme Court of Canada in *Redwater* confirmed that ARO is not a current liability; thus, the AER was not a creditor

³⁶ PWC Factum at para 119: The Trustee asserts that Rose pleaded that ARO is a liability.; Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at para 22.2] at P036: In fact, Rose’s defence expressly denied the allegation.; Reasons at para 212 [Appendix 1].

³⁷ PWC Factum at paras 114 and 116: The Trustee asserts that Rose did not plead that ARO is not a liability.; Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at para 22] at P036: In fact, Rose pleaded just that.; Reasons at paras 152-173, 356-364 and 368 [Appendix 1].

³⁸ AEKE, Volume 1 (Affidavit of Paul Darby) at A0007, para 39; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0968-73, 90/27-95/2.

³⁹ AEKE, Volume 1 (Affidavit of Paul Darby) at A0007, para 39; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0891-2, 13/19-14/2.

⁴⁰ AEKE, Volume 1 (Affidavit of Paul Darby) at A0007, paras 39 and 40. Notably, that third-party estimate is scant on important details, such as whether it is calculated based on Sequoia’s net or gross working interests, the timing of projected reclamation work or the value of the production to be received from the Goodyear Assets. It is further not clear how (or whether) this estimate accounts for reclamation and remediation already performed by Sequoia in the months prior to its bankruptcy.

⁴¹ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0956-7, 78/1-79/7: The AER filed a proof of claim calculated *at the time of Sequoia’s bankruptcy*, which was 18 months after the Aggregate Transaction. The AER concedes that its claim may be worth as little as \$1, and currently the Trustee has not even accepted it at that value.

of PEOC at the time of the Asset Transaction.⁴² To have a provable claim against a creditor of a well-owner, the AER's position must satisfy the test in *AbitibiBowater*:

First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]⁴³

36. In *Redwater*, and unlike this case, the AER had taken enforcement proceedings against the well-owner; and even that did not result in the AER having a claim provable in bankruptcy.⁴⁴

37. The Trustee's incorrect conception of ARO as a current liability of the well owner underlies every cause of action pleaded in the Statement of Claim. All of the Trustee's claims fail insofar as they are premised on the assertion that PEOC had ARO "liability" at the time of the Asset Transaction.

(iii) The Primary BIA Claim

38. The Trustee's primary claim (the **Primary BIA Claim**) was made pursuant to s. 96(1) of the *Bankruptcy and Insolvency Act*⁴⁵ (**BIA**) against PEI, POT and POC for a judgment voiding the Asset Transaction.⁴⁶

39. In the Primary BIA Claim, the Trustee did not challenge any other aspect of the Aggregate Transaction, including the Share Transaction (which was the genesis of the Release) or the Release.⁴⁷ The Trustee conceded that it does not have standing to challenge the Share Transaction under the BIA.⁴⁸

40. The Primary BIA Claim was not made against Rose, as she was not a party to the Asset Transaction.

(iv) Trustee's claims against Rose

41. The Trustee pleaded four claims against Rose:

⁴² *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at paras 7, 21-5, 118, 122, 124, 130-5, 138-9, 146 and 149, [2019] 1 SCR 150 [**Redwater**] [**BOA, Tab 2**]; Reasons at paras 143, 148-51 and 217-232 [**Appendix 1**].

⁴³ *NFLD. and Labrador v AbitibiBowater*, 2012 SCC 67 at para 26, [2012] SCR 3 [*AbitibiBowater*] [**BOA, Tab 3**]; Trustee's Answers at Question No. 21(a): The Trustee conceded that, "if a regulator cannot satisfy those three requirements, it will not have a provable claim" [**Appendix 2**]; Reasons at paras 138-142 [**Appendix 1**].

⁴⁴ *Redwater* at paras 141-159 [**BOA, Tab 2**].

⁴⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (*BIA*) [**BOA, Tab 4**].

⁴⁶ PWC Factum at para 2.

⁴⁷ Submission of Susan Riddell Rose (February 4, 2020) at para 22 [**Appendix 6**]; Proceeding Transcript (February 14, 2020) [**Appendix 5**].

⁴⁸ Trustee's Answers at Question No. 34(a) [**Appendix 2**].

- (i) the Alternative BIA Claim;
- (ii) the Oppression Claim;
- (iii) the Director Claim; and
- (iv) the Public Policy Claim.

42. The Trustee conceded that it was extraordinary for a trustee in bankruptcy to make such claims against an individual.⁴⁹

Claim 1: Alternative BIA Claim

43. In the alternative to the Primary BIA Claim, the Trustee sued PEI, POC and Rose pursuant to s. 96(1)(b)(ii) of the BIA⁵⁰ (the **Alternative BIA Claim**). The Alternative BIA Claim sought a monetary judgment reflecting the alleged difference in the consideration given and received by PEOC under the Asset Transaction.⁵¹ The Trustee's calculation of the consideration was premised on the allegation that PEOC was liable to the AER for ARO at the time of the transaction.

44. Subsection 96(1) of the BIA provides:

(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, ...or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if ...

...

(b) the party was not dealing at arm's length with the debtor and

...

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

⁴⁹ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0945-6, 67/21-68/2.

⁵⁰ BIA, s. 96(1)(b)(ii) [**BOA, Tab 4**].

⁵¹ Appeal Record, Volume 1, [Statement of Claim at para 23.2] at P008.

Meaning of person who is privy

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person. [Emphasis added.]

45. In order to establish that Rose was “privy” to the Asset Transaction, the Trustee had to do more than establish a transfer at undervalue: it had to plead a viable claim that Rose was not at “arm’s length” with PEOC, and that she “received a benefit” from the Asset Transaction. The Trustee did neither.

The Trustee’s case is silent as to whether Rose was at arm’s length with PEOC

46. Whether parties were at “arm’s length” in a transaction is a question of fact.⁵² The fact that Rose was a director of PEOC is not determinative: this Court has held that directors are *not* presumed not to be at arm’s length, noting that if “Parliament had intended to establish such a presumption, it could easily have done so by including directors within the definition of ‘related parties’” under the *BIA*.⁵³ The Statement of Claim is silent on the point.

47. The Trustee led no evidence of non-arm’s length dealing by Rose, who—it must not be forgotten—was not a party to the impugned Asset Transaction. Indeed, the evidence is to the contrary: Rose acted as PEOC’s director at the request of PEI.⁵⁴ The Trustee admitted this; in the Trustee’s own words, “*this was Perpetual Energy doing this transaction through a subsidiary.*”⁵⁵

48. The Chambers Justice correctly concluded that legal (or *de jure*) control flowed from the shareholder, PEI, and not Rose. Rose was not the directing mind of PEOC in relation to the transactions,⁵⁶ and did not control PEI.⁵⁷ Rose did not exercise *de jure* or *de facto* control over any party to the Asset Transaction, or to the Aggregate Transaction.

The Trustee’s case is silent on the benefit requirement of “privy”

49. For the purposes of the Alternative BIA Claim, the Statement of Claim made the bare allegation that “PEI, POC and Rose benefitted from and were privy to the Asset Transaction within

⁵² *BIA* at ss 4(2) and 4(5) [BOA, Tab 4]: Notably, where two parties are “related”, a presumption arises that they are not acting “at arm’s length” at *BIA* s 4(5). No such presumption arises here: the *BIA* is clear that in order for Rose and PEOC to be “related parties” she would have to exercise control over PEOC. *BIA* s 4(2)(b). She did not exercise any control over PEOC: Reasons at paras 310-314 [Appendix 1].

⁵³ *Pikani Nation v Pitikani Energy Corp.*, 2013 ABCA 293 at para 36, [2013] 12 WWR 436 [BOA, Tab 5].

⁵⁴ AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0247-8, para 78.

⁵⁵ Reasons at para 312 [Appendix 1].

⁵⁶ Appeal Record, Volume 1, Oral Reasons for Judgment of the Honourable Mr. Justice D.B. Nixon, F013, 11/24-26.

⁵⁷ Reasons at para 310 [Appendix 1].

the meaning of s. 96 of the BIA.”⁵⁸ There are no particulars of the alleged benefit, and the claim made no distinction among PEI, POC and Rose in that regard.

50. The only affidavit filed by the Trustee – the Affidavit of Paul Darby (**Darby**)⁵⁹ – made no suggestion that Rose had benefitted from the Asset Transaction. In the course of the Trustee’s ostensible investigation⁶⁰, it did not ask Rose whether she had benefitted in any manner at all.⁶¹ In the absence of any corroborating information, Darby speculated that Rose had benefitted from the “Goodyear Restructuring”, which referred to an August 2016 plan of PEI to divest the Goodyear Assets.⁶² At best, that was speculation that Rose somehow benefitted from the Aggregate Transaction, which the Trustee did not challenge.⁶³

51. On cross-examination, Darby admitted that he had never turned his mind to whether Rose had benefitted in any manner; he simply assumed a benefit to Rose as a shareholder of PEI, which was not a party to the Asset Transaction. Darby had not considered what actually happened with the price of PEI’s publically traded shares.⁶⁴ He had not considered that PEI’s share price had *fallen* in the weeks following PEI’s announcement of the Aggregate Transaction.⁶⁵

52. In contrast, Rose’s evidence was that she had not benefitted in any manner at all:

I received no "personal benefit" from the Transaction

77. Mr. Darby speculates that I received a "personal benefit" from the Transaction. He does not say what kind of benefit or how much it might be worth. He never asked me about any such benefit in the course of our discussions and correspondence.

78. I did not receive a personal benefit from the Transaction. As an officer and director of PEOC, I received no salary and no other form of compensation. I received no compensation from Perpetual or any other party other than my normal salary for my work on the Transaction. All of the shares of PEOC were owned by Perpetual. My work on behalf of PEOC was in my capacity as the director and officer nominated by Perpetual.

⁵⁸ Appeal Record, Volume 1, [Statement of Claim at para 22.2.5] at P007; Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at para 36] at P037; BIA s 96 [**BOA, Tab 4**].

⁵⁹ AEKE, Volume 1 (Affidavit of Paul Darby) at A0001 – 206.

⁶⁰ AEKE, Volume 1 (Affidavit of Paul Darby) at A0002, para 10.

⁶¹ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0948 – 50, 70/9-72/27, A0973-6, 95/16-98/2.

⁶² AEKE, Volume 1 (Affidavit of Paul Darby) at A0003, para 14, A0009, para 49.

⁶³ The fact that the Trustee does not challenge the *Aggregate* Transaction is similarly a complete answer to any suggestion that Rose “caused a benefit” to be received by any other person: *BIA*, s 96(3) [**BOA, Tab 4**]. The only parties to the *Asset* Transaction were PEOC and POT; even PEI cannot be said to have received any benefit from the transfer of assets between two entities when it is the sole shareholder of both.

⁶⁴ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0948-50, 70/17 – 72/18, A0974, 96/21-27.

⁶⁵ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0946-53, 68/13-75/5; A0973-6, 95/16-98/2.

79. I am a shareholder of Perpetual, a publicly traded company. There was no material impact on the Perpetual share price following the Transaction as described in Exhibit EE. I have not sold any shares of Perpetual that I owned at the time of closing.⁶⁶

53. Despite the pleading and evidence to the contrary, Trustee counsel submitted that Rose had benefitted from the Asset Transaction *as a shareholder of PEI*.⁶⁷ On the face of the Statement of Claim, Rose did not benefit from the Asset Transaction as a shareholder of PEI. PEI was not a party to the Asset Transaction. Further, from the perspective of PEI, the Asset Transaction did not materially change anything: both before and immediately after the Asset Transaction, PEI remained the indirect owner of the Goodyear Assets.

54. Subsequently, Trustee counsel submitted that: “*Every shareholder of PEI, including Ms. Rose, benefitted from the Goodyear Restructuring, as a matter of fact, not opinion (and whether the market immediately reflected that, or not).*”⁶⁸ After the Chambers Justice asked repeatedly how Rose could have benefited, Trustee counsel contended the benefit was “to Ms. Rose and the entities in improving the asset base *by eliminating obligations.*”⁶⁹ “Obligations” referred to ARO, which was never a liability of PEOC. Moreover, no obligations were “eliminated”; they remained with PEOC.

55. In short, the Alternative BIA Claim against Rose was a non-starter.

The Release is a bar to the Alternative BIA Claim

56. Rose defended the Alternative BIA Claim on the basis of the Release.⁷⁰ The Trustee did not reply. The Trustee conceded that it does not have standing or authority to challenge the Release under the BIA.⁷¹

⁶⁶ AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0247, paras 77-9; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1015, 5/3-19; The evidence is Rose held approximately 1-2% of PEI’s widely held stock; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1013-5, 3/12-5/20.

⁶⁷ Submission of the Respondent PricewaterhouseCooper Inc. Lit, regarding the Order arising from the Reasons for Judgement of Mr. Justice D.B. Nixon (February 7, 2020) at paras 6 and 22 [Appendix 8]: Cross-referencing the allegation of benefit made in the context of the Director Claim.

⁶⁸ Trustee’s Answers at Question No. 12 [Appendix 2].

⁶⁹ Proceeding Transcript (July 28, 2020) discussion at 74/9-77/36, quote at 75/38-9 [Appendix 9].

⁷⁰ Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at paras 24-9] at P022-4.

⁷¹ Appeal Record, Volume 2, [Proceeding Transcript, November 8, 2018 at 66/30-67/2] at 068-9: Trustee counsel stated: “So, in this context [the Primary BIA Claim], 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. ... 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.*”; Also see Trustee’s Answers at Question No. 34(a) [Appendix 2]; Reasons at para 329 [Appendix 1].

57. Yet when it came time to approve the form of Order resulting from the Reasons, the Trustee took the position that the Release was not a bar to the Alternative BIA Claim.⁷² The Court held a further hearing in that regard and confirmed that the claim is barred by the Release.⁷³

58. Many of the arguments now made in the Trustee's Factum regarding the Release were not made at that time. They are addressed below in response to the Trustee's specific submissions.

Claim 2: Oppression Claim

59. The Statement of Claim pleaded an oppression claim on the basis of the unspecified interests of two alleged contingent creditors of PEOC:

19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, POT and POC to enter into and carry out the Transactions⁷⁴:

19.1 Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

20. As a result of the Transactions generally, and the Asset Transaction in particular:

20.1 if PEOC was not insolvent, it was rendered insolvent;

20.2 PEOC was liable for, but unable to pay, the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*; and

20.3 PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of PEI, POC and Rose personally.

60. On the face of the Statement of Claim: (i) the Trustee did not have authority to sue for oppression under the BIA; (ii) the Trustee did not have standing as a complainant under the ABCA; and (iii) the Trustee did not plead a viable claim in oppression.

⁷² See eg Proceeding Transcript (February 14, 2020) at 11/7-35 [Appendix 5].

⁷³ Proceeding Transcript (February 14, 2020) at 15/24-30 [Appendix 5]; Order of Justice Nixon dated August 15, 2019 (filed February 18, 2020), at para 5 [Appendix 12]. On February 14, 2020, his lordship adopted the written submissions of Norton Rose Fulbright as his reasons for decision on the application to settle the terms of his order; those written submissions are attached hereto as Appendices 6 and 13.

⁷⁴ While the Statement of Claim used the term "Transactions", the Trustee later confirmed that the oppression claim specifically concerned the Asset Transaction: AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0968, 90/1-11; AEKE, Volume 1 (Affidavit of Paul Darby) at A0009, para 51: Opined that the oppression specifically related to the Asset Transaction and specifically to "the inability of PEOC to pay the ARO and municipal property taxes."; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0954, 76/12-23, A0958-9, 80/14-81/26, A0968, 90/1-11; Proceeding Transcript (August 30, 2018) at 31/8-30 [Appendix 4]: Trustee's counsel explained the theory of the oppression claim as being that PEOC was "set up to fail"; "It's not more complicated than that."

The Trustee does not have authority under the BIA to sue on behalf of individual creditors

61. A trustee in bankruptcy is a creature of statute. Its powers and duties are largely set out in the *BIA*; ⁷⁵ further duties and obligations are confirmed at common law. ⁷⁶
62. A trustee may have authority to sue regarding claims which concern all of the creditors of the estate. However, a trustee does not have authority to sue in respect of individual creditor claims. ⁷⁷ An important reason is that individual creditors are free to sue directly. ⁷⁸
63. The alleged contingent creditor claims in this case are at most individual debt claims. Both of the alleged contingent creditors could have sued directly: (i) Alberta municipalities have a variety of statutory enforcement rights regarding unpaid taxes, including the right to sue for payment, ⁷⁹ and (ii) subject to satisfaction of the *AbitibiBowater* test, the AER could sue to recover certain costs incurred. Neither chose to sue. ⁸⁰
64. Accordingly, the Trustee did not have authority under the *BIA* to pursue individual creditor oppression claims.

The Trustee does not qualify as a complainant under the ABCA

65. The Statement of Claim alleged that the Trustee had standing as a complainant ⁸¹, which Rose and the Perpetual Defendants denied. ⁸²
66. Unlike other corporate stakeholders, creditors of a corporation may qualify as complainants to advance oppression claims only if the Court grants them standing on a discretionary basis. ⁸³ In this case, neither of the alleged contingent creditors sought standing. The question, then, was

⁷⁵ *BIA* at s 16 *et seq* [BOA, Tab 4].

⁷⁶ *Sangha (Re)*, 2018 BCSC 1049 at para 23, 293 ACWS (3d) 668 [BOA, Tab 7].

⁷⁷ *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8, [2015] AWLD 1976 [BOA, Tab 6]; *Principal Group Ltd (Trustee of) v Principal Savings & Trust Co.*, 1990 CarswellAlta 260 at para 25, [1990] AWLD 687 [BOA, Tab 8]; PWC November Brief at para 79 [Appendix 3]: “As the above authorities establish, s. 30(1)(d) confers on the Trustee the power to step into the shoes of the bankrupt and advance any claims the bankrupt may have had, for the benefit of the general body of creditors.”; Reasons at paras 134-7, 193-4 and 204-211 [Appendix 1].

⁷⁸ *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 at para 30, [2001] O.J. No. 3394 [Olympia 2001] [BOA, Tab 9]; *Dylex Ltd (Trustee of) v Anderson*, 2003 CarswellOnt 819 at para 15, [2003] O.J. No. 833 [Dylex] [BOA, Tab 10]; *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.*, 2003 CarswellOnt 5210 at para 46, [2003] O.J. No. 5242 [Olympia 2003] [BOA, Tab 11]; *Ernst & Young Inv v Essar Global Fund Limited*, 2017 ONCA 1014 at para 63, 139 O.R. (3d) 1 [Ernst & Young] [BOA, Tab 12].

⁷⁹ *Municipal Government Act*, RSA 2000, Chapter M-26, as amended at ss 410(e), 411, 437(c-d), 438 and 552 [BOA, Tab 13].

⁸⁰ Remarkably, the Trustee never consulted any municipality or the AER about advancing such claims: AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0956-8, 78/22 – 80/13.

⁸¹ Appeal Record, Volume 1, [Statement of Claim at para 18] at P006; *Royal Trust Corp. of Canada v Hordo*, 1993 CarswellOnt 147 at para 9, O.J. No. 1560 [Hordo] [BOA, Tab 14]: It is open to the Court to determine standing on a preliminary application.

⁸² Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at paras 18-22] at P019-21.

⁸³ *Business Corporations Act*, RSA 2000, c B-9 as amended (ABCA) at s 239 [BOA, Tab 15].

whether the Trustee pleaded a claim in respect of which it could be granted standing.⁸⁴ The answer is no, because: (i) a trustee in bankruptcy may only bring creditor-based oppression claims which are collective, not individual; (ii) debt claims may not be advanced as oppression claims; and (iii) creditor-based oppression claims against directors must plead additional factors that the Trustee did not allege against Rose.

67. A threshold point regarding the oppression claim in respect of the AER is that, on the face of the claim, PEOC was not “liable for ... the ARO associated with the Goodyear Assets” at the time of the Asset Transaction. The AER was not a creditor of PEOC. Thus, there could not be an oppression claim based on the allegation that the AER was a creditor.

68. The requirement under the BIA that a trustee in bankruptcy may only sue on behalf of collective claims of the estate’s creditors applies equally where a trustee seeks to sue for oppression.⁸⁵ The claims pleaded by the Trustee concern alleged individual “interests” of unidentified municipalities and the AER.

69. Moreover, on the face of the claim, the alleged “interests” are merely interests to be paid as creditors.⁸⁶ The law is clear that claims in debt or contract may not be pursued as oppression claims.⁸⁷

70. If either of the unidentified municipalities or the AER had sued and alleged oppression, the Court might have granted them standing as complainants if: (i) the Statement of Claim set out a *prima facie* case that the corporation was used as a vehicle for fraud (this is not alleged); or (ii) the claim alleged that the impugned conduct breached their reasonable expectations based on their particular relationship with the corporation.⁸⁸ For a creditor to have such reasonable expectations,

⁸⁴ *Zimmer v DenHollander*, 2004 ABQB 493 at para 35, [2004] AJ No. 902 [**Zimmer**] [**BOA, Tab 16**]; Janis Sarra, “Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings” in Janis P. Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) at 9 [**BOA, Tab 17**]; *Hordo* at paras 12-13 [**BOA, Tab 14**]; *Trillium Computer Resources Inc. v Taiwan Connection Inc.* 1992 CarswellOnt 690 at paras 6-9, 10 OR (3d) [**BOA, Tab 19**]; *First Edmonton Place Ltd. v 315888 Alberta Ltd.*, 1988 CarswellAlta 103 at para 78, [1998] AWLD 1140, rev’d on other grounds 1989 ABCA 274 [**First Edmonton**] [**BOA, Tab 20**]; *The Investment Administration Solutions Inc. v Pro-Financial Asset Management Inc.*, 2018 ONSC 1220 at paras 103-105, 291 ACWS (3d) 315 [**BOA, Tab 21**]; *Apotex Inc. v Laboratories Fournier S.A.*, 2006 CarswellOnt 7164 at paras 39-43, [2006] OJ No. 4555 [**BOA, Tab 22**]; Reasons at paras 184-192 [**Appendix 1**].

⁸⁵ *Olympia 2001* at para 30 [**BOA, Tab 9**]; *Dylex* at para 15 [**BOA, Tab 10**]; *Olympia 2003* at para 46 [**BOA, Tab 11**]; *Ernst & Young* at para 63 [**BOA, Tab 12**].

⁸⁶ Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at paras 16 and 22] at P005-6 and P007.

⁸⁷ *Hordo* at para 14 [**BOA, Tab 14**]; *J.S.M. Corp. (Ontario) Ltd. v Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 at para 60, [2008] OJ No. 958 [**BOA, Tab 23**]; *Peoples Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 at para 43, [2004] 3 SCR 461 [**Peoples**] [**BOA, Tab 24**]; *Wilson v Alharayeri*, 2017 SCC 39 at paras 54-55, [2017] SCR 1037 [**Wilson**] [**BOA, Tab 25**].

⁸⁸ *Zimmer* at para 47 [**BOA, Tab 16**]; *First Edmonton* at paras 56-7 [**BOA, Tab 20**]; *Mackenzie v Craig*, 1999 ABCA 84 at para 17, [1999] 10 WWR 450 [**BOA, Tab 26**]; *BCE Inc., Re*, 2008 SCC 69 at paras 68 and 70-71, 3 SCR 560 [**BCE**] [**BOA, Tab 27**]; *Wilson* at paras 24 and 54-5 [**BOA, Tab 25**]; Reasons at paras 127-133 [**Appendix 1**].

it must allege that it was in a position analogous to that of a minority shareholder who had a legitimate interest in how the affairs of the corporation were conducted, and that a breach of its expectations caused it direct harm.⁸⁹

71. Significantly, the Statement of Claim says not one word about any such reasonable expectations or the interests of the alleged contingent creditors.⁹⁰ Nor can one imagine a contingent creditor having any such expectations of a wholly-owned single-purpose entity.

72. Finally, in the case of an oppression claim against a director – as in the claim against Rose – the plaintiff must plead additional factors. One reason is the courts’ concern about oppression claims being made against directors for tactical reasons.⁹¹ As stated by the Supreme Court of Canada in *Wilson*, a creditor of the corporation must plead and prove that (i) the alleged oppressive conduct is properly attributable to the director personally; and (ii) the director must have personally benefitted, breached a duty owed as a director, or misused corporate power.⁹² The Statement of Claim does not plead any such facts.

73. Accordingly, the trial judge had every reason to strike the Oppression Claim.⁹³

Claim 3: Director Claim

74. The Statement of Claim alleged that Rose breached her fiduciary duty and duty of care owed to PEOC by:

- (i) causing PEOC to enter into the Asset Transaction⁹⁴;
- (ii) failing to disclose to PEOC that the Asset Transaction was not in the best interests of PEOC as required by ss. 120 and 122 of the ABCA⁹⁵; and
- (iii) “causing PEI to require 198 Alberta to agree that, as a condition of closing the Share Transaction, 198 would deliver to PEI releases executed by PEOC’s new directors,

⁸⁹ *Hordo* at paras 14-17 [BOA, Tab 14]; *Gestion Trans-Tek Inc. v Shipment Systems Strategies Ltd.*, 2001 CarswellOnt 4270 at paras 21-2, [2001] OJ No. 470 [Gestion] [BOA, Tab 28]; *Wilson* at paras 24, 45 and 54-5 [BOA, Tab 25].

⁹⁰ Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at para 9] at P017; Reasons at paras 21-3 [Appendix 1].

⁹¹ *Wilson* at para 54 [BOA, Tab 25]; *Budd v Gentra Inc.*, 1998 CarswellOnt 3069 at paras 50-1, [1998] OJ No. 3109 [BOA, Tab 29].

⁹² *Wilson* at paras 47-55 [BOA, Tab 25]; *Mudrick Capital Management LP v Wright*, 2019 ABQB 662 at paras 102-12, [2019] AWLD 3327 [Tab 30].

⁹³ Reasons at paras 236-241 [Appendix 1].

⁹⁴ Appeal Record, Volume 1, [Statement of Claim at paras 16.1-.4] at P005-6.

⁹⁵ Appeal Record, Volume 1, [Statement of Claim at para 16.4] at P006. While the Statement of Claim refers to more than the Asset Transaction in this regard, the Trustee would later concede to the Court that that Director Claim concerned only the Asset Transaction.

purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to s. 122(3) of the ABCA.”⁹⁶

75. Notably, the Director Claim did not seek to set aside the Release or allege that it was unenforceable. Rather, on the basis of the three allegations noted above, the Trustee sought a declaration that the Asset Transaction should be set aside, or, alternatively, damages.⁹⁷

Rose did not cause PEOC to enter the Asset Transaction

76. On the face of the Statement of Claim, Rose could not and did not cause PEOC to enter the Asset Transaction.⁹⁸ The Trustee concedes that PEI controlled PEOC.⁹⁹ The Asset Transaction was one component of the Aggregate Transaction which was approved and implemented by PEI. In the words of Trustee counsel, this was PEI doing a transaction through a subsidiary.

77. On the evidence, Rose did not cause PEOC to enter into the Asset Transaction. As set out in more detail below, the evidence clearly shows that while Rose took her responsibilities as a director of PEOC seriously, PEOC was owned and controlled by PEI. The Asset Transaction was one component of a larger PEI transaction.

78. Even if Rose had independently caused PEOC to enter the Asset Transaction, that begs the question of breach of director duty. Notably, the sole alleged breach is premised on the untenable argument that the ARO associated with the Goodyear Assets was a PEOC liability. Moreover, whether ARO is a current obligation or not, the fact is PEOC would have had the same liability both before and after the Asset Transaction: PEOC already owned legal title and held the licenses for the Goodyear Assets. The only result of the *Asset* Transaction was to render PEOC the beneficial owner of those assets too.

Rose did not fail to “disclose” anything to PEOC

79. On the face of the Statement of Claim, Rose did not fail to disclose anything to PEOC. PEOC was a single-purpose corporation wholly-owned by PEI. Rose’s knowledge as a director of PEOC was PEOC’s knowledge.

⁹⁶ Appeal Record, Volume 1, [Statement of Claim at para 16.5] at P006.

⁹⁷ Appeal Record, Volume 1, [Statement of Claim at para 17] at P006.

⁹⁸ Appeal Record, Volume 1, [Statement of Claim at para 3] at P002; AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0913-4, 35/22-36/24.

⁹⁹ Trustee’s Answers at Question No. 51 [Appendix 2]; Reasons at para 313 [Appendix 1]; Incongruously, and in the face of its own admission, the Trustee *now* argues that Rose was nevertheless the “directing mind” of PEOC, an entity she could not and did not “control”: PWC Factum at paras 57-64.

80. The Trustee pleaded s. 120 of the ABCA. Section 120 provides that a director who is a party to a material contract with the corporation or has a material interest in any such contract must disclose it to the corporation. Rose was not a party to the Asset Transaction. Further, s. 120(9) provides that the Court may set aside such contracts, but it does not provide for personal liability of the director.

Rose did not cause PEI to cause 198Co to agree to the Release

81. It bears emphasis that this curious allegation was the Trustee's only challenge of the Release. Even then, it did not seek to set the Release aside.¹⁰⁰

82. It is obvious that Rose could not have caused PEI to do anything, let alone cause PEI to cause a third party to agree to something. The Trustee's evidence did not suggest Rose controlled PEI.¹⁰¹ As now conceded in the Trustee's Factum, PEI was controlled by its board of directors, of which Rose was only one member. 198Co was owned and controlled by Kailas, and there is no allegation and no evidence that Kailas was somehow coerced or deceived.¹⁰²

83. The Trustee knew about the Release yet saw no reason to ask Rose about it in the course of its ostensible investigation.¹⁰³ Nor did the Trustee ask the principals of 198Co who signed it.¹⁰⁴ The Darby Affidavit acknowledged the existence of the Release and raised no concerns about it.¹⁰⁵ On cross-examination, Darby conceded that the signatures of the new directors of PEOC reflected their decision to agree to the Release.¹⁰⁶

84. Rose's unchallenged evidence was all elements of the Share Purchase Agreement¹⁰⁷ and the resulting Release were negotiated at arm's length by PEI and Kailas, each with the advice of legal counsel.¹⁰⁸

85. The Trustee also pleaded s. 122(3) of the ABCA regarding the Release:

¹⁰⁰ The Trustee did not have standing to challenge the Release in the context of the Alternative BIA Claim.

¹⁰¹ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0958-9, 80/14-81/3.

¹⁰² Reasons at para 314 [**Appendix 1**].

¹⁰³ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0946-7, 68/10-69/21, A0959-60, 81/27-82/25; Appeal Record, Volume 2, [Proceeding Transcript, November 8, 2018 at 76/19-22] at 078.

¹⁰⁴ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0961-2, 83/23 – 84/25.

¹⁰⁵ AEKE, Volume 1 (Affidavit of Paul Darby) at A0005, para 28.

¹⁰⁶ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A1075, 65/2-25, A1093-5, 83/23-85/5, A1094-5, 84/22-85/5. Reasons at paras 315 and 324-5 [**Appendix 1**].

¹⁰⁷ AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0331-458, Exhibit H.

¹⁰⁸ AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0243, paras 56-8, A0248, paras 80-1; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1070-1, 60/8-61/26; A1082-3, 72/22-73/2; Reasons at para 314 [**Appendix 1**].

Subject to section 146(7)¹⁰⁹, no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty. [Emphasis added.]

86. Counsel for the Trustee explained to the Court:

The Trustee is not challenging the validity of the [Release] generally. However, the release portion is invalid to the extent that the Release purports to release Ms. Rose from liability for breaches of her statutory duties as a director.¹¹⁰

87. Counsel for the Trustee submitted that releasing a director from possible claims in relation to past conduct as a director would be “analogous to a release of liability for criminal conduct.”¹¹¹

88. As set out below in response to the Trustee’s submissions, s. 122(3) of the ABCA is intended to prohibit corporations from relieving directors from their duties to the corporation while in office. It does not prohibit corporations from releasing directors from possible claims after leaving office, or from releasing them as part of the settlement of a claim. The Trustee’s interpretation of s. 122(3) would mean claims against directors could never be settled or insured.

Claim 4: Public Policy Claim

89. As against all Defendants, the Statement of Claim pleaded – in one paragraph – a claim based on alleged breaches of statutes and regulations.

90. The Public Policy Claim did not plead any theory under which Rose could be personally liable for having been involved as a non-party in the Aggregate Transaction or the Asset Transaction. Nevertheless, Rose adopts the submissions of the Perpetual Defendants with respect to the Public Policy Claim.

(ii) Argument of Rose against Trustees Claims

Preliminary Point Regarding the Evidence

91. The Darby Affidavit was sworn in support of an application by the Trustee for judgment on all of its claims. By Order of the Court, that application was stayed in favour of the Respondents’ applications to strike and for summary judgment.¹¹² In support of their applications,

¹⁰⁹ Which applies to shareholders who are party to a unanimous shareholder agreement.

¹¹⁰ Trustee’s Answers at Question Nos. 34(b) and 37(a) [Appendix 2].

¹¹¹ Trustee’s Answers at Question No. 38 [Appendix 2]; Proceeding Transcript (July 28, 2020) at 84/31-85/39 [Appendix 9].

¹¹² Order [Procedural Matters and Sequencing of Applications] (August 30, 2018) [Appendix 10].

the Respondents filed the Schweitzer Affidavit and the Rose Affidavit. The Trustee filed no responding evidence¹¹³, and its cross-examination left the Respondents' evidence unshaken.

Ground 1: The Release¹¹⁴

(i) Standard of Review

92. The Court's interpretation of the Release is a matter of contractual interpretation; thus, it is a finding of mixed fact and law entitled to deference.¹¹⁵

93. The Trustee cites *Biancaniello* for the proposition that a standard of correctness applies to the interpretation of a release.¹¹⁶ *Biancaniello* does not stand for so broad a proposition: *Biancaniello* concerned the standard of review from decisions of the Ontario Divisional Court sitting as an appellate court;¹¹⁷ the Court was clear that this fact affected the standard of review, which would otherwise have been "the deferential standard normally applicable to the interpretation of negotiated agreements."¹¹⁸ The Court in *Biancaniello* applied a correctness standard because it found the release in question used language that is "standard in many common release documents."¹¹⁹

94. This principle was subsequently clarified in *Bailey*: where a release is *not* a standard-form contract, the standard of review applicable to its interpretation is *palpable and overriding error*.¹²⁰ There is no suggestion in this case that the Release is a standard-form contract. It follows that the interpretation given to the Release by the Court below is a finding of mixed fact and law, entitled to deference on appellate review.

(ii) Trustee Submissions

95. The Trustee now submits that:

¹¹³ PWC November Brief at para 28 [**Appendix 3**]: "The Trustee's Application relies on the facts *as presented by the Defendants*." (emphasis in original).

¹¹⁴ PWC Factum at paras 19-56.

¹¹⁵ *Sattva* at para 50 [**BOA, Tab 32**]; *Bailey v Temple*, 2020 NLCA 3 [*Bailey*] at para 20 [**BOA, Tab 52**].

¹¹⁶ *Biancaniello v DMCT LLP*, 2017 ONCA 386, 138 OR (3d) 210 [*Biancaniello*] [**BOA, Tab 38**]; Book of Authorities of the Appellant (**BAA**), Volume 1, Tab 1.

¹¹⁷ *Biancaniello* at paras 20-22 [**BOA, Tab 38**].

¹¹⁸ *Biancaniello* at para 20 [**BOA, Tab 38**].

¹¹⁹ *Biancaniello* at para 22 [**BOA, Tab 38**]: In reaching this conclusion, the Court in *Biancaniello* relied on the exception set out in *Ledcor*, where the interpretation of certain standard-form contracts of adhesion was found to be reviewable for correctness.

¹²⁰ *Bailey* at para 20 [**BOA, Tab 52**].

- (i) the language of the Release is not clear enough to bar the Trustee’s claims or is “erroneous”;
- (ii) the Release did not release unknown claims;
- (iii) the Release could not bar the Alternative BIA Claim against Rose;
- (iv) s. 122(3) of the ABCA prohibits the release of directors; and
- (v) the trial judge erred in making findings about common practices in relation to releases.

(iii) The Statement of Claim

96. The Statement of Claim did not plead that the Release is unenforceable as a matter of contract. Rose defended on the basis that the Release is a complete bar to all claims against her. The Trustee did not reply.¹²¹

97. The only pleading in relation to the Release was made specifically in the context of the Director Claim. The Statement of Claim pleads that:

16. Rose breached her duties to PEOC ... by:

[...]

16.5 causing PEI to require 198 to agree that, as a condition of closing of the Share Transaction, 198 would deliver to PEI releases executed by PEOC’s new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to s. 122(3) of the ABCA. [Emphasis added.]

98. The Trustee did not seek a declaration voiding the Release or a declaration that it was unenforceable. Rather, in relation to the Release as a ground of the Director Claim, the Trustee sought an order setting aside the Asset Transaction or, alternatively, a judgment for damages.¹²² The Trustee never explained how damages could be suffered in relation to an enforceable release.

99. Counsel for the Trustee explained the claim in relation to the Release as follows:

As for the release itself, My Lord, we do not take issue with the fact that releases can be granted. However, the wording of the Act is clear. If you grant a release with respect to a breach of the director’s duties under the [ABCA], that has no effect, and so you can

¹²¹ Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at paras 24-9] at P022-4.

¹²² Appeal Record, Volume 1, [Statement of Claim] at P008.

release the director from all kinds of things, including negligence, but you cannot release the director from liability under the Act, from her duties or from — subsequently from liability. Presumably in terms of settlement, thinking practically, the parties can agree that there was no breach. I imagine that could be — I’m not a solicitor, but I imagine that that could be something that you could agree to. But insofar as there’s a release that’s pursuant — or that’s contrary to the direct language of the Act, that has no effect.

So we do not take the position, as I think Mr. Leidl suggested, that no releases can ever work and the whole world should know that. That’s not what we say. We’re effectively just saying look at the Act, and as long as you stay within the boundaries of that exclusion or outside the boundaries of that exclusion, releases work. [Emphasis added.]¹²³

100. Trustee counsel said nothing of issues of contractual interpretation or the BIA.

(iv) The circumstances and language of the Release

101. No particular words are needed to create a valid release; words showing an intention to renounce a claim or discharge an obligation are sufficient. Releases should be construed in light of their circumstances including with reference to recitals.¹²⁴ Parties may agree to release potential claims of which they have no current knowledge or could not even imagine.¹²⁵ If a release applies to “all claims”, that includes unknown claims.¹²⁶ These interpretive principles will apply equally to a release covering an allegation of breach of a director’s duty.¹²⁷

102. As stated by the House of Lords:

The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took

¹²³ Proceeding Transcript (December 17, 2018) at 85/2-15 [Appendix 11].

¹²⁴ *Bank of British Columbia Pension Plan, Re*, 2000 BCCA 291 at para 17, [2000] BCWLD 645 [BOA, Tab 33]; *Toscana Ventures Inc. v Sundance Plumbing Gas & Heating Ltd.*, 2013 ABQB 289 at para 18, [2013] AWLD 2813 [BOA, Tab 34]; *Terwillegar Towne Residents Assn v Brookfield Residential (Alberta) LP*, 2015 ABQB 14 at para 22, [2015] AWLD 781 [BOA, Tab 35]; *White v Central Trust Co.*, (1984) CarswellNB 38 at paras 32-3 and 38, [1984] NBJ No. 147 [BOA, Tab 36]; *Athabasca Realty Co. v Foster*, (1982), 18 Alta LR (2d) 385 at para 34; [1982] AWLD 317 [BOA, Tab 37]; *Biancaniello* at paras 23-4, 28-9, 33 and 42 [BOA, Tab 38]; Reasons at paras 297-8 [Appendix 1].

¹²⁵ *Mostcash plc v Fluor Ltd*, [2002] EWCA Civ 975 at 26, 2002 WL 1311119 [BOA, Tab 39]; *The Law of Releases in Canada* (Aurora: Canada Law Book, 2006) at 98 [BOA, Tab 40]; *Taberner v World Wide Treasure Adventures Inc.*, 1994 CarswellBC 403 at para 7, [1994] BCJ No. 1154 [BOA, Tab 41]; *Biancaniello* at paras 29, 33 and 47-9 [BOA, Tab 38].

¹²⁶ *Biancaniello* at paras 47-51 [BOA, Tab 38].

¹²⁷ *Simkeslak Investments Ltd. v Kolter Yonge LP Ltd.*, 2011 ONSC 7134 at para 73, 210 ACWS (3d) 623 [BOA, Tab 42].

upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. [Emphasis added.]¹²⁸

103. Article 8 of the Share Purchase Agreement provided for “Closing and Deliveries”. Clause 8.1 provided that PEI would deliver releases of PEOC (under new ownership) by all current officers and directors. Clause 8.2 provided that 198Co would provide a release signed by the new signing authorities of PEOC “releasing the directors and officers of [PEOC] from any Claims related to such directors and officers acting as a director or officer of [PEOC]”. “Claim” was defined in clause 1.1(m) of the Share Purchase Agreement as “any claim, demand, lawsuit, proceeding, arbitration or government investigation, in each case, whether asserted, threatened, pending or existing.”

104. The Trustee does not submit that there is anything unclear about that.

105. On closing, the new signing authorities of PEOC signed the Release, which was negotiated to read as follows:

PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement) which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose. [Emphasis added.]

106. The Trustee submitted to the Chambers Justice that the “Release is clear.”¹²⁹

107. The Trustee’s Factum does not suggest that anything is unclear about the words “forever discharge”; “can have or can hereafter have”; or “by reason of ... as a director and officer of PEOC.”

108. It is true that the Release refers to the definition of Claims in the Asset Transaction (called the “Purchase and Sale Agreement”). This was never raised by the Trustee before the ruling under appeal. If the Trustee had done so, Rose could have cross-examined on the assertion and adduced evidence. On the evidence before the Court, it is clear there was no intention to import the

¹²⁸ *Bank of Credit & Commerce International SA (In Liquidation) v Ali (No 1)*, [2001] UKHL 8, [2001] All ER 961 [not included], as quoted in *Biancanello* at para 33 [BOA, Tab 38].

¹²⁹ Appeal Record, Volume 2, [Proceeding Transcript, November 8, 2018 at 76/19-22] at 078: Counsel for the Trustee stated: “Mr. Leitel 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 ...” (*emphasis added*).

definition of Claims from the Asset Purchase Agreement, which related to a representation by POT to PEOC in the Asset Transaction.¹³⁰ The Release recited the Share Purchase Agreement, so it is fair to conclude “Claims” was intended to be “Claims” as defined in that agreement. In any event, the negotiated language of the Release expanded upon the definition, providing that Rose was released from any claim that “PEOC now have or can have or can hereafter have ... by reason of, existing out of or in connection with [Rose] having acted, at the request of PEI, as a director and officer of PEOC.”

109. The Trustee cites a decision in which the Court disregarded (but did not “strike out”, as the Trustee asserts) an “awkward” sentence in a negligence waiver¹³¹, and one where the Court found that an indemnity clause “failed ‘to say what it means.’”¹³² Neither decision is relevant to the Trustee’s specific allegations or the wording of the Release.

(v) The Release clearly released future claims against Rose¹³³

110. The Release provides, in part, that PEI and PEOC (now Sequoia, in whose shoes the Trustee stands) released and forever discharged Rose from all Claims “which PEI and PEOC now have or can hereafter have against [Rose] by reason of, existing out of or in connection with [Rose] having acted, at the request of PEI, as a director and officer of PEOC ...”.¹³⁴

111. There is no requirement that all possible claims were known at the time.¹³⁵

(vi) There is no finding that the Release “displaced the statutory provisions applicable to Ms. Rose”

112. The Trustee’s Factum makes the new argument that a release given by a bankrupt prior to its bankruptcy cannot bind a trustee in bankruptcy.¹³⁶ This argument is not only belated; it is

¹³⁰ AEKE, Volume 1 (Affidavit of Paul Darby) at A0066-7, Schedule D – Purchase and Sale Agreement at cl. 4.01(l).

¹³¹ *Van Hooydonk v Jonker*, 2009 ABQB 8 at paras 32 and 44, [2009] AWLD 831 [BOA, Tab 53]; BAA, Volume 1, Tab 2: In that case, the issue was the defendants’ liability for negligence regarding the plaintiff’s fall from a horse during a trail ride. The plaintiff had signed a waiver before the ride. The Court found that the plaintiff had failed to establish a duty of care, breach of contract and causation. The Court also found that if that was wrong, the waiver protected the defendants from any liability. The Court did not “strike out” any portion of the waiver but rather disregarded an “awkward” sentence in the waiver.

¹³² *McCallum v Jackson*, 2019 ONSC 7077 at paras 16, 47 and 51, 313 ACWS (3d) 132 [BOA, Tab 54]; BAA, Volume 1, Tab 3: That case concerned a motion by three defendants for summary judgment dismissing a cross-claim and allowing their counterclaim against the plaintiff. The plaintiff was in bike race and was hit by a car. He sued the driver and race organizer. Prior to the race, the cyclist had electronically accepted a “Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement”. The plaintiff conceded that he had waived the right to sue the race organizer, but disputed that he had agreed to indemnify the organizer where another party cross-claimed against it. The issue was whether the indemnity provisions had been “sufficiently brought to the Plaintiff’s attention”. The Court found that it had, but: “There is so much legalese in the [indemnity clause] that it fails to say what it means”; “the terms in question have no discernable meaning”.

¹³³ PWC Factum at paras 29-30.

¹³⁴ PWC Factum at para 26.

¹³⁵ *Biancaniello* at paras 1 and 51-6 [BOA, Tab 38]: The Ontario Court of Appeal ruled that a broadly worded release applied to “unanticipated claims”.

¹³⁶ PWC Factum at paras 30-8.

directly contrary to submissions made by the Trustee before the Court below. In its Brief filed November 1, 2018, the Trustee insisted it was “not seeking to review the [Release] pursuant to s. 96”, and that the sole basis of its challenge was s. 122(3) of the ABCA.¹³⁷ The Trustee conceded that it has no authority under s. 96 to challenge the the Release.¹³⁸ If so, then the Trustee stands in the shoes of PEOC and has no basis to assert that the Alternative BIA Claim somehow skirts the plain consequences of the Release.

113. The Trustee submits Rose provided no authority for the proposition that a release given by PEOC could apply to the Alternative BIA Claim.¹³⁹ That is because the issue was never pleaded or raised by the Trustee. Notably, now having made the argument, the Trustee provides no authority for the proposition that the Release does *not* bar the specific Alternative BIA Claim where the Trustee has no authority to challenge the Release.

114. The Trustee cites the decision in *Montor*¹⁴⁰, which concerned an appeal by a trustee in bankruptcy from the trial court’s dismissal of claims under s. 96 of the BIA, the Ontario *Assignments and Preferences Act*, *Fraudulent Conveyances Act* and *Business Corporations Act*, and for unjust enrichment in relation to a negotiated dissolution of a business. The dissolution terms included a release by the bankrupt. The trustee challenged certain payments made under the agreement. The Court of Appeal dismissed the trustee’s appeal on all grounds. The decision did not discuss the release. The Trustee’s submissions as to the “implicit” meaning of the decision is pure speculation.¹⁴¹

115. The only other decision cited by the Trustee in this regard is *Kerzner*¹⁴², which concerned an appeal from an order granting summary dismissal of a wrongful dismissal claim on the basis of a release. The court found that the trial judge had erred in finding that the release barred a claim for severance pay under the Ontario *Employment Standards Act* because the Act was specifically designed to preclude the release of such a claim. The scope of the release was irrelevant in that

¹³⁷ PWC November Brief at paras 160-1 [**Appendix 3**].

¹³⁸ Also see: AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0961, 83/9-22.

¹³⁹ PWC Factum at para 32.

¹⁴⁰ *Montor Business Corporation v Goldfinger*, 2016 ONCA 406, [2016] WDFL 3770 [**BOA, Tab 56**]; BAA, Volume 1, Tab 6.

¹⁴¹ PWC Factum at paras 33-5.

¹⁴² *Kerzner v American Iron & Metal Company Inc*, 2018 ONCA 989, 299 ACWS (3d) 756 [**Kerzner**] [**BOA, Tab 57**]; BAA, Volume 1, Tab 7; PWC Factum at paras 36-8.

regard.¹⁴³ However, it was enforceable in all other respects.¹⁴⁴ This case does not concern the Ontario *Employment Standards Act*.

116. The Chambers Justice correctly noted that the Trustee’s claims against Rose were “solely in relation to her having acted as a director of PEOC.”¹⁴⁵ Specifically, the Court summarized the Trustee’s claims as being based on “the theory that Ms. Rose caused Perpetual Energy to require 198Co to agree to the Release.”¹⁴⁶ He found, as a fact, that she did no such thing.¹⁴⁷ Only now does the Trustee suggest that somehow it was not *open* to Sequoia to release Rose from the very allegations it made against her, even though in substance those allegations are made on behalf of *PEOC*, in the Trustee’s capacity as PEOC’s legal representative.¹⁴⁸

(vii) Rose did not contract out of liability for breaches of ABCA duties¹⁴⁹

117. The Trustee asserts that s. 122(3) of the ABCA precludes the release of a director from a claim in relation to the director’s past conduct, even where the corporation knows of the conduct. The Trustee submits that exposing directors to liability for an indeterminate length of time is “precisely the objective” of s. 122(3).¹⁵⁰ If so, all settlements of claims made against directors are subject to attack; no claims against directors can be settled; and all existing director and officer liability insurance is in peril.¹⁵¹

118. The Trustee argues this interpretation is necessary to ensure that officers and directors comply with their current duties.¹⁵² On the contrary, reading s. 122(3) as prohibiting directors from contracting out of their current duties is all that is needed.¹⁵³ Prohibiting the release of claims in respect of prior conduct does nothing to ensure current compliance.

119. In *Tongue*, the trial Justice stated: “Directors cannot obtain a valid release from liability for future breaches of the CBCA.”¹⁵⁴ A similar provision in the Ontario *Business Corporations Act* has been construed by the Ontario courts as being intended to “regulate the conduct of directors

¹⁴³ *Kerzner* at paras 34-6 [BOA, Tab 57].

¹⁴⁴ *Kerzner* at para 38 [BOA, Tab 57].

¹⁴⁵ Reasons at para 328 [Appendix 1].

¹⁴⁶ Reasons at para 309 [Appendix 1].

¹⁴⁷ Reasons at paras 310-5 [Appendix 1].

¹⁴⁸ *A. Marquette & Fils Inc. v Mercure*, 1975 CarswellQue 51 at para 9, [1977] 1 SCR 547 [BOA, Tab 43].

¹⁴⁹ PWC Factum at paras 39-51.

¹⁵⁰ PWC Factum at para 47.

¹⁵¹ Reasons at paras 318-322 [Appendix 1].

¹⁵² PWC Factum at para 46.

¹⁵³ Reasons at para 317 [Appendix 1].

¹⁵⁴ *Tongue v Vencap Equities Alberta Ltd*, 1994 CarswellAlta 35 (QB) at para 139, [1994] 5 WWR 674, aff’d 1996 ABCA 208 (emphasis added) [BOA, Tab 51]; Reasons at para 326 [Appendix 1].

and officers whenever they served in either capacity”, such that they cannot contract out of liability “while they held such a position”.¹⁵⁵

120. The Trustee argues that “the ‘finality’ advocated by the Chambers Judge would undermine the objective of s. 122(3) by ensuring that a director could breach his or her statutory duties with the assurance that a release could always be extracted from a hapless purchaser at the end of the day.”¹⁵⁶ With respect, there is no basis to assume that arm’s-length purchasers of a corporation would be “hapless”. In this case, it was the opposite: the unchallenged evidence is the Release was part of a reciprocal agreement negotiated by a sophisticated purchaser with the advice of competent legal counsel.

121. The Trustee cites *Tran v Kerr*¹⁵⁷ in support of its criticism of the limited judicial notice taken by the trial judge regarding the common use of releases. In *Tran*, the issue was professional malpractice. The appellate court found that it is customary and usually necessary to have expert evidence on the standard of care. As such, it was not appropriate for the trial judge to have relied on his own experience as a practitioner. In this case, there was no standard of care issue raised, and the Trustee did not seek to tender expert evidence regarding releases. In any event, the trial judge’s limited observations about common practice were not determinative.

Ground 2: Rose was not the “directing mind” of PEOC¹⁵⁸

122. Whether Rose was the “directing mind” of PEOC is not determinative of the allegation of breach of director duty. Notably, the Trustee does not venture to suggest what Rose ought to have done differently as a director of PEOC. The Trustee’s Factum entirely ignores Rose’s unchallenged evidence that she considered the Asset Transaction to be in the best interests of PEOC given the upside associated with the new owners’ business plan.¹⁵⁹

¹⁵⁵ *McKay-Cocker Construction Ltd v McMurdo (2001)*, 109 ACWS (3d) 245 at para 16, 2001 CarswellOnt 3833; BAA, Volume 1, Tab 11 [BOA, Tab 58]: The decision concerned an application for leave to amend a defence to a third party claim. The defendant sought to claim against the third party law firm for negligence for not obtaining a release in relation to his conduct as an officer and director. The third party argued that any such release would not have been enforceable by virtue of section 134(3) of the Ontario *Business Corporations Act*. While section 134(3) speaks of “directors”, section 136(1) (regarding indemnity) speaks of directors and “former directors”. That is to say, section 134(3) does not expressly apply to former directors; *Business Corporations Act*, RSO 1990, c B.16 as amended at ss 134 and 136 [BOA, Tab 44].

¹⁵⁶ PWC Factum at para 49.

¹⁵⁷ *Tran v Kerr*, 2014 ABCA 350, [2014] AWLD 4847 [BOA, Tab 59]; BAA, Volume 1, Tab 13.

¹⁵⁸ PWC Factum at paras 57-76.

¹⁵⁹ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1034-5, 24/17-25/16, A1069-1070, 59/50-60/1, A1070-2, 60/8-62/5.

123. The Statement of Claim pleaded, and the Trustee conceded, that PEI owned and controlled PEOC; and that PEOC was a single-purpose vehicle of PEI.¹⁶⁰ Incongruously, and only in relation to the Asset Transaction, the Trustee argues that Rose was the “directing mind” of PEOC simply because she signed the Asset Transaction as the director of PEOC.¹⁶¹

124. The Trustee tendered no evidence that Rose was the directing mind of PEOC. It never asked her about that in the course of its ostensible investigation. In contrast, Rose’s unshaken evidence was as follows:

I was not the “directing mind” of PEOC

80. PEOC was a special purpose wholly-owned subsidiary of [PEI]. I took my responsibilities as a director and officer seriously, considered its best interests and the interests of its stakeholders, and exercised my business judgment to the best of my ability, but the ultimate decision to enter into the [Aggregate Transaction] was that of [PEI] and its board of directors. [Emphasis added.]

125. On cross-examination, Rose reiterated, without challenge, that PEI was the directing mind of PEOC.¹⁶² In response, Trustee counsel suggested the interests of PEI and PEOC had diverged, but declined to put the ostensible divergence to Rose. Rose’s evidence was the interests had not diverged.¹⁶³

126. The Trustee argues that the trial judge committed an extricable error of law in considering that PEOC was a single-purpose corporation and wholly-owned by PEI.¹⁶⁴ The Trustee goes farther, arguing that a wholly-owned subsidiary is not controlled by its sole shareholder, but rather is controlled by its directors.¹⁶⁵ The Trustee cites s. 101(1) of the ABCA, which provides that directors shall manage the corporation. It disregards ss. 106 and 109, which provide that directors are elected, and may be removed, by ordinary resolution of the shareholders.

127. The Trustee ignores the relevant and determinative law on this point. The law has *long* stipulated that *de jure* control is a function of a person’s “ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors.”¹⁶⁶ *De facto* control is exercised by any person who can, without holding a majority of the issued shares,

¹⁶⁰ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0966-7, 88/20-89/3; AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1015-6, 5/21-6/1; Trustee’s Answers at Question No. 51 [Appendix 2].

¹⁶¹ PWC Factum at para 57.

¹⁶² AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1082-4, 72/22-74/22.

¹⁶³ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1065-6, 55/6-56/19, A1068, 58/14-27.

¹⁶⁴ PWC Factum at para 17.

¹⁶⁵ PWC Factum at para 66.

¹⁶⁶ *Buckerfield’s Ltd. v Minister of National Revenue*, 1964 CarswellNat 351 at para 10, [1964] CTC 504 [BOA, Tab 45].

change the board of directors or influence its composition.¹⁶⁷ The Trustee led no evidence to suggest that Rose had any such power. Clearly, she did not.

128. With respect, cases about the authority of ships' masters¹⁶⁸ or murder¹⁶⁹ do not displace the fact that as PEOC's sole shareholder, PEI controlled PEOC. PEOC was a single-purpose subsidiary of PEI; Rose was its director at PEI's request.¹⁷⁰ PEI could replace Rose in an instant by shareholder resolution.¹⁷¹

129. This is not the situation in *Wilson*, where the director exercised total control over the corporation and oppression by the corporation was admitted.¹⁷²

*The ultimate decision to enter into the Aggregate Transaction was that of PEI and its board of directors*¹⁷³

130. Despite its own pleading, evidence and contrary submissions, the Trustee now argues the Chambers Justice erred in finding the decision to enter the Aggregate Transaction was PEI's.

131. Remarkably, in support of this argument, the Trustee refers to a single document: a PEOC director resolution dated October 1, 2016¹⁷⁴ pursuant to which Rose, as a director of PEOC, recited that she believed the Asset Transaction to be in the best interests of PEOC, and resolved to approve it. Incredibly, the Trustee submits that this is the only evidence on point.¹⁷⁵

Ground 3: Business Judgment Rule¹⁷⁶

132. The Trustee's focus on the business judgment rule begs the question as to what alternatives PEOC had, and why they might have been better for PEOC and its stakeholders. The Trustee has never addressed this point. The obvious point is that a wholly-owned subsidiary corporation has

¹⁶⁷ *Silicon Graphics Ltd. v Canada*, 2002 FCA 260 at para 66, [2002] 3 CTC 527 [**BOA, Tab 46**].

¹⁶⁸ PWC Factum at para 66; *Rhone v Peter A.B. Widener*, [1993] 1 SCR 497 at para 27, 1993 CarswellNat 1376 [**BOA, Tab 60**]; BAA, Volume 1, Tab 15: concerned section 647 of the *Canada Shipping Act* which allows ship-owners to limit liability for damages caused to other vessels without the ship owner's fault or privity, and specifically whether a ship-owner is entitled to limit its liability for negligence of an employee in directing the navigation of a flotilla. A subsidiary issue was whether the master of a tugboat was a "directing mind" of the ship-owner corporation. This was relevant to whether the ship-owner corporation had "actual fault or privity"; in other words, "at what point in the hierarchy of a company is the fault of a person employed in the organization to be treated as the fault of the company itself".

¹⁶⁹ PWC Factum at para 70 citing *R v Walle*, 2007 ABCA 333 at para 31, 82 Alta LR (4th) 1 [**BOA, Tab 61**]; BAA, Volume 1, Tab 19: Holding that it is irrelevant under section 229(a) of the *Criminal Code* (culpable homicide) to consider the respondent's anger in assessing his intention to cause grievous bodily harm.

¹⁷⁰ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at AEKE, A1012, 2/23-3/4; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0247-8, para 78 ("My work on behalf of PEOC was in my capacity as the director and officer nominated by Perpetual").

¹⁷¹ ABCA ss 108 and 109 [**BOA, Tab 15**].

¹⁷² *Wilson* at paras 24-5, 33 and 68 [**BOA, Tab 25**].

¹⁷³ PWC Factum at paras 71-6.

¹⁷⁴ AEKE, Volume 1 (Affidavit of Paul Darby) at A0204-6, Exhibit "Q".

¹⁷⁵ PWC Factum at para 76.

¹⁷⁶ PWC Factum at paras 77-93.

no alternatives independent of the decision-making of its parent, and that there is nothing at all wrong with that.

133. The business judgment rule calls for judicial deference to director decision-making:

In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders¹⁷⁷, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The “business judgment rule” accords deference to a business decision, so long as it lies within a range of reasonable alternatives. ... It reflects the reality that directors, who are mandated ... to manage the corporation’s business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders’ interests, as much as other directorial decisions.¹⁷⁸

134. Similarly, regarding the director’s duty of care to the corporation:

Directors and officers will not be held in breach of the duty of care ... if they act prudently and on a reasonably informed basis.¹⁷⁹ The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.¹⁸⁰

135. The Trustee cites *Sphere Energy*¹⁸¹ which concerned the interpretation of executive employment agreements under which the plaintiffs were entitled to sell their shares back if dismissed without cause. The board was to value the shares “having regard to recent equity financing values, recent reserve reports and such other information as the Board considers appropriate.”¹⁸² It was common ground that board decisions are subject to the business judgment rule;¹⁸³ however, the Court found that the rule did not apply because the board’s process was

¹⁷⁷ Also see ABCA s 122(4) [BOA, Tab 15]. In this case, the only shareholder of PEOC was PEL.

¹⁷⁸ *BCE* at para 40 [BOA, Tab 27].

¹⁷⁹ Insofar as the Trustee pleaded a breach of Rose’s duty of care under the ABCA, there is no independent cause of action for stakeholders without satisfying the test in *R v Saskatchewan Wheat Pool*, 1983 CarswellNat 92 at para 42 [1983] 1 SCR 205 [BOA, Tab 47]. Also see: *Hogarth v Rocky Mountain Slate Inc.*, 2013 ABCA 57 at para 13, [2013] 5 WWR 457 [BOA, Tab 48]; *Blacklaws v 470433 Alberta Ltd.*, 2000 ABCA 175 at para 41, [2000] AWLD 548 [BOA, Tab 49]; Appeal Record, Volume 1, [Statement of Defence of Susan Riddell Rose at para 34] at P037.

¹⁸⁰ *Peoples* at para 67 [BOA, Tab 24]. See also *Greenlight Capital Inc. v Stronach*, 2006 CarswellOnt 6719 at paras 28-30 and 79, [2006] OJ No. 4353, rev’d in part on other grounds 2008 CarswellOnt 4093 [BOA, Tab 50].

¹⁸¹ *Tarrant v Sphere Energy*, 2018 ABQB 492, [2018] AWLD 2849 [Sphere Energy] [BOA, Tab 55]; BAA, Volume 2, Tab 23; PWC Factum at para 89.

¹⁸² *Sphere Energy* at para 38 [BOA, Tab 55].

¹⁸³ *Sphere Energy* at para 39 [BOA, Tab 55].

materially deficient.¹⁸⁴ In this case, the Trustee did not question the process followed by the PEI board or Rose, and did not propose a different process that ought to have been followed.

*A director does not have to be the “directing” mind in order to act properly*¹⁸⁵

136. The Trustee submits that it was inconsistent for the trial judge to find that Rose took her responsibilities as a director seriously (a finding which the Trustee does not challenge) and that she was not the “directing mind” of PEOC.¹⁸⁶ A director can take her responsibilities seriously whether or not she is the directing mind of the corporation, just as Rose did as one of several members of the PEI board of directors.

Ground 4: Rose did not Breach her Fiduciary Duty or Duty of Care Owed to PEOC¹⁸⁷

137. The fiduciary duty is a duty of loyalty. The duty of care concerns competence and performance.¹⁸⁸

138. The Trustee pleaded that Rose breached her fiduciary duty and duty of care owed to PEOC by causing PEOC to enter the Asset Transaction “in circumstances where Rose and the other Defendants had determined that the assets to be purchased by PEOC were high liability assets that should be disposed of by, and for the benefit of, the Defendants.”¹⁸⁹ The Trustee’s allegations amount to this:

- (i) Rose, not PEI, caused PEOC to enter the Asset Transaction;
- (ii) the Goodyear Assets were encumbered with high liabilities; and
- (iii) the transfer to PEOC of the beneficial interests in the Goodyear Assets immediately harmed PEOC and benefitted all the Defendants.

Rose did not cause PEOC to enter the Asset Transaction

139. This is addressed above. The allegation of breach of duty of care fails on this basis alone.

ARO does not ground a claim for breach of director duty

¹⁸⁴ *Sphere Energy* at para 48 [BOA, Tab 55].

¹⁸⁵ PWC Factum at paras 77-82.

¹⁸⁶ PWC Factum at paras 77-82.

¹⁸⁷ PWC Factum at paras 94-120.

¹⁸⁸ *Peoples* at para 32 [BOA, Tab 24]; *BCE* at paras 36-8, 66 and 81 [BOA, Tab 27].

¹⁸⁹ Appeal Record, Volume 1, [Statement of Claim at para 16.3] at P005-6.

140. ARO was not a PEOC liability at the time of the Asset Transaction.

141. It is also noteworthy that the Trustee's allegation of breach of director duties asks the Court to look only at the Asset Transaction.¹⁹⁰ If the Court looked to the actual context of the Asset Transaction – the Aggregate Transaction – it is easy to see that Kailas was fully aware of the future ARO associated with the Goodyear Assets when it offered to purchase them and performed extensive due diligence prior to closing the Aggregate Transaction.¹⁹¹ Even if one were to consider only the Asset Transaction, the Trustee's allegation fails. Both before and after the Asset Transaction, PEOC was exposed to the ARO as the legal owner of the Goodyear Assets. So, if one is to consider only the Asset Transaction – as the Trustee pleads – it was inconsequential for PEOC.

There is no evidence of breach of director duty

142. The Trustee tendered no evidence in support of the allegation of breach of director duty other than a short statement of opinion by Darby¹⁹² which the Trustee ultimately conceded was inadmissible.¹⁹³ On cross-examination, Darby admitted that he based this opinion on the fact Rose signed the Asset Transaction on behalf of PEOC and POT. The Trustee saw no reason to consider anything else.¹⁹⁴ It did not understand that, as trustee for POT, PEOC had to sign for POT.¹⁹⁵

143. In contrast, during the brief cross-examination of Rose, Trustee counsel stated that "... in order to understand exactly what [Rose] considered and how she decided to proceed, I need to understand what she had in mind and why she believed this was a good transaction, a good deal for PEOC."¹⁹⁶ Rose addressed the Trustee's questions in that regard, stating without challenge that she had considered the Asset Transaction to be in the best interests of PEOC in light of all the circumstances.¹⁹⁷ For example:

Q. Okay. You say that you took your responsibilities as a director of PEOC seriously. You were also a director of Perpetual, as you said earlier, and I assume you took your responsibilities as the director of Perpetual just as seriously; correct?

¹⁹⁰ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A1100, 90/1-11.

¹⁹¹ AEKE, Volume 2 (Affidavit of Mark Schweitzer) at A0211, para 17; AEKE, Volume 2 (Affidavit of Susan Riddell Rose) at A0233, paras 17-19; A0235, paras 30-4; and A0236-7, paras 39(b-c).

¹⁹² AEKE, Volume 1 (Affidavit of Paul Darby) at A009, paras 48-51.

¹⁹³ Trustee's Answers at Question No. 10(a) [**Appendix 2**].

¹⁹⁴ AEKE, Volume 5 (Cross-Examination of Paul Darby) at A0951, 73/1-1, A0968, 90/1-23; Proceeding Transcript (July 28, 2020) at 79/1-82/39 [**Appendix 9**].

¹⁹⁵ See AEKE, Volume 1 (Affidavit of Paul Darby) at A0079, Schedule "A" - Asset Purchase Agreement Signature Page.

¹⁹⁶ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1027-8, 17/24-18/1; See also: Appeal Record, Volume 2, [Proceeding Transcript, November 8, 2018 at 83/28-33] at 085.

¹⁹⁷ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1020-1, 10/15-11/14, A1041-2, 31/20-32/3, A1071-2, 61/11-62/5, A1075-6, 65/14-66/7.

A. Mm-hm. Yes.¹⁹⁸

[...]

MR. DE WAAL: Paragraph 80 [of the Rose affidavit], yes.

[...]

A. Yes. So I would have considered all the stakeholders. I mean, the stakeholders of PEOC included [PEI], you know, employees, other – all sorts of people that would have been considered stakeholders, I guess, of this transaction.

Q. ... Did you consider Kailas to be a stakeholder?

A. ... I mean, they were definitely a stakeholder. Was I – was I confident what Kailas was actually acquiring was going to be something that was good for them? We negotiated the [Aggregate Transaction] in a – in a very thoughtful way, and they had a lot of opportunity to prosper if their business plan worked out in the environment that they found themselves in actually was as they postulated. And, you know, so I think I – you know, whether they were a stakeholder or not, I think I was quite happy for them to do this transaction.

Q. Did you consider Kailas to be a stakeholder of PEOC when you decided to sign the share – the asset purchase agreement?

A. I think I would have considered them to be a stakeholder, yes, because they were really directing the transaction through the share purchase agreement.¹⁹⁹

[...]

Q. You were involved in the asset purchase transaction because POT, as the seller of these assets, were selling assets to PEOC. And as I read paragraph 54 of your affidavit, you were not involved in the ...

-- the asset transaction on behalf of PEOC as purchaser of these assets?

A. I think only in the capacity of being comfortable that the asset transaction was positive for PEOC.

Q. Oh, you took that into account? You considered that?

A. I think I did already tell you that I believe that the transaction in its whole, the [Aggregate Transaction], was positive on both sides. It was a win-win for the business strategies that we had.

Q. But when you say –

A. So the inference of that would be that would be okay for PEOC as well.²⁰⁰

[...]

Q. Maybe I should ask you this: Who was making sure that the asset purchase agreement was in the best interests of PEOC in these discussions?

A. At that point in time, PEOC was the trustee of POT. And so our team would have been working to make sure that that was being looked after. I think I've already referenced that I believed that the [Aggregate Transaction] was a good one for 198, and,

¹⁹⁸ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1064-5, 54/27- 55/5, A1069, 59/1-14, A1084-5, 74/23-75/10, A1086, 76/18-22, A1089, 79/2-11.

¹⁹⁹ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1069-70, 59/5-60/7.

²⁰⁰ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1075-6, 65/14-66/4.

you know, implicitly, that means that – and also believed it was a good arrangement for PEOC going forward.

Q. Are you saying it was a good arrangement for PEOC going forward because it was a good deal for 198?

A. I'm saying that with the business plan that PEOC was moving into, PEOC was going to be well suited to execute the business plan. [Emphasis added.]²⁰¹

144. The Trustee's submission that the "Asset Transaction was highly beneficial to the Perpetual Defendants but disastrous for PEOC"²⁰² is manifestly wrong. First, the only thing effected by the Asset Transaction was the combination of the legal and beneficial interests in the Goodyear Assets in PEOC. How is that a disaster? No person and no business entity lost money as a result. Second, rather than being disastrous for PEOC, the combination made PEOC an attractive buy for Kailas. Third, the bankruptcy of PEOC (by then called Sequoia) occurred nearly 18 months after the Asset Transaction and as a consequence of events that had nothing to do with the Asset Transaction. The Trustee's implicit assertion that PEOC was destined to fail is entirely unsupported.

145. Put another way, if Sequoia's business plan had succeeded, the Trustee would have no claim. If so, how does the failure of Sequoia's business plan, after 18 months of management by Sequoia's new directors and material changes to the natural gas price environment, create a cause of action against Rose?

146. Notably, after all the evidence was in and the parties' submissions concluded, the Court asked the Trustee to articulate the duties alleged to have been breached by Rose. All that the Trustee could do was to repeat verbatim the bare allegations in its Statement of Claim.²⁰³ The Trustee had no answer.

Ground 5: The Court was Right to Strike the Oppression Claim²⁰⁴

147. As set out above, on the face of the Statement of Claim, the Trustee did not have authority under the BIA to advance individual creditor claims, and it did not qualify as a complainant to advance creditor-based oppression claims regarding the unspecified interests of the unidentified municipalities or the AER.

²⁰¹ AEKE, Volume 6 (Cross-Examination of Susan Riddell Rose) at A1084-6, 74/23-76/23; A1089, 79/2-10.

²⁰² PWC Factum at para 90.2.

²⁰³ Trustee's Answers at Question No. 23 [BOA, Tab 2].

²⁰⁴ PWC Factum at paras 121-144.

148. The Trustee argues the trial judge failed to assume alleged facts to be true²⁰⁵, but does not identify the facts. On the face of the Statement of Claim, there is no oppression claim of any kind because the claims are individual and there are no allegations of a breach of reasonable expectations. At most, the creditor claims would be debt claims. Moreover, as a matter of law, the AER could not have been a creditor at the time.

149. The Trustee argues that the trial judge improperly began his analysis by considering a public report of the ERCB and a public 1990 industry task force report.²⁰⁶ In light of the Trustee's pleading of the significance of ARO, the trial judge rightly considered the scope of the oppression remedy in the context of Alberta's regulatory regime.²⁰⁷

150. The Trustee argues that by simply alleging that the Asset Transaction left PEOC unable to pay unidentified municipal tax liabilities,²⁰⁸ "this is sufficient to satisfy the '*Hordo* Factors'."²⁰⁹ This argument exposes a key weakness in the Trustee's case: *Hordo*, along with numerous other authorities cited in support of the Trustee's oppression claim, are either distinguishable or of no assistance to the Trustee.

151. *Hordo* concerned a claim by Royal Trust against Hordo and his spouse on a promissory note. Hordo constructed an elaborate defence and counterclaim, and moved under Ontario's oppression provisions for the appointment of a receiver and other extraordinary remedies. The basis of the motion was newspaper articles. It was also disclosed that Hordo had only recently purchased \$65 in Royal Trust shares. Justice Farley struck portions of Hordo's affidavit, and found that, at best, Hordo had a contingent claim against Royal Trust and was not a creditor.²¹⁰ He found that creditors should not be granted standing as complainants "where the creditor is not in a position analogous to that of the minority shareholder and has no 'particular legitimate interest in the manner in which the affairs of the company are managed'."²¹¹ Further, a party that does qualify as a complainant must have so qualified at the time of the actions complained of.²¹²

²⁰⁵ PWC Factum at paras 123-6.

²⁰⁶ PWC Factum at paras 127-129.

²⁰⁷ Reasons at paras 120-5 [Appendix 1].

²⁰⁸ Notably, the Trustee's allegation is preposterous anyway: the record is clear that PEOC was *already*, before the Asset Transaction occurred, the taxpayer in respect of municipal taxes on the Goodyear Assets. AEKE, Volume 6, (Cross-Examination of Susan Riddell Rose), A1016, 6/12-27. The Trustee has never explained how it thinks the *Asset Transaction* rendered PEOC liable for the payment of municipal taxes that were already billed to it before the transaction occurred.

²⁰⁹ PWC Factum at para 134.

²¹⁰ *Hordo* at paras 11 and 15 [BOA, Tab 14].

²¹¹ *Hordo* at para 14 [BOA, Tab 14].

²¹² *Hordo* at para 13 [BOA, Tab 14].

152. The Trustee cites *Gestion*²¹³ in which the Court found that the plaintiffs qualified as a creditor complainant because they had been pursuing relief against the defendant when the defendant transferred assets out of their reach to avoid judgment. The Court found that they “were much more than holders of a speculative claim to become creditors in the future.”²¹⁴

153. The Trustee also cites *Downtown Eatery*²¹⁵, which concerned a claim by a former employee who was unable to collect on a judgment against his employer. He then sued related companies on the basis of the “common employer doctrine”, and sued two directors for oppression. He succeeded in the former. The Court also granted the oppression claim, finding that the directors had caused the judgment debtor company to cease business and to transfer its assets to related companies in the face of the trial to defeat judgment.²¹⁶

Ground 6: “Public Policy” and “Statutory Illegality” Claims²¹⁷

154. Rose adopts the submissions of the Perpetual Defendants regarding the Trustee’s claims based on “public policy” and “statutory illegality”.

155. In respect of these claims, it is important to note Rose was not a party to the Asset Transaction *or* the Aggregate Transaction. Neither the Statement of Claim nor the Trustee’s Factum articulate any theory under which an individual can be liable in relation to transactions entered by corporations.

Ground 7: Claim for Equitable Rescission²¹⁸

156. Rose adopts the submissions of the Perpetual Defendants regarding the Trustee’s claims on equitable rescission.

157. In respect of these claims, it is important to note Rose was not a party to the Asset Transaction *or* the Aggregate Transaction. Irrespective of the Court’s finding on this ground, Rose should not be impacted.

²¹³ *Gestion* [BOA, Tab 28]; BAA, Volume 2, Tab 32.

²¹⁴ *Gestion* at paras 33, 36 and 38 [BOA, Tab 28].

²¹⁵ *Downtown Eatery (1993) Ltd. v Ontario*, 200 DLR (4th) 289 BAA, 2001 CanLII 8538 [Downtown Eatery] [BOA, Tab 62]; Volume 2, Tab 33.

²¹⁶ *Downtown Eatery* at paras 60-2 [BOA, Tab 62].

²¹⁷ PWC Factum at paras 145-161.

²¹⁸ PWC Factum at paras 162 – 171.

PART 5 – CONCLUSION

158. For the reasons set out herein, Rose respectfully asks that the appeal of the Trustee be dismissed, with costs.

Counsel estimates the length of argument will not exceed 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF SEPTEMBER 2020

Norton Rose Fulbright Canada LLP

“Steven Leitzl”

Steven H. Leitzl, QC | Gunnar Benediktsson
Counsel for Susan Riddell Rose

Table of Authorities

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| 1. | <i>Motkoski Holdings Ltd v Yellowhead (County)</i> | 2010 ABCA 72 |
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| 5. | <i>Piikani Nation v Piikani Energy Corp</i> | 2013 ABCA 293 |
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| 10. | <i>Dylex Ltd (Trustee of) v Anderson</i> | 2003 CarswellOnt 819 |
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| 19. | <i>Trillium Computer Resources Inc v Taiwan Connection Inc</i> | [1992] O.J. No. 2175 |
| 20. | <i>First Edmonton Place Ltd v 315888 Alberta Ltd</i> | 1988 CarswellAlta 103 |
| 21. | <i>The Investment Administration Solutions Inc v Pro-Financial Asset Management Inc</i> | 2018 ONSC 1220 |
| 22. | <i>Apotex Inc v Laboratoires Fournier SA</i> | 2006 CarswellOnt 7164 |
| 23. | <i>JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd</i> | 2008 ONCA 183 |
| 24. | <i>Peoples Department Stores Ltd (1992) Inc Re</i> | 2004 SCC 68, 2004 CSC 68 |
| 25. | <i>Wilson v Alharayeri</i> | 2017 CSC 39 |
| 26. | <i>Mackenzie v Craig</i> | 1999 ABCA 84 |
| 27. | <i>BCE Inc Re</i> | 2008 SCC 69 |
| 28. | <i>Gestion Trans-Tek Inc v Shipment Systems Strategies Ltd</i> | 2001 CarswellOnt 4270 |
| 29. | <i>Budd v Gentra Inc</i> | 1998 CarswellOnt 3069 |
| 30. | <i>Mudrick Capital Management LP v Wright</i> | 2019 ABQB 662 |
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| 34. | <i>Toscana Ventures Inc v Sundance Plumbing Gas And Heating Ltd</i> | 2013 ABQB 289 |
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| 45. | <i>Buckerfields Ltd v Minister of National Revenue (Appendix 18)</i> | 1964 CarswellNat 351 |
| 46. | <i>Silicon Graphics Ltd v R</i> | 2002 FCA 260 |
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| 48. | <i>Hogarth v Rocky Mountain Slate Inc</i> | 2013 ABCA 57 |
| 49. | <i>Blacklaws v 470433 Alberta Ltd</i> | 2000 ABCA 175 |
| 50. | <i>Greenlight Capital Inc v Stronach</i> | 2006 CarswellOnt 6719 |
| 51. | <i>Tongue v Vencap Equities Alberta Ltd</i> | 1994 CarswellAlta 35 |
| 52. | <i>Bailey v Temple</i> | 2020 NLCA 3 |
| 53. | <i>Van Hooydonk v. Jonker</i> | 2009ABQB 8 |
| 54. | <i>McCallum v. Jackson</i> | 2019 ONSC 7077 |
| 55. | <i>Tarrant v Sphere Energy Corp</i> | 2018 ABQB 492 |
| 56. | <i>Montor Business Corporation v. Goldfinger</i> | 2016 ONCA 406 |
| 57. | <i>Kerzner v. American Iron & Metal Company Inc.</i> | 2018 ONCA 989 |
| 58. | <i>McKay-Cocker Construction Ltd. v. McMurdo (Appendix 19)</i> | 2001 CarswellOnt 3833 |
| 59. | <i>Tran v Kerr</i> | 2014 ABCA 350 |
| 60. | <i>Rhône v. Peter A.B. Widener (Appendix 20)</i> | 1993 CarswellNat 1888 |
| 61. | <i>R. v. Walle</i> | 2007 ABCA 333 |
| 62. | <i>Downtown Eatery (1993) Ltd. v. Ontario</i> | [2001] O.J. No. 1879 |

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| 3 | Brief of the Respondent PriceWaterhouseCoopers Inc., Lit (November 8, 2018) |
| 4 | Proceeding Transcript (August 30, 2018) |
| 5 | Proceeding Transcript (February 14, 2020) |
| 6 | Submission of Susan Riddell Rose (February 4, 2020) |
| 7 | Proceeding Transcript (August 26, 2020) |
| 8 | Submission of the Respondent PricewaterhouseCooper Inc. Lit, regarding the Order arising from the Reasons for Judgement of Mr. Justice D.B. Nixon (February 7, 2020) |
| 9 | Proceeding Transcript (July 28, 2020) |
| 10 | Order [Procedural Matters and Sequencing of Applications] (August 30, 2018) |
| 11 | Proceeding Transcript (December 17, 2018) |
| 12 | Order of Justice Nixon dated August 15, 2019 (filed February 18, 2020) |
| 13 | Submission of Susan Riddell Rose (February 10, 2020) |
| 21 | Written Judgement of Justice Nixon for Costs (September 24, 2020) |

Court of Queen’s Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABQB 6

Date: 20200113
Docket: 1801 10960
Registry: 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

**Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon**

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I. Introduction

[1] A summary of my decision in this case was given orally on Thursday, August 15, 2019 from the bench. I advised the parties that I would be issuing written reasons. The detailed reasons and conclusions are provided below. If there are any discrepancies between the brief oral reasons provided and this written decision, this written decision takes precedence.

[2] The Applicant, PriceWaterhouseCoopers Inc, is the trustee in bankruptcy (the “**Trustee**” or “**PWC**”) of the Estate of Sequoia Resources Corp (“**Sequoia Resources**”). Sequoia Resources was formerly known as Perpetual Energy Operating Corp (“**PEOC**”).

[3] The Trustee commenced an action by way of a Statement of Claim (the “**Trustee SOC**”). The Trustee seeks an order declaring a particular sale of assets (the “**Asset Transaction**”) void as against the Trustee. Alternatively, the Trustee seeks judgment for an amount not less than \$217,570,800 based on the application of section 96(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[4] The Defendants to the Trustee SOC are Perpetual Energy Inc (“**Perpetual Energy**”), Perpetual Operating Trust (“**POT**”) and Perpetual Operating Corp (“**POC**”) (collectively, the “**Perpetual Energy Defendants**”) and Ms. Susan Riddell Rose (“**Ms. Rose**”).

II. Issues

[5] I have framed the issues as follows.

- A. Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA* (the "**BIA Claim**")?
- B. Is the Trustee a "complainant" that is entitled to bring an oppression claim under section 242 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 [*ABCA*] (the "**Oppression Claim**")?
- C. Should the claim by the Trustee for relief on the grounds of public policy, statutory illegality, and equitable rescission be struck (the "**Public Policy Claim**")?
- D. Is the release a complete bar to the claims against Ms. Rose (the "**Release Issue**")?
- E. Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction ("**Director Claim**")?

III. Facts

[6] Perpetual Energy is a public company. It holds all of the shares in PEOC, and is the sole beneficiary of the POT.

[7] Ms. Rose was a director and shareholder of Perpetual Energy. Prior to October 1, 2016, she was also the sole director of PEOC.

[8] PEOC was the trustee of POT until October 1, 2016. Prior to that date, PEOC had no assets or operations, and existed solely to act as the trustee for POT.

[9] POT held a beneficial interest in various oil and gas properties and related assets (the "**Trust Assets**"). A subset of the Trust Assets included a large number of gas wells as well as certain other properties in Alberta identified for disposition (collectively, the "**Goodyear Assets**").

[10] In its capacity as trustee for POT, PEOC held the legal interests and licenses for the Goodyear Assets.

[11] During the first six months of 2016, Perpetual Energy decided to sell the Goodyear Assets. It solicited over ten potential third party buyers in respect of the Goodyear Assets.

[12] Confidentiality agreements were entered into with four parties concerning the Goodyear Assets. Those confidentiality agreements permitted the third parties to conduct due diligence, and review the information in the data room established by Perpetual Energy.

[13] Perpetual Energy provided multiple presentations to prospective purchasers. These presentations included: (i) the analysis of recently implemented operating models; (ii) a system of abandonment and reclamation activities and results; and (iii) workover, recompletion and drilling opportunities with respect to the Goodyear Assets.

[14] Perpetual Energy and Kailas Capital Corp (“**Kailas Capital**”) entered into a letter of intent dated July 7, 2016 (the “**Kailas LOI**”). The Kailas LOI was non-binding, and was issued by Kailas Capital to Perpetual Energy. Kailas Capital incorporated 1986114 Alberta Inc (“**198Co**”) to effect its business strategy.

[15] The Kailas LOI informed Perpetual Energy that Kailas Capital had participated in numerous successful transactions in Canada over the past 12 months, and that it managed producing energy assets in Canada.

[16] The Kailas LOI also stated that Kailas Capital desired to minimize commodity price risk. Consistent with that expressed desire, the Kailas LOI stipulated that concurrent with the signing of the “Definitive Agreement”, Perpetual Energy would enter into commodity price risk management contract to secure price protection (the “**Gas Marketing Contract**”).

[17] The sale of the Goodyear Assets from Perpetual Energy to Kailas Capital was effected through the following steps (collectively, the “**Aggregate Transaction**”):

- (a) POT sold its beneficial interest in the Goodyear Assets to PEOC in the Asset Transaction. This step was effected through an asset purchase agreement dated October 1, 2016 (the “**Asset Purchase Agreement**”). The Asset Purchase Agreement caused the legal and beneficial interest in the Goodyear Assets to be combined in PEOC.
- (b) Except for a 1% interest in the legal title to four East Edson wells (the “**Retained Assets**”), PEOC transferred legal title to all the remaining POT assets to POC. This transaction was effected because POC was the new trustee for POT.
- (c) Perpetual Energy sold all of the shares in PEOC to 198Co (the “**Share Transaction**”). The Share Transaction was effected through a share purchase and sale agreement dated September 26, 2016 (the “**Share Purchase Agreement**”).
- (d) Rose resigned as the sole director of PEOC.
- (e) PEOC changed its name to “Sequoia Resources Corp” (“**Sequoia Resources**”).
- (f) POC requested the transfer of the Retained Assets.

[18] The Aggregate Transaction was completed on October 1, 2016. In the course of the Aggregate Transaction, the “Resignation & Mutual Release” was negotiated and signed by the parties (the “**Release**”).

[19] During the 17 months following the Aggregate Transaction, Sequoia Resources (formerly PEOC) operated the Goodyear Assets. In a public letter to its stakeholders issued in March 2018, Sequoia Resources reported that during the first 11 months of operations after October 1, 2016, the corporation steadily increase its production and reduced its overall environmental liabilities. In that same letter, Sequoia Resources also reported that it ranked fifth in the Province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017.

[20] On March 23, 2018, PWC was appointed the Trustee in Bankruptcy of PEOC, being the date on which the corporation assigned itself into bankruptcy.

IV. The Pleadings

[21] The Trustee filed the Trustee SOC on August 2, 2018. On that same date, the Trustee filed an application for relief (the “**Trustee Application**”) and the affidavit of Mr. Paul J. Darby (the “**Darby Affidavit**”). The relief sought in the Trustee Application paralleled the relief sought in the Trustee SOC.

[22] The claims in the Trustee SOC are grounded on four approaches: (i) An alleged transfer at undervalue, which the Trustee asserts violated section 96 of the *BIA*. This is the *BIA* Claim. (ii) The alleged application of the oppression provisions of the *ABCA*. This is the Oppression Claim. (iii) An alleged violation of public policy, statutory illegality and equitable grounds. This is the Public Policy Claim. (iv) An alleged breach by Ms. Rose of her duties as the sole director of PEOC at the time of the Asset Transaction. This is a combination of the Release Issue and the Director Claim described above (collectively, the “**Breach Claim**”).

[23] The Defendants filed two separate Statements of Defence. One Statement of Defence was filed by the Perpetual Energy Defendants. The other Statement of Defence was filed by Ms. Rose.

[24] The Defendants also filed four applications (collectively, the “**Defendants’ Applications**”), two of which were “Stay Applications”. The other two were “Summary Dismissal and Strike Applications” (collectively, the “**Summary Dismissal Applications**”).

V. Remedies Sought by the Defendants

[25] The parties agreed that the Summary Dismissal Applications filed by the Defendants would be heard before the Trustee Application. Concerning the Stay Applications filed by the Defendants, they were to be addressed only if any of the Trustee’s claims survived the Summary Dismissal Applications.

[26] The Defendants seek remedies under two different provisions of the *Alberta Rules of Court*, AR 124/2010 (the “**Rule**” or “**Rules**”). In numerical sequence, those provisions are as follows.

- a. Pursuant to Rule 3.68, the Defendants seek to strike various claims made by the Trustee.
- b. Pursuant to Rule 7.3, the Defendants seek to summarily dismiss various claims made by the Trustee.

[27] I first review the law concerning the striking of pleadings, including the limits of Rule 3.68(3), followed by a review of the current state of the law concerning summary dismissals. This is necessary because of the recent judicial developments emanating from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 [*Weir-Jones*].

A. Striking Pleadings

1. Background

[28] Striking claims that disclose no reasonable prospect of success is a valuable housekeeping measure. Striking claims in appropriate circumstances is essential to effective and fair litigation. It unclutters proceedings and weeds out hopeless claims. It also provides claims that have some chance of success a better opportunity to go on to trial on a timely basis: *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 19 and 20 [*Knight*].

[29] Striking claims is also consistent with the underlying philosophy of the Rules. That philosophy is to identify the real issues, and to facilitate the quickest means of resolving a claim at the least expense: *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 7 [*Grenon*].

[30] In summary, striking claims promotes litigation efficiency, reduces time and cost, and contributes to justice by permitting all stakeholders to focus on the serious claims: *Knight* at para 20. Notwithstanding the attractiveness of Rule 3.68, it is applied sparingly. It is often misused to strike out claims that are only probably bad, but not certainly bad: William A Stevenson & Jean , *Alberta Civil Procedure Handbook*, 2019 ed by Jean E Côté, F F Slatter & Vivian Stevenson (Edmonton: Juriliber, 2019) vol 1 [*Stevenson & Côté 2019*] at 3-123.

2. The Law

[31] The Rules provide that a claim or part of a claim may be struck if it discloses no reasonable claim: r 3.68. The relevant provisions of the Rules read as follows:

Court Options to Deal With Significant Deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;
- (b) that a commencement document or pleading be amended or set aside;
- (c) that judgment or an order be entered;
- (d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following: ...

- (b) a commencement document or pleading discloses no reasonable claim or defence to a claim; ...

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

[32] When considering an application under Rule 3.68(2)(b), “the Court must accept the allegations of fact as true except to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof”: *Grenon* at para 6. In other words, the decision must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application; and

(ii) the applicable statutory and common law: *HOOPP Realty Inc v Guarantee Co of North America*, 2015 ABCA 336 [*HOOPP Realty*] at para 25, Wakeling JA, concurring.

[33] In the course of assessing the application of Rule 3.68(3), the following judicial guidelines should be considered:

- a. A Chambers Judge may consider “the content of any document referred to in a statement of claim because it is part of the statement of claim”: *HOOPP Realty* at footnote 5, Wakeling JA, concurring.
- b. A Chambers Judge “must ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff’s prospects of success are extremely low”: *HOOPP Realty* at footnote 8, Wakeling JA, concurring.
- c. A Chambers Judge may consider “the underlying litigation context of a claim, even one which does not give rise to a novel cause of action”: *HOOPP Realty* at para 19. On this particular point, the majority in *HOOPP Realty* suggest that the Court may go “outside the contents of the Amended Statement of Claim”, albeit short of evidence. The debate in *HOOPP Realty* was whether it was open to the chambers judge to consider the fact that the principal debtor in another case had been released from its obligations to HOOPP, as had been confirmed in 2014 ABCA 20. At footnote 4, Wakeling JA is more categorical, and states that “[n]o other facts may be introduced by way of affidavits or judicial notice”.
- d. A Chambers Judge may consider a range of factors when considering the test for striking pleadings: *O’Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140 at para 16. The factors that can be considered include the clarity of the factual pleadings and the case law.

[34] The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action is not absolute. Judicial comments in this regard are as follows:

- a. The Supreme Court of Canada has stated that the rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true: *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 27. The Supreme Court in that case went on to state that “[t]he very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven”: *Operation Dismantle* at para 27.
- b. The Court of Queen’s Bench of Alberta has stated that types of “[a]llegations that are not assumed to be true include those based purely on assumptions and speculation and those that are incapable of proof”: *PR Construction Ltd v Colony Management Inc*, 2017 ABQB 600 at para 29.

- c. In the context of considering Rule 9-5(1) of the B.C. Supreme Court Civil Rules (which parallels Rule 3.68), the Supreme Court in that province stated that when determining "... whether it is plain and obvious the statement of claim does not disclose a reasonable cause of action ..., facts are considered true; assumptions and speculations are not": *McGregor v Holyrood Manor*, 2014 BCSC 679 at para 10; see also *Honborg v Private Career Training Institutions Agency*, 2015 BCSC 695 at para 32; *Dempsey v Envision Credit Union*, 2006 BCSC 750 at para 7; and *McDaniel v McDaniel*, 2009 BCCA 53 at para 22.
- d. Courts have expressed the need for caution on this point. For example, the B.C. Court of Appeal has stated that great caution must be taken in relying on *Operation Dismantle* as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind: *Young v Borzoni*, 2007 BCCA 16 at para 30. Notwithstanding that caution, the B.C. Court of Appeal went on to state that its consideration of the authorities led it "... to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases": *Borzoni* at para 30. It drew this inference "...from the statement of Estey J in *Operation Dismantle* that the 'rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven'": *Borzoni* at para 30.
- e. This entitlement to look behind the allegations was also endorsed in a 1985 BC Supreme Court decision, where the following comment was made – "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure": *Rogers v Bank of Montreal* (1985), 64 BCLR 63 (SC) at 192.
- f. The Court of Queen's Bench of Alberta has also stated that an exception exists where the facts pleaded are absurd, highly implausible or are considered bald allegations: *Arabi v Alberta*, 2014 ABQB 295 at paras 72-75.

[35] Another instructive comment is from Master Schlosser. In his view, *HOOPP Realty* confirms that there is no simple bright line for the material that can be used in support of an application to strike under Rule 3.68(2)(b): *McDonald & Bychkowski Ltd v Lougheed*, 2015 ABQB 792 at para 15. Materials are to be considered on a case-by-case basis. After considering the matter, Master Schlosser determined that the pleadings from another action (the *Bhasin* pleadings) fall into the category of acceptable materials permitted by *HOOPP Realty* because the subject pleadings were not in the nature of evidence: *McDonald* at para 15.

[36] In summary, the judicial guidelines indicate that it is appropriate to consider the circumstances, litigation history and allegations in a particular case, and to subject assumptions and speculations to skeptical analysis: *Borzoni* at para 31. In contrast to facts, assumptions and speculations are not considered true. That said, seldom will a party seek to strike a pleading based on a fatal flaw in the pleading pursuant to Rule 3.68; rather, an application for summary judgment may proceed instead. However, if there is an abuse of process or no cause of action, Rule 3.68 may apply and is often used.

B. Summary Judgment

1. Background

[37] Summary judgment applications are a valid means to adjudicate and resolve legal disputes: *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] at para 36. The Supreme Court of Canada has directed that summary judgment motions be used more robustly by the courts because they are a less expensive, more expeditious way to determine actions: *Hryniak* at paras 4 and 67.

[38] The Alberta Court of Appeal has further directed that Courts in this province may summarily dismiss a case where there is no genuine issue requiring a trial. In particular, no trial is required where a judge is able to reach a fair and just determination on the merits of a motion for summary dismissal: *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 at para 13. This will be the case when the process:

- a. allows the judge to make the necessary findings of fact;
 - b. allows the judge to apply the law to the facts; and
 - c. is a proportionate, more expeditious and less expensive means to achieve a just result.
- (see *Hryniak* at para 49)

2. The Law

[39] Summary dismissal applications are permitted under Rule 7.3. That Rule reads as follows:

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- a) there is no defence to a claim or part of it;
- b) there is no merit to a claim or part of it;
- c) the only real issue is the amount to be awarded.

[40] For purposes of this case, the relevant provision is Rule 7.3(1)(b). For the Defendants to be successful under that Rule, they need to establish that there is no merit to the particular claim or part of it.

[41] While the persuasive burden is initially on the applicant, once that burden is satisfied the persuasive burden shifts to the respondent: *Wood Buffalo Housing & Development Corp v Flett*, 2014 ABQB 537 at para 33.

[42] As a matter of process, parties to a summary dismissal application are expected to put their “best foot forward”. That being the case, gaps in the record will not necessarily prevent summary disposition: *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at para 12.

[43] In recent years, the Alberta Court of Appeal had applied two different tests concerning the level of proof necessary to succeed on a summary dismissal application. That Court recently addressed this rift and clearly set out the applicable test in *Weir-Jones v Purolator Courier*,

2019 ABCA 49 [*Weir-Jones*]. The Alberta Court of Appeal also outlined how Rule 7.3(1)(b) was to be applied to determine whether there is no merit to a claim or part of it.

[44] In addressing the application of Rule 7.3(1)(b), the Court of Appeal emphasized that a determination under Rule 7.3(1)(b) is not a result of a summary trial. It is a matter of summary judgment. In that regard, a summary judgment process is not to be construed as being on the summary trial process continuum: *Weir-Jones* at para 19. To underscore the point, the Alberta Court of Appeal stated that summary judgment “is a way of resolving disputes *without* a trial; a summary trial *is* a trial”: *Weir-Jones* at para 18 (emphasis in original). Witnesses may give oral evidence at a summary trial; an application proceeds on affidavit evidence and transcripts of any cross examinations. In the course of its commentary, the Court of Appeal at para 21 reiterated that the three-part test in *Hyrniak* set out above is the correct analytical approach for when summary judgment may be appropriate: see *Hyrniak* at para 49.

[45] With respect to assessing the facts when applying the *Hyrniak* test, the Alberta Court of Appeal directed that a judge can make findings of fact if the record permits that to be done, when viewed from an overall perspective: *Weir-Jones* at para 38. Further, that Court indicated that a judge may draw inferences as necessary, and need not restrict themselves only to cases where the facts are not in dispute.

[46] In connection with that judicial guideline, a plaintiff cannot resist summary dismissal merely by raising a “doubt”: *Stefanyk* at para 16. That said, the Alberta Court of Appeal provided caution on a couple of fronts. First, it stated that for a matter to be appropriate for summary judgment, there ought not to be a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. Second, the presiding judge must consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily: *Weir-Jones* at para 34.

[47] Summary judgment also may be granted where, “even if the facts asserted by the resisting party were true, they would not support that party’s claim”: *Weir-Jones* at para 38.

[48] In terms of the standard of proof, the moving party must begin by proving the factual basis of the application on the balance of probabilities: *Weir-Jones* at paras 30 and 33. Once that has occurred, the presiding judge must be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial: *Weir-Jones* at para 30. In short:

[t]he moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden...: *Weir-Jones* at para 35.

[49] In this regard, it is important to note that summary judgment cannot be resisted merely by speculating as to what may arise at trial: *Weir-Jones* at paras 37 and 39.

[50] Summary judgment also may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: *Weir-Jones* at para 21. In general, the

sufficiency of the record will depend on the nature of the issues, the source and continuity of the evidence, and other relevant considerations: *Weir-Jones* at para 36.

[51] In any event, the presiding judge retains the discretion to send a matter to trial if that is necessary to achieve a just result. However, doing so should not be used as a pretext to avoid resolving the dispute when possible: *Weir-Jones* at para 21.

[52] Notwithstanding the above comments, a trial may be necessary in the following circumstances.

- a. Where there is a dispute on material facts, or one depending on issues of credibility: *Weir-Jones* at para 35.
- b. Where there is a realistic prospect that a trial will create a better record: *Weir-Jones* at para 39.
- c. Where the factual issues are sufficiently complicated that a trial is appropriate: *Weir-Jones* at para 45.

[53] The question is whether a trial is required as a matter of fairness. In addressing that question, the judge must recognize that there is “no right to take an unmeritorious claim to trial”: *Weir-Jones* at paras 42 and 46. Where the defendant can show that a claim does not have merit, it should not have to suffer a trial: *Weir-Jones* at para 43.

[54] In *Weir-Jones*, the Court of Appeal summarized the application of the principles as follows at paragraph 47:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level, the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

VI. Analysis

A. *BIA* Claim – Was the Asset Transaction an arm’s length transfer for purposes of section 96(1) of the *BIA*?

1. Incremental Facts and Context

[55] Kailas Capital was incorporated in Alberta. The voting shares of that corporation are owned 50% by Mr. Hao Wang and 50% by Mr. Wentao Yang. Those two individuals are the only directors of the corporation. I infer from the evidence before me that each of Mr. Wang and Mr. Yang are at arm’s length with all members of the Perpetual Energy group of entities and Ms. Rose.

[56] Kailas Capital initiated an offer to purchase shares of PEOC. That offer was made in the Kailas LOI. That letter stipulated that PEOC was to hold the legal and beneficial interest in the Goodyear Assets.

[57] Separate teams and their respective counsel represented each of the Perpetual Energy group and the Kailas Capital group in the negotiations concerning the Aggregate Transaction (as a whole) and the Asset Purchase Agreement (on its own). (I will refer to these negotiation teams as, the “Vendor Team” and the “Purchaser Team”, respectively.)

[58] The Aggregate Transaction involved multiple steps, all of which were structured in sequence. That sequence occurred on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[59] Concerning the negotiation of the Asset Transaction, the Trustee agreed that Kailas Capital, 198Co, Mr. Wang and Mr. Yang (collectively, the “Kailas Group”) had an “interest” in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised “influence” in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

[60] Perpetual Energy Defendants framed their response to the *BIA* Claim as only involving the question of whether the parties were dealing at arm’s length¹. In particular, the Perpetual Energy Defendants were careful to assert that they were not challenging the “value” issue in respect of their opposition to the *BIA* Claim, apparently on the basis that it was irrelevant to the arm’s length issue.

2. The Law

a. Statutory Framework - The *BIA*

[61] The two relevant statutory provisions in respect of the *BIA* Claim are section 4 and 96 of the *BIA*. The relevant portions of those sections are outlined below.

[62] Section 4 of the *BIA* defines “related persons”, and addresses whether such persons are dealing at arm’s length. It reads, in part, as follows.

¹See paragraph 4(a) of the Application for Summary Dismissal and to Strike filed by Perpetual Energy, POT and POC on October 19, 2018. See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which is categorical in the use of the term “only”.

4 (1) In this section, ...

Definition of *related persons*

(2) For the purposes of this Act, persons are related to each other and are “related persons” if they are ...

(c) two entities

(i) both controlled by the same person or group of persons, ...

Relationships

(3) 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;

...

Question of fact

(4) 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.

Presumptions

(5) 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 the absence of evidence to the contrary*, deemed not to deal with each other at arm’s length.

[Emphasis added.]

[63] Section 96 of the *BIA* addresses “Transfer at undervalue”. It reads, in part, as follows.

96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, ... the trustee—or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor—if

(a) *the party was dealing at arm’s length with the debtor and*

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

...

(b) *the party was not dealing at arm’s length with the debtor and*

...

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event

and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it...

[Emphasis added.]

[64] The “arm’s length” issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Section 96 of the *BIA* is concerned with transfers that are effected at undervalue.

[65] If a transfer was between arm’s length parties and was effected within one year of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(a) of the *BIA*. If a transfer was between non-arm’s length parties and was effected within five years of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(b) of the *BIA*.

[66] Concerning this arm’s length issue, section 4 of the *BIA* outlines the rules as to who is a related party. Generally, persons who are related to each other are deemed not to deal with each other at arm’s length.

[67] Section 4(5) of the *BIA* regarding presumptions was amended a few years ago to make it a rebuttable presumption. Because of its recency, this presumption has not been extensively considered in the context of the *BIA*.

[68] A review of the amendments to section 4(5) of the *BIA* is relevant to the analysis that will be required to address the arm’s length question in this case. Section 4(5) of the *BIA* was amended to make it clear that the rules in the statute that otherwise deem persons to not be dealing with each other at arm’s length can be rebutted in limited circumstances. Section 4(5) of the *BIA* now provides that for the purposes of establishing whether persons are dealing at arm’s length in a transfer at undervalue, persons who are related to each other are, *in the absence of evidence to the contrary*, deemed not to deal with each other at arm’s length.

[69] As a result of the inclusion of the phrase “in the absence of evidence to the contrary” in section 4(5) of the *BIA*, the general presumption that related persons are not dealing with each other at arm’s length may be rebutted. This rebuttable presumption applies to two particular scenarios. One of those scenarios concerns an alleged transfer at undervalue pursuant to section 96(1)(b) of the *BIA*. That legislative change was introduced into section 4(5) of the *BIA* to better ensure that legitimate agreements were not inadvertently captured by the avoidance transaction provisions of the *BIA*. The second scenario, which does not apply here, relates to section 95(1)(b) regarding a payment or obligation allegedly made in favour of a creditor who is not dealing at arm’s length with the insolvent person.

[70] The example used in the legislative commentary that introduced the amended section 4(5) of the *BIA* was an agreement in the family law context. The commentary states that the rebuttable presumption was added to section 4(5) of the *BIA* to ensure that legitimate family law agreements were not inadvertently captured by the avoidance transaction provisions in the *BIA*.

[71] I infer that the example of the agreement in the family law context was used in the legislative commentary because in divorce proceedings the parties bargain keenly, notwithstanding that the *BIA* might otherwise deem those individuals to be related. While the legislative commentary to Bill C-12 used “legitimate family law agreements” as an example, the wording in the amended provisions is not restricted to family circumstances. It is of general application.

b. The Jurisprudence

[72] The Alberta Court of Appeal considered the meaning of the phrase “arm’s length” in the *BIA: Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd*, 2013 ABCA 293 [*Piikani Energy*] at paras 20-23, 26 and 29; see also *Juhasz (Trustee of) v Codeiro*, 2015 ONSC 1781 at paras 38-44. In connection with a review of section 4 of the *BIA*, the Alberta Court of Appeal observed that the phrase “arm’s length” is not defined in the *BIA: Piikani Energy* at para 20.

[73] In circumstances such as this, the jurisprudence under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (“*ITA*”) provides appropriate principles for determining whether two parties deal at arm’s length: *Piikani Energy* at para 21. As a starting point, the definitions of “related persons” and “arm’s length” are either identical or similar as between the *ITA* and the *BIA: Piikani Energy* at para 21. That said, it should be noted that the *ITA* does not contain a provision that parallels the rebuttable presumption provision inherent in section 4(5) of the *BIA*. Notwithstanding that difference, the jurisprudence that has considered the *ITA* provides instructive guidance for purposes of the *BIA*.

[74] The Alberta Court of Appeal has endorsed judicial comments that in choosing to incorporate the term “control” into the *BIA*, Parliament must have intended to adopt the meaning it had in the *ITA* insofar it used almost identical terminology in the *BIA*: see *Duro Lam Ltd v Last*, 1971 2 OR 202, (SCJ) at 385. Our Court of Appeal has applied similar logic to the phrase “arm’s length”: *Piikani Energy* at para 23.

[75] In the course of its analysis, the Court of Appeal in *Piikani Energy* at paras 28-29 considered *Canada v McLarty*, 2008 SCC 26 [*McLarty*]. In *McLarty*, the Supreme Court of Canada discussed the phrase “not dealing at arm’s length” within the meaning of the *ITA*.

[76] The Court of Appeal in *Piiknai* held that the factors the Supreme Court considered in interpreting arm’s length under the *ITA* “provide helpful guidance and apply in the *BIA* context to determine whether, as a question of fact, two parties deal with each other at arm’s length...”: *Piikani* at paras 29-30. I turn to outline those factors, to the extent they may be relevant in this case.

[77] In *McLarty*, Rothstein J commented as follows, at para 43:

43 It has long been established that when parties are not dealing at arm’s length, there is no assurance that the transaction “will reflect ordinary commercial dealing between parties acting in their separate interests” (*Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at p. 1152). ...

[78] Later in the same decision, Rothstein, J continued, at paras 61-62:

61 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.

62 The Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 "Meaning of Arm's Length" (June 8, 2004) sets out an approach to determine whether the parties are dealing at arm's length. Each case will depend on its own facts. However, there are some useful criteria that have been developed and accepted by the courts: see for example *Peter Cundill & Associates Ltd. v. R.*, [1991] 1 C.T.C. 197 (Fed. T.D.), aff'd [1991] 2 C.T.C. 221 (Fed. C.A.). The Bulletin provides:

22. ... By providing general criteria to determine whether there is an arm's length relationship between unrelated persons for a given transaction, it must be recognized that all-encompassing guidelines to cover every situation cannot be supplied. Each particular transaction or series of transactions must be examined on its own merits. The following paragraphs set forth the CRA's general guidelines with some specific comments about certain relationships.

23. The following criteria have generally been used by the courts in determining whether parties to a transaction are not dealing at "arm's length":

- was there a common mind which directs the bargaining for both parties to a transaction;
- were the parties to a transaction acting in concert without separate interests; and
- was there "de facto" control.

[79] While the Supreme Court of Canada acknowledged that the parties in *McLarty* were not related, the analysis of that Court is still instructive because of the consideration that the Supreme Court gave to the arm's length issue in that case. The Supreme Court stated that because the parties were not related, the issue as to whether they were dealing at arm's length was a question of fact: *McLarty* at para 45. That judicial comment is instructive for purposes of the Asset Transaction because of the need to consider the possible application of the rebuttable presumption in section 4(5) of the *BIA*.

[80] In subsequent cases dealing with either the *BIA* or *ITA*, the above analysis concerning what constitutes "arm's length" was been adopted: see *Juhasz; National Telecommunications v Stalt*, 2018 ONSC 1101; and *Montor Business Corp v Goldfinger*, 2016 ONCA 406.

3. Application of the Law to the Facts

[81] Concerning the *BIA* Claim, the primary objective of the Defendants is to seek summary dismissal. In considering the application of summary dismissal to that claim, I am required to

assess whether the Defendants have established that the record makes it possible to resolve the respective disputes on a summary basis.

[82] I must also assess whether the Defendants have demonstrated on the balance of probabilities that, on the facts as proven, there is no merit to the *BIA* Claim. If the Defendants discharge this burden, I must assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the *BIA* Claim. This latter assessment will be based on the nature of the issues, and their merits. Lastly, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the *BIA* Claim: *Geophysical Service Incorporated v Falkland Oil and Gas Limited*, 2019 ABQB 162 at para 40.

[83] The first step in respect of the application of the law to the facts is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. If so, I will address that step in detail. If not, the second step is to determine whether the *BIA* Claim should be struck. If not, then the *BIA* Claim needs to proceed to a regular trial.

[84] Before I address the first step in the analysis, I acknowledge that the non-arm's length issue in respect of the *BIA* Claim arises because Kailas Capital wanted the Goodyear Assets bundled into PEOC. As such, the Asset Transaction was implemented to address the request of the Kailas Group, in its capacity as purchaser. That request was stated in the Kailas LOI.

[85] The Trustee asserts that the Asset Transaction should be viewed in isolation from the other components of the Transaction, and that the parties were not dealing at arm's length. The Trustee does not assert that the Share Transaction was not at arm's length.

[86] The Asset Transaction is an issue in this case because the Trustee SOC alleges that the underlying disposition of property involved circumstances where the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC. The PWC commencement document goes on to assert that the Asset Transaction was entered into between PEOC and POT in circumstances where PEOC, Perpetual Energy, POC, POT and Ms. Rose were not dealing at arm's length with each other within the meaning of the *BIA*.

a. Can the *BIA* Claim be determined on a summary judgment basis?

[87] Given the above context, I turn to consider the first step, which is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. In considering this claim, my sole focus is on the arm's length issue, and not on value.

[88] The reason that I am not considering value is because my focus is dictated by the pleadings, and the relevant provision is clause 4(a) of the Summary Dismissal Application filed by Perpetual Energy. That pleading focuses the challenge of the *BIA* Claim on the arm's length issue.² Indeed, it would be an error of law for me to consider the value issue since that would be

² See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which states that “[t]he first threshold issue addresses only the question of whether the parties were dealing at arm's length” (underlining added). The first threshold issue is referenced in that Brief as the *BIA* claim.

outside the scope of this Application: *Online Constructors Ltd v Speers Constructions Inc*, 2020 ABCA 132 at para 15; see also *Stevenson & Côté 2019* at page 13-23.

[89] This focus on the “arm’s length issue” (and not on “value”) was also emphasized by the Perpetual Energy Defendants during the hearings. This focus away from the value issue was evident in the submissions of Counsel for Perpetual Energy when he asserted:

- a. that *PriceWaterhouseCoopers v Legge*, 2011 NBQB 255 was not good authority. The *Legge* decision states that because the disputed transaction in that case was not at fair market value, it was not at arm’s length;
- b. that focusing on the “consideration” underlying the transaction to answer the “arm’s length” question was wrong;
- c. that the current “evidence” before me concerning value was “highly unreliable”; and
- d. that the “arm’s length” issue could be determined without regard to the consideration (value) exchanged on the deal.

[90] This narrow focus on the “arm’s length” issue made sense at the time that the Perpetual Energy Defendants drafted the Summary Dismissal Application in respect of the *BIA* Claim because they wanted to terminate the *BIA* Claim without getting into the valuation issue. The Perpetual Energy Defendants could have a number of reasons for wanting to avoid the valuation issue, including the fact that if valuation needed to be addressed, *viva voce* evidence likely would be required. If *viva voce* evidence was required, that would preclude a summary dismissal of the *BIA* Claim.

[91] The critical issue at this stage is to determine the nature of the relationship between the key players involved in the Aggregate Transaction. During the negotiation leading up to that transaction, the Vendor Team and the Purchaser Team represented the Perpetual Energy group and the Kailas Group, respectively, in the Aggregate Transaction.

[92] The Aggregate Transaction involved multiple components, all of which were structured in sequence. Although the Asset Purchase Agreement was signed on September 26, 2016, the closing sequence was effected on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[93] Concerning the negotiation of the Asset Transaction, the Trustee agreed that the Kailas Group had an “interest” in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised “influence” in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

[94] The threshold issue in respect of the *BIA* Claim in the context of the Summary Dismissal Application concerns the involvement of the Purchaser Team in respect of the Asset Transaction, in general, and the degree of influence that the Purchaser Team had over PEOC, in particular.

[95] As noted above, the involvement of the Purchaser Team in respect of the Asset Transaction, generally, and the degree of influence that the Purchaser Team had over PEOC, in particular, must be determined. If the Perpetual Energy Defendants provide sufficient evidence to

allow the Court to make the necessary findings on the balance of probabilities, then the rebuttable presumption in section 4(5) of the *BIA* must be considered by the Court in the context of the evidence before it.

[96] In considering the evidence before me, I acknowledge the particulars about the transaction that the Perpetual Energy Defendants emphasized. Those particulars include the emails between the Purchaser Team and the Vendor Team during the course of negotiations.

[97] While that evidence certainly provides a factual basis to support the assertion that the Purchaser Team exercised *de facto* control over PEOC in respect of its purchase of the Goodyear Assets, I am not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily: *Weir-Jones* at para 34. In particular, while I may be able to draw certain inferences, those inferences are not robust enough to permit me to determine on the balance of probabilities that the Purchaser Team established the necessary control over the subject transactions.

[98] Given the importance of that factual issue, I find that the determination of the “arm’s length issue” will turn on the credibility of witnesses who were directly involved in the negotiation of the Asset Transaction, including their alleged control of PEOC. Given the importance of the issue, I have scrutinized the evidence before me with considerable care. I find that the cogency of the evidence does not allow me to conclude that it is more probable than not that the Purchaser Team had the degree of “influence” that would be necessary for me conclude that they exercised the prerequisite control.

[99] Concerning an issue such as this, the totality of the surrounding circumstances should be assessed and weighed as a prerequisite to determining whether the Perpetual Energy Defendants, in their capacity as the moving party, have satisfied the burden of proof. In short, the critical factual evidence pivots on this credibility point, and the inferences that I can draw from the current record are too weak to allow me to draw the necessary conclusions on the balance of probabilities.

[100] While I concede that there is some supporting evidence from the Perpetual Energy Defendants, I find that it should be tested in a *viva voce* context. Further, the “interest” and “influence” of the Kailas Group should be tested in open court so that both (i) the “credibility” of those participants can be assessed, and (ii) the “location” of the alleged arm’s length activities can be determined. I refer to “location” because it is important to consider how, what and when critical steps on the negotiation continuum occurred as between the Vendor Team and the Purchaser Team. In my view, that evidence is necessary before an informed finding can be made on the arm’s length issue.

[101] Given the above facts and analysis, I find that the Perpetual Energy Defendants have not demonstrated on a balance of probabilities that there is no merit to the *BIA* Claim. I make this finding because they rely on witnesses whose credibility must be assessed. Evidence of the witnesses from both the Vendor Team and Purchaser Team needs to be tested in order to establish, on the balance of probabilities, the necessary evidentiary foundation. This assessment occurs as part of the adversarial process, and is necessary in that system. Accordingly, the first step fails with the result that the *BIA* Claim cannot be dismissed on a summary basis.

[102] Again, I emphasize that the above finding is only made on the basis of the arm's length issue, and not on value.

b. Can the *BIA* Claim be struck?

[103] Given the above finding, I now turn to consider whether the record makes it possible to strike the *BIA* Claim under Rule 3.68 on the basis that it discloses no reasonable claim. In considering this question, my sole focus continues to be on the arm's length issue, and not on value.

[104] My narrow focus is based on my understanding of the pleadings concerning the *BIA* Claim and the above noted emphasis by the Perpetual Energy Defendants that the "arm's length" issue should be determined without regard to the consideration (value) exchanged on the deal. As I noted above, the Perpetual Energy Defendants framed the *BIA* Claim so that the underlying issue addressed "...only the question of whether the parties were dealing at arm's length".

[105] As framed, the *BIA* Claim raises an interesting arm's length issue, which involves a mixture of facts, deeming rules and rebuttable presumptions. In the context of the arm's length issue that the Perpetual Energy Defendants are challenging, there is neither a fatal flaw nor an abuse of process. Technically, the arm's length question raises an issue that is worthy of consideration by a Court.

[106] Subject to a comment that I will make below in respect of the Oppression Claim, I find that the Perpetual Energy Defendants have not provided me with the necessary foundation to strike the *BIA* Claim. Accordingly, the *BIA* Claim will not be struck.

4. Conclusion

[107] Concerning the following determinations, I emphasize that they are made on the premise that the sole focus of the *BIA* Claim is on the arm's length issue. To underscore the point, the "arm's length" issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Since the moving parties (the Perpetual Energy Defendants) framed the *BIA* Claim to focus on the arm's length issue, I have not touched on value. I am constrained by the manner in which the issue was framed in the Summary Dismissal Application, as reinforced by the Brief provided by the Perpetual Energy Defendants. That being the case, my only focus under the *BIA* Claim component of the decision is on whether section 96(1)(b) of the *BIA* is displaced because of the arm's length argument advanced by the Perpetual Energy Defendants.

[108] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[109] Given the above facts and analysis, I will not strike the *BIA* Claim.

[110] In making these findings, I am bound to decide the *BIA* claim within the confines of the underlying application: *MNP (Next Friend of) v Bablitz*, 2006 ABCA 245 at para 9 leave to appeal to SCC refused, 31686 (12 April 2001) citing *Rodaro v Royal Bank* (2002), 59 OR (3d) 74 (ONCA) at para 60. I cannot make a decision on an issue that is not pleaded or argued: *Humphries v Lufkin Industries Canada Ltd*, 2011 ABCA 366 at para 49. To do so is an error of law: *Online Constructors* at para 15; see also *Stevenson & Côté 2019*, at page 13-23. While there were good practical reasons for the Perpetual Energy Defendants to confine the *BIA* Claim

to the arm's length issue, I note for the record, without deciding the point, that my findings below in respect of the Oppression Claim may have caused me to arrive at a different conclusion in respect of the *BIA* claim if I had not been restricted to addressing the arm's length issue.

[111] As a final comment, the Trustee argues that the presumption that related parties do not deal at arm's length for the purposes of section 96 of the *BIA* can only be rebutted by proof that the transaction was at fair market value. While I agree that the arm's length issue can be rebutted by proof that the transaction was at fair market value, I do not agree that is the only way it can be rebutted for the purposes of section 96 of the *BIA*. While nothing turns on the point in this decision, I concur with the arguments advanced by the Perpetual Energy Defendants to the effect that section 4(5) of the *BIA* provides a foundation by which to rebut the application of section 96 of the *BIA* independent of proof of fair market value.

B. Oppression Claim – Is the Trustee a “complainant” that is entitled to bring an oppression claim under section 242 of the *ABCA*?

1. Incremental Facts and Context

[112] The handling of environmental regulatory obligations in receivership, bankruptcy and CCAA proceedings has long been challenging. This case exemplifies some of the challenges, including the status of a trustee and creditor to seek corporate remedies.

[113] The principals behind 198Co and Sequoia Resources (formerly named PEOC) took steps between October 1, 2016 and March 23, 2018 (being the date that Sequoia Resources assigned itself into bankruptcy) to pursue a business in respect of the Goodyear Assets. The evidence is that the operational activities of Sequoia Resources during that period of slightly over 17 months included steps to abandon some wells. In contrast, there is no evidence that the Trustee has taken any steps to abandon any PEOC wells.

[114] Amongst other facts, the Trustee SOC includes the following.

- a. The Goodyear Assets had significant associated abandonment and reclamation obligations (“**ARO**”) when PEOC acquired that property in the context of the Asset Transaction: para 5 of the Trustee SOC.
- b. The amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified: para 6.1 of the Trustee SOC.
- c. The Goodyear Assets had significant net liability at the time of the Asset Transaction: para 13 of the Trustee SOC.
- d. The liabilities assumed by PEOC when it acquired the Goodyear Assets were at least \$223,241,000: para 13.1 of the Trustee SOC.
- e. The value of the Goodyear Assets acquired in the Asset Transaction were at most \$5,670,200: para 13.2 of the Trustee SOC.
- f. The Goodyear Assets were high liability assets: para 16.3.1 of the Trustee SOC.
- g. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.

- h. PEOC will suffer costs incurred: (i) until the Goodyear assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.
- i. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242: para 18 of the Trustee SOC.
- j. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[115] The Oppression Claim is plead in three components, contained in paragraphs 18, 19 and 20 of the Trustee SOC. Those three paragraphs are under the heading “Oppression”.

[116] Paragraph 18 of the Trustee SOC states that the Trustee is a “proper complainant” within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute.

[117] The Trustee SOC pleads the Oppression Claim as follows:

19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

19.1 Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors (emphasis added).

[118] The Trustee SOC addresses the “interests of the creditors of PEOC”, and is focused on the ARO and unidentified municipalities. The text reads as follows.

20. As a result of the [Aggregate Transaction] generally, and the Asset Transaction in particular:

20.1 if PEOC was not insolvent, it was rendered insolvent;

20.2 PEOC was liable for, but unable to pay the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*; and

20.3 PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of PEI, POC and [Ms.] Rose personally.

[119] In cross examination on the Darby Affidavit filed by the Trustee, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction.

2. The Policy and The Law

a. The Policy

[120] The issue of who is liable for well abandonment, reclamation, release of substances and contaminated sites, or ARO, is an on-going challenge for the oil and gas industry. It has broad implications, and has been a matter for discussion for many years.

[121] For example, the Energy Resources Conservation Board (“ERCB”) published *Recommendations to Limit the Public Risk from Corporate Insolvencies Involving Inactive Wells* in December 1989. It recommended the primary beneficiaries, or well licensees, should bear responsibility, rather than the working interest owners of the well: N Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (Calgary: University of Calgary, 2000) at 49. The ERCB set out a proposed order as to who would bear the obligation for abandoned wells. Its recommendations were not adopted: Vlavianos at 50.

[122] In response to the ERCB report, representatives of three petroleum industry associations formed a task force that presented its report to the government in December 1990: Vlavianos at 51. The industry task force rejected the ERCB’s proposed order of responsibility. Under the ERCB’s proposal, the original well licensee could potentially be liable for the well indefinitely: Vlavianos at 51. Instead, the industry task force recommended the licensee of record should be liable for abandoned wells, and recommended an abandonment fund be available to cover these costs: Vlavianos at 52. These recommendations were largely adopted in legislative changes in 1994: Vlavianos at 53.

[123] This history illustrates the policy discussions that have been ongoing surrounding liability for abandoned oil and gas wells. The position now advanced by the Trustee is what was advanced by the ERCB, and rejected by the legislature, that the prior licensee should be liable for abandoned wells.

[124] I acknowledge the importance of environmental protection, as well as the need to address who pays to remediate abandoned wells and contaminated sites. That said, the actions of the Trustee pose an interesting question. Should the Trustee be permitted to engage the oppression remedy to challenge the Asset Transaction or ought environmental protection and reclamation be pursued under a position advanced by an appropriate regulatory framework that is developed in conjunction with the stakeholders?

[125] It is not the function of the Court to fix legislative or regulatory regimes. That is the domain of the legislature or Parliament. Until laws are past, policy is not enforceable. In this case, the Trustee asks the Court to frame a legal regime that has been rejected by the legislature.

b. The Law

i. Statutory Framework – The ABCA

[126] “Complainant” is defined in section 239(b) of the ABCA as follows:

(b) “complainant” means

- (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (ii) a director or an officer or a former director or officer of a corporation or any of its affiliates,
- (iii) a creditor
 - (A) in respect of an application under section 240 [derivative action], or
 - (B) in respect of an application under section 242 [oppression], if the Court exercises its discretion under subclause (iv),

or

- (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

[Emphasis added.]

ii. The Jurisprudence

(A) Creditor as a Complainant

[127] Creditors have been permitted to use the oppression remedy for some years. The authority of creditors to do so was confirmed in 2004 by the Supreme Court of Canada: *Peoples Department Store Inc (Trustee of) v Wise*, 2004 SCC 68 [*Peoples*].

[128] The entitlement of creditors to use the oppression remedy, however, was constrained by the Supreme Court of Canada. In particular, that appellate Court stated that creditors could use the oppression remedy to protect their interests from the harmful conduct of directors if they qualify as a “proper person”: *Peoples* at para 48 to 50; see also section 239(b)(iv) of the *ABCA*.

[129] In making these statements in 2004, the Supreme Court of Canada did not provide guidance on what constituted a “proper person”. It left that task to the determination and discretion and of the lower courts. The trial courts and provincial appeal courts have taken on that task, and have effectively put a fence around the oppression remedy in respect of creditors. Creditors are only granted access to the oppression remedy if they meet certain criteria.

[130] The law in this area has evolved over the years. An early case that is still authoritative on this point is *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)), [1993] OJ No 1560 [*Hordo*].

[131] The Court in *Hordo* commented that debt actions should not normally be turned into oppression actions. That Court also stated that “complainant” status should be refused to creditors, unless the creditor was “in a position analogous to a minority shareholder” with some “particular legitimate interest in the manner in which the affairs of the company are managed”: *Hordo* at para 14. This has been interpreted to mean having “a direct financial interest in how the company is being managed” but having “no legal right to influence or change what they see to be

abuses of management or conduct contrary to the company's interests": *PRW Excavating Contractors Ltd v Louras*, 2016 ONSC 5652 at paras 17-19 [*PRW*].

[132] The Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: *Hordo* at para 15, citing *Re Daon Development Corporation* (1984) 54 BCLR 235 at 13, 10 DLR (4th) 2016.

[133] The status of a person as a "complainant" under the oppression remedy is a prerequisite to the application of the two-step framework that is outlined in the BCE case: *Re BCE Inc*, 2008 SCC 69. If a person does not qualify as a complainant in the first instance or, where section 239(b)(iii)(B) or section 239(b)(iv) of the *ABCA* apply, a person has not been granted standing as a "complainant", the quest for an oppression remedy in respect of that person ends, full stop.

(B) Trustee as a Complainant

[134] Trustees in bankruptcy are not always recognized as being "proper persons." Accordingly, they are not automatically "complainants" that are entitled to bring oppression proceedings. It depends on the circumstances.

[135] There are circumstances where the Alberta Court of Appeal determined that a trustee did not have status to bring an oppression claim pursuant to section 234 of the *ABCA*: *Carter Oil and Gas Ltd (Trustee of) v 400133 BC Ltd*, 1998 ABCA 372 at para 27. In another case, the Ontario Superior Court of Justice stated that while the standing of a trustee in an oppression action was not fully settled in the jurisprudence, it also was not obvious that the trustee in bankruptcy does not have such capacity: *Dulex Ltd (Trustee of) v Anderson* (2003), 63 OR (3d) 659 (SCJ) at para 18.

[136] In effect, these cases confirm that the status of a trustee in bankruptcy does not automatically determine that a trustee is a "proper person" to be accorded standing as a "complainant".

[137] Generally, a trustee in bankruptcy must pursue the common interests of all of the creditors at the time of bankruptcy. The Alberta Court of Appeal has provided the following instructive comments on this point: see *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.

Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. Of particular importance are sections 30 and 72:

30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

...

The case law establishes that a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors.

[Emphasis added.]

(C) Redwater Factor

[138] The recent decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*] is relevant to the Oppression Claim, and other matters touched on below. At paragraph 37 of *Redwater*, the three-part test in *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 [*Abitibi*] is set out for determining when an environmental obligation imposed by a regulator will be a provable claim in the insolvency context. In *Abitibi*, the Supreme Court of Canada said, at para 26:

First, there must be a debt, a liability or an obligation to a *creditor*.
Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation (emphasis in original).

(I) *Redwater* – AER Creditor Status

[139] The *Abitibi* test and the status of the AER as a creditor was addressed in *Redwater*. Insofar as that status may impact the “facts” that have been included in the Trustee SOC, that case needs to be considered carefully.

[140] In *Redwater*, the Supreme Court stated its position concerning the creditor status of the AER as follows, at paras 121 and 122:

[121] In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the “creditor” step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599 (CanLII), 368 D.L.R. (4th) 122 (“*Nortel CA*”), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the “monetary value” step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the “sufficient certainty” step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater’s regulatory obligations were “intrinsically financial”. Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

[122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the “creditor” step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of

completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

[141] The Supreme Court made it clear in *Redwater* that whether the AER has a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test, which presupposes that the AER is a creditor: *Redwater* at para 130. That is, the “creditor” test cannot be bypassed on the basis of a contingency.

[142] A contingent claim must be capable of valuation in order to be a provable claim. It cannot be too remote or speculative: *Redwater* at para 138. As a matter of law, it must be established that enforcement by the regulator results in the regulator attaining the status of creditor: *Redwater* at para 146. Absent any such establishment, the AER is not a creditor. As I read the *Abitibi* test, it is binary. There is no middle ground. The regulator either is a creditor or is not.

[143] *Redwater* holds that the AER is not a creditor. As stated by the Supreme Court, “[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes”: *Redwater* at para 158.

[144] This holding by the Supreme Court in *Redwater* is consistent with the findings by the Alberta Court of Appeal in *Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, leave to appeal to SCC refused 22655 (16 January 1992) [*Northern Badger*]. In *Northern Badger*, the Alberta Court of Appeal acknowledged that the legislative framework embedded in the *Oil and Gas Conservation Act*, RSA 2000, c O-6 gave it the right to incur costs in respect of abandoned boreholes, and become a creditor for the amounts incurred. While the regulator had the right to incur costs in respect of abandoned boreholes, it did not do so in respect of the Northern Badger wells. Instead, the steps taken by the regulator were “...simply in the course of enforcing observance of a part of the general law of Alberta”: *Northern Badger* at para 34.

[145] The Alberta Court of Appeal further stated that the statutory abandonment obligations were part of the general law of Alberta: *Northern Badger* at para 33. It commented that such obligations bind every citizen in a manner that parallels many other laws, including, for example, health and safety laws.

[146] The Alberta Court of Appeal went on to state that such public duties are owed to all citizens of the community, rather than being owed to the public authority enforcing them: *Northern Badger* at para 33. That appellate Court further stated that the regulator was not a creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: *Northern Badger* at para 33 and 34.

[147] While the Alberta Court of Appeal commented that Northern Badger had a liability, it described that liability as being “inchoate”: *Northern Badger* at para 32. Given the use of the term “inchoate”, that appellate Court was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the

Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: *Northern Badger* at para 32.

(II) *Abitibi* – Insufficient Certainty

[148] *Abitibi* confirmed that a remediation order could be a contingent obligation, which is commonly understood to be an obligation that only becomes a debt upon the occurrence of a future event that may or may not occur. If the future event is too remote or speculative, the claim will not be included in the insolvency process. Given this background, if the AER has not triggered the enforcement mechanism, will not be performing the remediation work, or will not be asserting a monetary claim to have its costs reimbursed, then the future event is too remote or speculative for the AOR associated with the Goodyear Assets to be included in the insolvency process: *Redwater* at paras 36, 140 and 152.

[149] As noted above, in *Redwater*, the Supreme Court of Canada revisited the test in *Abitibi*. In the course of considering the *Abitibi* test, the Supreme Court found that it was not “...sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process”: *Redwater* at para 142. That Court reinforced this determination by commenting as follows, at para 145:

The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator’s affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy.

[150] Accordingly, under the *Abitibi* test, the AER did not have a claim provable in bankruptcy.

[151] In summary, the Supreme Court of Canada in *Redwater* held that the AER had no status as a creditor in relation to the ARO of a licensee. Further, even if it could be said that the AER were a creditor, there is not sufficient certainty that the AER would ever perform any remediation work and have a claim for reimbursement.

(III) ARO a Component of Value

[152] The Trustee alleges that the ARO obligation is a liability. That being the case, it is necessary to consider the meaning of the term “liability”.

[153] The jurisprudence has stated the term “liable” is not a legal term, and that it has no technical meaning: *Laurance (Re)* (1923), 55 OLR 196 at para 7, 25 OWN 482 (Ont SC). That same jurisprudence went on to state that the concept of “liability” is “...primarily referable to the existence of the obligation and is not to be confined to the present right to enforce it”: *Laurance* at para 7. The Court also commented that the exact meaning of the term “liability” may vary with the context: *Laurance* at para 7.

[154] The *Laurance* decision involved the question as to whether a landlord was entitled to rank as a preferred creditor concerning certain property taxes paid by him, which were properly

payable by an insolvent tenant. Mr. Laurance was the tenant of Mr. McConnell's farm. Under the terms of the lease, Mr. Laurance had covenanted to pay the property taxes in respect of the subject farm land.

[155] The trustee in *Laurance* at para 4 opposed the claim for preference concerning the property taxes. He argued that a liability had not yet arisen because a specified time period had to lapse after a demand was made before the collector was entitled to seizure.

[156] The Court in *Laurance* at para 5 stated that the liability to pay property taxes does not arise only when payment is demanded. The Court noted that the liability for property taxes under the *Municipal Act* attached on January 1 of the particular calendar year for which the rates were imposed. That legislative framework establishes a liability in law, because it was referable to an existing legal obligation. Thus, the landlord, Mr. McConnell, was entitled to include in his proof of claim the portion of the 1923 property taxes that were properly payable by the insolvent, Mr. Laurance, under the terms of the lease: *Laurance* at para 11.

[157] There also have been occasions where the jurisprudence has recognized a liability in circumstances where no current action can be taken to enforce payment. This judicial recognition has occurred in the context of an undeclared dividend on preferred shares: *Fairhall v Butler*, [1928] SCR 369.

[158] The *Fairhall* decision involved a circumstance where Mr. Butler, on behalf of White Star Refining Company ("White Star"), had an option to acquire common shares in Western Motor Corporation Limited. ("Western Motor"). White Star accepted the option on the condition that Mr. Fairhall would furnish a statement "showing the assets and liabilities ... of Western Motor" (the "Western Motor Financial Report"): *Fairhall* at para 3.

[159] The Western Motor Financial Report was prepared by Chartered Accountants. That report included a balance sheet that allegedly disclosed the assets and liabilities of Western Motor.

[160] The context within which the Western Motor Financial Report was requested and prepared is important. White Star was interested in acquiring a controlling interest in Western Motor, and it planned on doing so through the acquisition of common shares in that target company. White Star protected itself under the option by stipulating the need for full disclosure of assets and liabilities because, I infer, any undisclosed liabilities would reduce the value of the Western Motor common shares.

[161] The capital structure of Western Motor included issued and outstanding preference shares (the "Western Motor Preferred Shares"). The Western Motor Preferred Shares were non-participating and nonassessable, and they entitled the holders to a first, fixed, cumulative dividend at 8% per annum: *Fairhall* at para 6.

[162] White Star accepted the option, but noted that the acceptance was based on the disclosure presented in the Western Motor Financial Report: *Fairhall* at para 8. However, at the time of settlement, the undeclared and unpaid dividends on the Western Motor Preferred Shares presented a difficulty.

[163] The Western Motor Financial Report did not show the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares. This caused a dispute: *Fairhall* at para 8.

[164] The question underlying the dispute was whether the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares constituted a liability that should have been disclosed in the Western Motor Financial Report. The Supreme Court of Canada recognized that until a dividend is declared, no action is available to a shareholder to enforce payment: *Fairhall* at para 19. As such, the Court also acknowledged that a company incurs no liability until a dividend is declared by it: *Fairhall* at para 19.

[165] Notwithstanding the above recognition by the Supreme Court of Canada that no enforcement action was available in these circumstances, the Court in *Fairhall* went on to state “...that within the meaning of the contract, as understood by the parties, the undeclared dividends on preference shares were a liability which should have been disclosed [*sic*] in the report of the appellant’s auditors”: *Fairhall* at para 18. That is, the contractual framework in the form of the terms and conditions associated with the Western Motor Preferred Shares establishes an accruing liability in law because it is referable to an existing and accumulating obligation. The Court took this position, in part, because no dividend would be payable on the common shares of Western Motor until all of the accrued dividends were paid on the Western Motor Preferred Shares: *Fairhall* at para 19.

[166] In *Redwater*, the Supreme Court of Canada addressed the ARO liability allegation from a different viewpoint. Rather than being a form of liability, the Supreme Court held that the “...end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front”: *Redwater* at para 157. In making this determination, the Supreme Court of Canada relied on *Daishowa-Marubeni International Ltd v Canada*, 2013 SCC 29 [*Daishowa*] at para 29.

[167] While courts should be cautious in relying too heavily on *Daishowa* because it approached the issue from an income tax perspective, it does touch on the very issue that was being argued in *Redwater*. In *Daishowa*, the Supreme Court found that statutory reforestation obligations of persons that held forest tenures in Alberta were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure’s value at the time of sale: *Daishowa* at para 31.

[168] While those regulatory parameters depressed the value of the assets, the Supreme Court of Canada in *Daishowa* held that those “...reforestation obligations were not a distinct existing debt”: *Daishowa* at para 35. That is, those future obligations did not equate to a current monetary claim.

[169] The Trustee equates an ARO obligation to that of a liability. That position is not supportable for at least four reasons.

[170] First, concerning the ARO associated with the Goodyear Assets, there is no creditor. That was confirmed by *Redwater*. Absent a creditor, there can be neither a debtor nor a corresponding liability.

[171] Second, concerning the ARO associated with the Good year Assets, there is neither a liability nor any amount referable to an existing obligation. In contrast to *Laurance*, there is no legislative framework that established a present liability in respect of the Goodyear Assets at the time of the Asset Transaction. Similarly, in contrast to *Fairhall*, there was no contractual framework that established an existing and accumulating obligation in respect of the Goodyear Assets at the time of the Asset Transaction.

[172] Third, to the extent that there is an ARO associated with the Goodyear Assets, it is a notional and contingent obligation. That is not sufficient to constitute a liability that needs to be considered for purposes of the Asset Transaction.

[173] Fourth, the alleged ARO obligation in the Asset Transaction is one step further removed from being a liability than was the case in *Redwater*. In *Redwater*, Abandonment Notices had been issued. In contrast, in this matter there is no evidence that Abandonment Notices were issued in respect of the Goodyear Assets on or before the date of the Asset Transaction.

3. The Application of the Law to the Facts

[174] Before I commence my analysis, a few preliminary comments are warranted.

[175] First, the Defendants are effectively challenging the Oppression Claim by contesting the standing of the Trustee to bring such a claim. Generally, Courts prefer to resolve questions of standing in conjunction with an assessment of the substantive merits of oppression claim. Indeed, some Courts have taken the position that the issue of standing on preliminary motions courts should not be allowed where the resolution of the issue requires them to explore the merits of the application: *Jabaco Inc v Real Corporate Group Ltd*, [1989] OJ No 68, 13 ACWS (3d) 352.

[176] Second, there are exceptions to the position that standing should not be addressed in preliminary motions courts. Courts have struck actions for want of standing as a preliminary matter where the nature of the claim strained the boundaries because the person seeking the oppression remedy was too far outside recognized parameters: *Hordo* at paras 14 and 15. Another exception is where the resisting party would not be held to be a “proper person” because they did not satisfy the Court “...that there was some evidence of oppression or unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer”: *First Edmonton Place Ltd v 315888 Alta Ltd* (1988), 40 BLR 28 at 50-51 (Alta QB), 60 Alta LR (2d) 122, reversed on other grounds 1989 ABCA 274. This judicial comment suggests that there is a *prima facie* test, and that standing may be determined on a preliminary motion.

[177] Third, deciding whether the Trustee is an eligible complainant is a threshold issue. Given that the underlying application is a preliminary motion that challenges standing, disputed facts generally should be decided in favour of the resisting party, unless it is clear on the face of the record that such an assumption is unfounded: *Levy-Russell Ltd v Shieldings Inc* (1998), 41 OR (3d) 54 at para 21 (Ont Ct J(Gen Div)), 165 DLR (4th) 183, leave to appeal refused 42 OR (3d) 215, 41 BLR (2d) 142.

[178] Assuming that the Oppression Claim of the Trustee is a collective and representative claim on behalf of all creditors, the inquiry turns to whether the Court should exercise its discretion to grant standing to the Trustee as a “complainant”.

[179] Returning to the particulars of this case, I will: (i) consider whether the record makes it possible to strike the Oppression Claim; and (ii) touch on the issue of summary judgment. Depending on my conclusions in respect of those three matters, the Oppression Claim may need to proceed to a trial.

[180] Before I turn to the analysis, an overview of some context is useful. First, in cross-examination, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction. That positions the Oppression Claim into a relatively narrow framework. Second, but for the alleged ARO and property taxes, the Trustee SOC provides no further particulars or allegations regarding the amounts or nature of the alleged liabilities. Amongst other issues, I will need to consider whether the approach taken by the Trustee is a selective action, and whether it violates a principle of bankruptcy law that all actions should be focused on the collective. Third, the Trustee SOC contains no allegation that any creditor had an actionable reasonable expectations of any kind. I raise this point because when considering whether there has been an oppression of a complainant, I must determine what the reasonable expectations of that person were according to the arrangements which existed between that alleged complainant and the body corporate: see *Mennillo v Intramodal inc*, 2016 SCC 51 at para 9. Fourth, the Trustee asserts that Sequoia Resources was “set up to fail”. The Trustee further asserts that this, in and of itself, constitutes oppression. With this background in mind, I turn to analyze the Oppression Claim.

a. Can the Oppression Claim be struck?

[181] I turn to whether the record makes it possible to strike the Oppression Claim under Rule 3.68(2)(b). A decision to strike must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application, and (ii) the applicable statutory and common law.

[182] The facts to which I can refer for purposes of Rules 3.68(2)(b) and 3.68(3) are limited. In particular, and as mentioned above, the facts to which I can refer are limited to what is in the Trustee SOC. The relevant particulars in that commencement document are as follows:

- a. The Goodyear Assets had significant associated ARO when PEOC acquired that property in the context of the Asset Transaction.
- b. The Asset Purchase Agreement is referenced, and the Trustee SOC reiterates that the amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified.
- c. The Goodyear Assets had significant net liability at the time of the Asset Transaction. The Trustee SOC further states that the liabilities assumed by PEOC when it acquired the Goodyear Assets were at least \$223,241,000.
- d. The value of the Goodyear Assets acquired in the Asset Transaction were at most \$5,670,200.
- e. The Goodyear Assets were high liability assets.
- f. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.

- g. PEOC will suffer costs incurred: (i) until the Goodyear Assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.
- h. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242.
- i. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[183] In considering the application to strike the Oppression Claim, there are three grounds that warrant review under Rule 3.68(2)(b). The first ground involves the factors that emanate from *Hordo*. The second ground involves the question as to whether this Oppression Claim is a collective action or a selective action. The third ground involves the impact of *Redwater*.

[184] Before I address Rule 3.68, an overview of the law associated with creditors in the context of an oppression action is warranted. The entitlement of a creditor to seek the oppression remedy is not automatic. The statutory framework requires a Court to exercise discretion: ss 239(b)(iii) and (iv) of the *ABCA*. A similar statutory framework applies to a proposed complainant who is "...any other person...: s 239(b)(iv) of the *ABCA*.

[185] There is a policy reason for not allowing a creditor automatic access to the oppression remedy in the *ABCA*. Importantly, a broad interpretation of the "proper person" phrase would open the oppression remedy to abuse from creditors. The policy concern is that if the oppression remedy is applied too broadly, creditor protection will impose a punishment on debtors when a business risk fails. That would allow creditors to "escape the consequences of their debtor's bad decisions...": Douglas G Baird & Thomas H Jackson, "Fraudulent Conveyance Law and Its Proper Domain," (1985) 38: 4 *Vanderbilt LR* 829 at 834.

[186] To address the concern that creditors might abuse the oppression remedy mechanism, the Courts have developed a series of factors to assist in determining which creditors will be granted standing (the "**Factor-Based Approach**"). The case most frequently cited for this Factor-Based Approach is *Hordo*.

[187] The *Hordo* case gathered and summarized factors from a number of different decisions. Under the Factor-Based Approach, an alleged creditor is typically denied standing where: (i) the plaintiff was not a creditor when the oppression occurred, but was merely a contingent creditor; (ii) the creditor's interest in the affairs of the Corporation are too remote; (iii) the complaints of the creditor have nothing to do with the circumstances giving rise to the debt; (iv) the creditor is not in a position analogous to that of a minority shareholder; or (v) the creditor had no particular legitimate interest in the manner in which the affairs of the company are managed (collectively, the "**Hordo Factors**").

[188] The Hordo Factors have been framed to ensure that the boundaries of what constitutes a "proper person" are not pushed beyond what is reasonable in the circumstances. The reason for the boundaries is because the oppression remedy is not intended to be a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a Court to accord with an assessment of a third-party as to what is just and equitable,

especially on an *ex pose facto* basis. In this regard, it is not the function of the Court rewrite contracts: *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183 at para 60. Further, and as stated above, it is not the function of the Court to fix legislative or regulatory regimes. The need to reform regulatory regimes is the domain of the legislature. Courts should not participate in that process, except in a traditional adjudicative manner.

i. The Hordo Factors – Rule 3.68(2)(b)

[189] A creditor of a corporation may sue the corporation or its officers/directors for oppression only if the Court exercises its discretion in determining that the creditor qualifies as a “complainant”: see sections 239(b)(iii)(B) and 239(b)(iv) of the *ABCA*. Any other person may make an application to be granted “complainant” status, subject always to the discretion of the Court: section 239(b)(iv) of the *ABCA*. In both a “creditor” or “any other person” circumstance, the Court will exercise its discretion to grant a person standing as a complainant only if the applicant is a “proper person”.

[190] The Courts have restricted the application of the oppression remedy to creditors. As noted above, the Court in *Hordo* at para 14 commented that debt actions normally should not be turned into oppression actions.

[191] The Court in *Hordo* also stated that “complainant” status should be refused unless the creditor was “in a position analogous to a minority shareholder” with some “particular legitimate interest in the manner in which the affairs of the company are managed”: *Hordo* at para 14. This has been interpreted to mean having “a direct financial interest in how the company is being managed” but having “no legal right to influence or change what they see to be abuses of management or conduct contrary to the company’s interests”: *PRW* at paras 17-19, citing *Re Dawn Development Corporation* (1984), 54 BCLR 235 at 13, 10 DLR (4th) 216.

[192] The reason the Courts have been hesitant to grant “complainant” status to creditors is because the connection of a creditor is typically viewed as being too remote to the affairs of the subject corporation: *Hordo* at para 14. If the interest of a creditor in the affairs of a corporation is too remote, then the creditor is typically not a “proper person” for purposes of being designated as a “complainant”. Similarly, where the creditor has nothing to do with the circumstances giving rise to the debt, “proper person” standing is typically denied.

[193] When a trustee in bankruptcy is involved, additional factors must be considered. A trustee is neither automatically barred from being a complainant nor automatically entitled to that status: *PriceWaterhouseCoopers Inc v Olympia & York Realty Corp* (2003), 68 OR 3d 544 at para 45, [2003] OJ No 5242 (CA) [*Olympia*]. The judge at first instance is the one tasked to determine whether the trustee is a “proper person” to be accorded standing as a “complainant”. It will be an exercise of discretion, based on the circumstances of the particular case.

[194] I acknowledge that the Trustee SOC states that the Trustee is a “proper complainant” within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute. As an aside, I assume that the Plaintiff intended to say that the Trustee was a “proper person” to be accorded standing as a “complainant”. For purposes of the analysis below, I will construe the phrase “proper complainant” in that manner.

[195] While I acknowledge the statement in that commencement document, I do not accept assertion therein that the Trustee is a “proper person” as a “fact” for purposes of Rule 3.68(2)(b). The assertion that the Trustee is a “proper person” to be accorded standing as a “complainant” is a legal conclusion. Whether the Trustee is a “proper person” is a question of law. Questions of law are not determined by a trustee. Such questions are the domain of the Court, and they must be left to the determination of the Court.

[196] As stipulated in section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*, only the Court is granted the right to exercise discretion to determine that threshold issue. In argument, the Trustee stated that it was seeking an Order pursuant to Part 19 of the Rules, which I construe to mean a determination under section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*. Until I exercise my discretion to decide, any assertion as to whether the Trustee is a “proper person” that is to be accorded standing as a “complainant” is mere speculation. Further, any conclusion to be drawn from the facts is solely a function of the Court.

[197] This distinction between pleading a legal conclusion and pleading facts is not new. A commencement document “...must plead the necessary facts, and a mere legal conclusion is not enough”: *Fallowka v Whitford*, (1996) 147 DLR (4th) 531 at 14, [1996] NWTJ No 95 (CA), leave to appeal to SCC refused [1997] SCCA No 58. Further, “...there is a big difference between pleading a mere conclusion of law and pleading a fact”: *Fallowka* at para 15.

[198] Courts are critical when conclusions are plead without the facts to support the conclusion: *Shiels v TELUS Communications Inc*, 2003 ABQB 53 at para 17. It is not enough for a commencement document to plead a legal conclusion without the necessary facts: *Stevenson & Côté 2019* at page 13-24. Absent the necessary facts, a legal conclusion cannot be drawn.

[199] This not to say that points of law cannot be stated in a commencement document. However, if a statement about a point of law is plead, then the facts that make the point of law applicable must also be plead: r 13.8(1)(b).

[200] Given my analysis above, I find that the allegation in the Trustee SOC that the Trustee is a “proper person” to be accorded standing as a “complainant” is an assumption (or speculation) that I am not required to treat as true for the purpose of an application under Rule 3.68: *Operation Dismantle* at para 27; *PR Construction* at para 29; and *McGregor* at para 10.

[201] I now turn to whether the Trustee SOC allows me to find that the Trustee is a “proper person” to be accorded standing as a “complainant” in the circumstances. This takes me to the Hordo Factors.

[202] To address the Hordo Factors, the Trustee SOC would need to include particulars that would allow me to be satisfied that the alleged creditors that it represents: (i) were closely connected with PEOC at the time of the alleged oppression; (ii) were in a position analogous to that of a minority shareholder at the time of the alleged oppression; and (iii) had a particular legitimate interest in the manner in which the corporation was managed at the time of the alleged oppression. I find that none of those prerequisites were addressed the Trustee SOC.

[203] Given the absence of particulars in the Trustee SOC to properly address the Hordo Factors, I find that the Trustee has not satisfied me that it is the “proper person” to be accorded

standing as a “complainant” for purposes of the Oppression Claim. In making this finding, I emphasize that I am not permitted to look for evidence outside the four corners of the Trustee SOC (except in very limited circumstances): *HOOPP Realty* at para 25, Wakeling JA, concurring; *Operation Dismantle* at para 27; and *Borzoni* at para 30. That restriction prevents me from looking outside of the Trustee SOC for evidence that would assist the Trustee in establishing the necessary facts to support its “proper person” assertion, just as it prevents me from looking outside of the Trustee SOC for evidence that would assist the Defendants in respect of points that it would want to make.

ii. Collective Action – A Prerequisite

[204] An important bankruptcy principle is that the regime is a collective action to pursue claims of creditors: *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, at para 7; *Olympia* at para 46.

[205] The Trustee SOC advances the Oppression Claim by reference to the “interests of the creditors of PEOC, including its contingent creditors”. The Trustee SOC then frames the “interests of the creditors of PEOC, including its contingent creditors” by reference to only the ARO and unidentified municipalities.

[206] While the Trustee SOC provides some particulars in respect of the alleged ARO, it provides no further particulars or allegations concerning the amounts or the nature of other liabilities. Further, the scope of the alleged creditors is restricted to the ARO (and by inference, the AER) and the unidentified municipalities. That commencement document contains no allegation that any other creditor has any actionable reasonable expectation of any kind.

[207] In any oppression action pursued by a trustee in bankruptcy, it is important that it be framed to include all persons to whom the bankrupt is liable. That is a necessary prerequisite because a fundamental principle in bankruptcy is that the regime is a collective action: *Husky Oil* at para 7; and *Olympia* at para 46. That is, the bankruptcy regime pursues claims for all creditors. It must be a collective pursuit, and not a selective pursuit. Bankruptcy achieves this objective by replacing a regime that allows individual actions with a framework that is focused on a collective action: see Aleck Dadson, “Comment” (1986), 64 *Can. Bar Rev.* 755, at p. 755.

[208] In this case, we know that there are other creditors because they are referred to in the Trustee SOC in the context of alleged damages that PEOC has suffered. Those other creditors are described in the Trustee SOC as being persons who provide safety, environmental, and investigative services to PEOC in respect of the Goodyear Assets.

[209] Notwithstanding that the commencement document includes a claim for damages in respect of the costs associated with those other creditors, the Oppression Claim has not included them in the scope of creditors for purposes of the oppression allegation. Instead, the Trustee SOC focuses on just two creditor groups, being the AER (by inference, because the commencement document refers to ARO) and municipalities (which are not identified).

[210] If the Oppression Claim were framed to cover all creditors, that would satisfy the collective requirement. By framing the Oppression Claim to focus only on the AER and municipalities, the Trustee has breached a fundamental principle that is inherent in the collective

approach that the Trustee must always follow in the execution of its duties. In my view, a trustee in bankruptcy cannot be permitted to pursue matters for a selective class, which would be a subset of the collective group to which it is responsible.

[211] Given the above analysis, I find that the Oppression Claim is framed too narrowly in the Trustee SOC because it only focuses on a selective class of alleged creditors. As a result, I will not exercise my discretion to find the Trustee to be a “proper person” in order to accord it standing as a “complainant” for purposes of the Oppression Claim. To reiterate, the reason for this finding is that I view a collective approach by the Trustee to be a prerequisite to the exercise of my discretion to find it to be a “proper person” entitled to seek standing as a “complainant”.

iii. The *Redwater* Ground – Rule 3.68(2)(b)

[212] The substantive focus of the Trustee SOC is on the ARO. It emphasizes that the ARO is significant, and that the Goodyear Assets were high liability assets. I infer that the “high liability” comment in the Trustee SOC is an indirect reference to the ARO.

[213] While the only facts to which I can refer are those included in the Trustee SOC (and anything which that commencement document references), I am permitted to refer to the common law, including the impact of *Redwater*. My authority to do so in the context of Rule 3.68 is threefold.

[214] First, the limitation in Rule 3.68(3) is only in respect of evidence. Decisions by a Court are not evidence; they are law. Also, the text set out in the Trustee SOC is not evidence.

[215] Second, the Alberta Court of Appeal has stated that a decision in respect of Rule 3.68(2)(b) must be based only on: (i) the facts alleged in the commencement document (which must be assumed to be true for the purpose of disposing of the application); and (ii) the applicable statutory and common law: *HOOPP Realty* at para 25, Wakeling JA, concurring. *Redwater* is a component of the common law.

[216] Third, in considering the application of Rule 3.68(2)(b), a member of the Alberta Court of Appeal suggests that it is appropriate to “...ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff’s prospects of success are extremely low”: *HOOPP Realty* at footnote 8, Wakeling JA, concurring (emphasis added). This point is relevant because *Redwater* is now part of the existing law.

[217] Based on the above authority, I turn to consider *Redwater*, and its relevance to Rule 3.68 in the context of the Oppression Claim.

[218] In this case, the Trustee relies on the argument that the AER had a contingent claim against PEOC at the time of the Asset Transaction, and has a contingent claim provable in the bankruptcy of Sequoia Resources (formerly PEOC). Given the findings by the majority of the Supreme Court in *Redwater*, I find that position is not supportable.

[219] I make this finding for the following five reasons. As required under Rule 3.68, I only consider the facts as stated in the Trustee SOC, excluding any assumptions or speculation that are in that commencement document.

[220] First, there is nothing in the Trustee SOC that suggests that the regulatory obligations of PEOC were “intrinsically financial” that the time of the Asset Transaction: *Redwater* at para 121. In particular, there is nothing in that commencement document to suggest that AER had even issued an abandonment order in respect of the Goodyear Assets. In any event, the majority in *Redwater* disagreed with “intrinsically financial” test, calling it “an erroneous interpretation of the third step of the *Abitibi* test”: *Redwater* at para 146; see also para 156.

[221] Second, in *Redwater* the AER advanced the position that it acted in the public interest and for the public good. The Supreme Court of Canada accepted that assertion, and went on to state that it is the public that is the beneficiary of those environmental obligations, and that the province does not stand to gain financially from them: *Redwater* at para 122.

[222] Third, on the facts in *Redwater* the Supreme Court of Canada at para 154 found that the Chambers judge erred in finding that there was sufficient certainty that the AER would ultimately perform the environmental work and assert a claim for reimbursement. In contrast, after a careful review of the Trustee SOC, I see nothing in that commencement document to support an assertion that AER would perform any environmental work on the Goodyear Assets or assert a claim to PEOC for reimbursement.

[223] Fourth, in *Redwater* the Supreme Court of Canada effectively held that the “creditor” test cannot be circumvented on the basis of a contingency. It reinforced this point by stating that a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test: *Redwater* at para 130.

[224] Fifth, in *Redwater* the Supreme Court of Canada stated that in order to be a provable claim, a contingent claim must be capable of valuation. It cannot be too remote or speculative: *Redwater* at para 138. In my view, being capable of valuation is also a prerequisite for a liability. If the alleged obligation is not capable of valuation, it is too remote or speculative to be characterized as a liability. In the case of PEOC, the Trustee SOC effectively reiterates that the amount of the ARO associated with the Goodyear Assets was not capable of being quantified: see para 6.1 of the Trustee SOC. Given that acknowledgment and on the authority of *Redwater*, I find that the ARO is not a liability.

[225] Given the above analysis, all of which pivots on the content of the Trustee SOC, I find that the ARO is not a liability for purposes of the Oppression Claim. I see no reason why the character of the future obligation (the ARO) should be different as between a bankrupt context and an oppression remedy context. The Supreme Court of Canada in *Redwater* at para 135 held that the AER had no status as a creditor in relation to the ARO of a licensee. If the AER is not a creditor in respect of the ARO associated with the Goodyear Assets, it follows that PEOC could not have assumed a liability in respect of the ARO in conjunction with the Asset Transaction. In effect, *Redwater* holds that the AER is not a creditor.

[226] As stated by the Supreme Court, “[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes”: *Redwater* at para 158. As a result of the *Redwater* decision, the ARO referenced in the Trustee SOC is not a liability. Instead, it is a mere assumption, which can be disregarded for purposes of considering whether to strike or dismiss the Oppression Claim. Restated, I find that *Redwater* has nullified the Oppression Claim.

[227] This finding is consistent with the findings by the Alberta Court of Appeal in *Northern Badger*. In that case, the Alberta Court of Appeal acknowledged that the steps taken by the regulator were “...simply in the course of enforcing observance of a part of the general law of Alberta”: *Northern Badger* at para 34. The Alberta Court of Appeal went on to state that the regulator was not a creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: *Northern Badger* at paras 33 and 35.

[228] While I acknowledge that the Alberta Court of Appeal did comment that Northern Badger had a liability, it described that liability as being “inchoate”: *Northern Badger* at para 32. Given the use of the term “inchoate”, it was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: *Northern Badger* at paras 32 and 36.

[229] I also note that in *Daishowa* the Supreme Court found that statutory reforestation obligations were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure’s value at the time of sale: *Daishowa* at para 31. The Supreme Court of Canada further stated that those “...reforestation obligations were not a distinct existing debt”: *Daishowa* at para 35. That is, those future obligations did not equate to a current monetary claim. Based on what is stated in the Trustee SOC, I find that the same result applies to the ARO associated with the Goodyear Assets at the time of the Asset Transaction.

[230] In this case, the Trustee SOC refers to the fact that the ARO was significant when the Goodyear Assets were acquired by PEOC in the Asset Transaction. It refers to no other “significant” liability.

[231] I infer from the content of the Trustee SOC that the only significant liability in PEOC is the ARO associated with the Goodyear Assets. This inference is reinforced by the additional statement in the Trustee SOC which reiterated that the Goodyear Assets were “high liability” assets.

[232] Given that the ARO is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact, I need not consider the ARO as a true fact for purposes of Rule 3.68(2)(b). While I will detail matters out below under the “5. Conclusion”, based on the above analysis I strike the Oppression Claim because it discloses no reasonable claim: Rule 3.68(1)(a) and Rule 3.68(2)(b).

b. Can the Oppression Claim be determined on a summary judgment basis?

[233] Given my finding in respect of the application of Rule 3.68(2)(b) and the consequential striking of the Oppression Claim, there is no need to address the application of Rule 7.3 and

whether to resolve the Oppression Claim on a summary judgment basis. That said, a few comments are warranted.

[234] I initially paused on the issue of whether summary dismissal was appropriate in this case because of an overarching directive from the Alberta Court of Appeal cautioning that a summary dismissal may not be appropriate if there is a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor for purposes of an oppression action. Hence, this is the reason that I stated in my oral decision that I was not satisfied that summary dismissal was appropriate in respect of the Oppression Claim.

[235] While I need not consider summary dismissal because I have struck the Oppression Claim on the basis that there is no cause of action, I note in my conclusion below that the *Redwater* decision nullifies the Oppression Claim. That is, given the *Redwater* decision, what was initially the basis for a dispute on the material fact as it is framed in the commencement document has been eliminated. For the above noted reasons, the ARO is not a liability for purposes of the Oppression Remedy.

4. Conclusion

[236] Given the above analysis and findings, I strike the Oppression Claim under Rule 3.68(2)(b) on the basis that the claim does not constitute a cause of action. In summary, my reasons for this decision is threefold.

[237] First, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the Trustee SOC does not include the particulars necessary for me to address the prerequisites that are embedded in the Hordo Factors.

[238] Second, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the Oppression Claim is framed too narrowly in the Trustee SOC. In particular, the Trustee SOC frames the Oppression Claim in respect of two classes of alleged creditors (which is a selective focus), and not all creditors (which would be a collective focus).

[239] Third, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the impact of the *Redwater* decision is to nullify the Oppression Claim. I exercise my discretion in this manner because, on the authority of *Redwater*, the very foundation underlying the Oppression Claim, the ARO, is not a liability. Instead, it is a future burden that has not crystallized into a liability.

[240] As a final comment on this matter, a member of the Alberta Court of Appeal has stated in a concurring decision that when a Chambers Judge is considering the striking of a claim under Rule 3.68(2)(b), it is necessary to ask whether the assumed facts and the state of the existing law, or potential changes in the law considered together, lead to the conclusion that the plaintiff’s prospects of success are extremely low: *HOOPP Realty* at footnote 8. In considering that important question in the context of the Oppression Claim, I find that the Trustee’s prospect of success is extremely remote. I make this finding because of the impact of *Redwater*, and, based on the text within the commencement document, there is nothing to suggest that any of the

creditors meet the oppression remedy prerequisites that the Courts have established over the last three or so decades.

[241] In summary, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I make this determination on two foundations. First, given the analysis above, I find that the Trustee is not a “proper person” that would accord it standing as a “complainant”. Second, given the impact of *Redwater*, the Trustee has no cause of action in respect of the Oppression Claim because that decision of the Supreme Court of Canada has nullified that claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

1. Incremental Facts and Context

[242] The Public Policy Claim is referred to in a single paragraph of the Trustee SOC under the heading “Public Policy, Statutory Illegality and Equitable Rescission”: para 24 of the Trustee SOC. The only claim is that the “Transactions” are “void”, for one or more of three reasons. (I equate the term “Transactions” in the Trustee SOC to “Aggregate Transactions” for purposes of this section.) The reasons the Trustee alleges that the Aggregate Transactions are void are as follows.

1. The Trustee SOC asserts that the Aggregate Transactions are contrary to public policy because they are “reflected” in a statute, a regulation and three directives (collectively referred to as, the “**Regulatory Regime**”). There are no further particulars given regarding the alleged public policy (the “**Policy Claim**”).
2. The Trustee SOC asserts that the Transactions are a statutory illegality because they are “expressly or impliedly” prohibited by the Regulatory Regime (the “**Illegality Claim**”). There are no particulars as to what aspects of, for example, the Share Purchase Agreement or the Asset Purchase Agreement are prohibited.
3. The narrative in the Trustee SOC makes a claim based on “equitable grounds” (the “**Equitable Claim**”). There is only a reference to the “reasons” and “circumstances” set out in the Trustee SOC. No further particulars are provided.

[243] The remedy section of the Trustee SOC seeks an Order setting aside the Asset Transaction, and declaring that transaction void as against the Trustee. The narrative in the Trustee SOC makes no claim for “Equitable Rescission”. That phrase only appears in a heading, and not in the body of the Trustee SOC.

2. The Law

a. Cause of Action – The Prerequisites

[244] A pleading requires facts, not conclusions: *JO v Alberta*, 2012 ABQB 599 at para 137. A pleading need only include salient facts: *Klemke Mining Corporation v Shell Canada Limited*, 2008 ABCA 257 at para 30; see also *677960 Alberta Ltd v Petrokazakhstan Inc*, 2013 ABQB 47 at para 46. It need not name the cause of action: *Barclay v Kodiak Heating & Air Conditioning Ltd*, 2019 ABQB 850 at para 28; *Petrokazakhstan* at para 48; see also *MDI*

Industrial Sale Ltd v McLean, 2000 ABQB 521 at para 7. While the difference between facts and evidence is sometimes a question of degree, the general rule is that evidence is not to be pleaded: *Wenzel v Nenshi*, 2015 ABQB 788 at para 12.

[245] While pleadings need not name a cause of action, they do govern (*i.e.*, regulate) the evidence to be led at trial: *WAR v AG Alta*, 2006 ABCA 219 at para 26. However, in order to have a cause of action, a pleading must include every fact necessary for the plaintiff to prove in order to support his or her right to a judgment: *Barclay* at para 29; see also *Read v Brown* (1888), 22 QBD at 128, Lord Esher M.

[246] The classical definition of a cause of action is simply a factual situation, the existence of which entitles one person to obtain from a judicial forum a remedy against another person: see *Letang v Cooper*, [1964] 2 All ER 929 at 934, 1 QB 232 (HL), Diplock LJ; and *Consumers Glass Co Ltd v Foundation Co of Canada Ltd* (1985), 1985 CanLII 159 (ON CA), 51 OR (2d) 385 at 8, 20 DLR (4th) 126 (CA). If the pleadings do not include the facts necessary to establish an entitlement to a remedy (*i.e.*, negligence), then no cause of action exists.

b. “Public Policy” Breaches and “Statutory Illegality”

[247] Neither an illegal contract nor a contract contrary to public policy is a cause of action: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, Ont: Thomson Reuters Canada Limited, 2011) (“*Fridman Textbook*”) at 338. Further, the doctrine of illegality is a defence, not a cause of action: *Brooks v Canadian Pacific Railway*, 2007 SKQB 247 [*Brooks*] at paras 116 to 118. Finally, the breach of a statutory duty is not a cause of action: *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225.

[248] With respect to breach of a statutory duty, Justice Dickson of the Supreme Court of Canada commented that “[a] duty to all the public (ratepayers, for example) does not give rise to a private cause of action whereas a duty to an individual (an injured worker, for example) may”: *Saskatchewan Wheat Pool*. At the conclusion of that case, Justice Dickson held that the “[c]ivil consequences of breach of statute should be subsumed in the law of negligence”: *Saskatchewan Wheat Pool* at 227.

[249] An allegation that a contract is contrary to public policy cannot “...be used to establish a cause of action, but rather to refuse to grant relief on policy grounds”: *Brooks* at para 122.

[250] Concerning the consequences of illegality, a claim cannot be made on such a foundation. A legal scholar has commented as follows: *Fridman Textbook* at 406 and 407.

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

...

This major consequence of such a contract is often expressed in one of two ways. The first is, *ex turpi causa non oritur action*. This means that a claim cannot be founded upon a base cause, namely, the breach of a statute or a contract that is against public policy. The second is, *in pari delicto potior est conditio defendentis*. This means that where the parties are equally at fault in their

participation in illegality, the position of the defendant is the superior. It may be seen that these are two ways of saying the same thing, that rights or claims may not be founded upon illegality.

[251] Other legal scholars have also asserted that neither an illegal agreement nor the contravention of public policy is a ground for a cause of action in damages: see Brandon Kain and Douglas T. Yoshida, “The Doctrine of Public Policy in Canadian Contract Law”, *Annual Review of Civil Litigation 2007* (“*Kain and Yoshida Paper*”) at note 183.

[252] There is a judicial aversion to concluding that a contract is prohibited by statute or to interfering with the rights and entitlements provide under the law of contract. This aversion is evident in the following judicial comment from this Court.

A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or “necessary inference”, as Parke, B., put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent...: *Alberta Turkey Producers v Leth Farms Ltd*, 1998 ABQB 887 at para 17, citing *St John Shipping Corporation v Joseph Rank Ltd*, [1956] 3 All E.R. 683 at 690.

[253] Extending the doctrine of public policy beyond well-established categories would push the courts into the realm of the legislature. The “...courts have shown an awareness that in declaring new grounds of public policy they are really making law and they have rightly been hesitant in extending the doctrine beyond well-established grounds”: *LE Shaw Ltd v Berube-Madawaska Contractors Ltd* (1982), 40 NBR (20) 374 at para 8, [1982] NBJ No 210 (CA).

c. “Equitable Rescission” or “Equitable Grounds”

[254] Equitable rescission is “a remedy, not a cause of action”: *Fridman Textbook* at 761. That remedy is predicated on a plaintiff alleging that the contract:

- a. resulted from some fraud (and, as a result, the plaintiff mistakenly entered into the contract) or was mistakenly entered into on the basis of a misrepresentation; or
- b. was obtained by some unconscionable act: *Swan City Taekwon-Do Club v Podolchyk*, 2017 ABPC 244 at paras 143-144.

[255] The facts included in pleadings are critically important. Lawsuits must be determined within the boundaries of the underlying pleadings: *Bablitz* at para 9; *460635 Ontario Limited v 1002953 Ontario Inc*, [1999] OJ No 4071 at para 9, 1999 CanLII 789 (CA). If the statement of claim does not include the necessary alleged facts, a Court will not know the plaintiff’s contentions.

[256] To obtain equitable rescission, generally “it must be possible to restore the parties substantially to their pre-contract position”: *Kingu v Walmer Ventures Ltd (1986)*, 10 BCLR (2d) 15 (CA) at para 18(g), [1986] BCJ No 597. Although the Court always has discretion to grant the equitable remedy of rescission, it must consider matters carefully. Judicial scholars have framed the parameters as follows.

This is the possibility of being able to effect a true *restitutio in integrum* between the parties. Since the purpose or aim of the equitable remedy of rescission is to return the plaintiff to the position in which he was before the contract was made, and since one of the essential features of an equitable remedy is *mutuality*, that is, the potential availability of the remedy to both parties equally, 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: *Fridman Textbook* at 771.

3. Application of the Law to the Facts

a. The Pleadings and Argument – Preliminary Comments

[257] The Trustee SOC asserts that the Aggregate Transaction was effected in circumstances where PEOC acquired the Goodyear Assets with a significant net liability. The particular allegation in the commencement document is that PEOC acquired the Goodyear Assets at “undervalue”.

[258] The Trustee SOC states that the Aggregate Transactions are void, presumably premised on the alleged undervalued transactions: see para 24 of the Trustee SOC. The Trustee has attempted to frame this “void” point as a fact. I find that it is not a fact. It is a legal conclusion.

[259] A legal conclusion is a determination for the Court, and not the Trustee. In particular, whether one or more components of the Aggregate Transaction are void will be determined by the Court, based on the evidence before it. By itself, there is no cause of action for the allegation that the “[t]ransactions are void”.

[260] Among other relief, the remedy section of the Trustee SOC seeks an order setting aside the Asset Transaction, and declaring the Asset Transaction void as against the Trustee. Consistent with that particular remedy sought, the Defendants acknowledged in argument that if it is ultimately determined on the evidence, first, that there was a transfer at undervalue; second, that the parties were not dealing at arm’s length; third, that the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer; and, fourth, that the transfer occurred within the five-year period before bankruptcy, the Trustee is entitled to an order declaring the Asset Transaction void as against the Trustee. That result would arise from an application of section 96 of the *BIA*.

[261] During argument, the Trustee addressed this point, albeit indirectly. The Trustee first alleged that all of the transactions are void because of the “scheme.” Specifically, the Trustee alleges that POT, POC and PEOC entered into an agreement, in part by which PEOC would retain a 1% legal interest in certain highly productive gas assets as bare trustee in trust for POT, and POT would retain the beneficial interest (the “**Retained Interests Agreement**”). The Trustee claims the objective of the transaction contemplated by the Retained Interests Agreement was to support PEOC’s License Liability Rating to allow the Aggregate Transaction to be

completed without regulatory intervention by the AER. When it made this argument, the Trustee referred to the Retained Interest Agreement and the Licensee Liability Rating for PEOC. The Trustee then narrowed its focus to the Asset Transaction. In particular, the Trustee submitted that it was only “...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” (emphasis added).

[262] The question is whether the various components within the Public Policy Claim are causes of action.

b. Are Alleged “Public Policy” Breaches and “Statutory Illegality” Causes of Action?

[263] Concerning the alleged breaches of “public policy” and the alleged “statutory illegality”, there is nothing in the Trustee SOC that provides any particulars concerning the allegation that the Aggregate Transaction:

- a. is prohibited by the Regulatory Regime;
- b. is expressly or by necessary implication illegal; or
- c. could conceivably bring an agreement to transfer corporate shares (or viewed in isolation, an agreement to combine the beneficial and legal interest in assets [*i.e.*, the Asset Transaction]) within any of the recognized categories of agreements that are contrary to public policy.

[264] I acknowledge that there are categories of agreements that are contrary to public policy. These include contracts that (i) are injurious to the state; (ii) are injurious to the system of justice; (iii) encourage immorality; (iv) affect marriage; (v) are in restraint of trade; and (vi) are restrictive of personal liberties: *Kain and Yoshida Paper* at section III.2 to 6. Given the scope of these categories as currently defined, I find that no component of the Aggregate Transaction falls into any of these classes.

[265] If what is intended to be illegal or contrary to public policy is the alleged objective of the Retained Interests Agreement to support the Licensee Liability Rating for PEOC to allow the Transaction to be completed without regulatory intervention, the Trustee has not provided any basis that would make that objective expressly, nor by necessary inference, prohibited. In my view, the Trustee is fishing but it has neither a hook nor a net.

[266] Public policy considerations may be relevant to the question of whether a particular contract should be enforced. Similarly, public policy considerations may be relevant in considering the consequences that should apply if a finding of the illegality is made: *Still v MNR* (1997), [1998] 1 FC 549 at para 48, [1997] FCJ No 1622 (FCA). However, neither of those points assume an independent legal force: *Kain and Yoshida Paper* at section III.1. That is, being contrary to public policy is not a cause of action.

[267] The doctrine of illegality is a defence, and not a cause of action: *Brooks* at 116. Similarly, an allegation that a contract is contrary to public policy does not establish a cause of action: *Brooks* at paras 117, 122.

[268] The key case on which the Trustee relied is *Sidmay Ltd v Wehltam Investments Ltd*, 1967 CarswellOnt 235, [1967] 1 OR 508 (ONCA). I find that case is of no assistance to the Trustee in this matter for three reasons.

[269] First, the Trustee is relying on *obiter* in the decision. In contrast, *Brooks* is on point, and I need not rely on *obiter* from *Sidmay*.

[270] Second, there are no particulars in the Trustee SOC that show that anything in the Aggregate Transactions was illegal. Pursuant to Rule 13.6(3)(e), grounds for pleading illegality of a contract must be provided. The Defendants should not need to guess what component of the Aggregate Transaction allegedly broke what law. The mere reference to the Regulatory Regime is not sufficient.

[271] Third, *Sidmay* was focused on an exception. The plaintiff in that case fell within the class of persons for whom the legislation was designed to protect. In contrast, I see nothing in the Trustee SOC that leads me to conclude that the Trustee falls within an exception.

[272] The Trustee also advanced *Chapman v Michaelson*, [1908] 2 Ch.612; aff'd [1909] 1 Ch. 238 as authority for it to apply to the Court for a declaration as to the illegality of the transaction. The Ontario Court of Appeal commented on that case in *Sidmay*. For the purposes of this case, the relevant comment was that “[d]ue 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”: *Sidmay* at para 54. This is a persuasive statement by an appellate Court, which cause me not to follow *Chapman*.

c. Is Either “Equitable Rescission” or “Equitable Grounds” a Cause of Action?

[273] As noted above, the facts included in a pleading are of critical importance: *Bablitz* at para 9. In this case, the phrase “equitable rescission” is only stated in the heading. That phrase is not stated in the body of the pleading. Most importantly, no particulars are included in the pleading. That is not sufficient to ground a cause of action. Appropriate facts must be plead. If pleadings do not include the facts necessary to establish an entitlement to a remedy, then no cause of action exists: *Barclay* at para 9.

[274] Concerning the claims based on “equitable rescission” and “equitable grounds”, I find that there is no cause of action because the necessary facts to support the remedy are not included in the Trustee SOC.

[275] Even if “equitable rescission” were pleaded, the claim would still fail because it is “a remedy, not a cause of action”: *Fridman Textbook* at 761. Further, it is an all or nothing remedy: *Fridman Textbook* at 761.

[276] The remedy of equitable rescission is predicated on (i) the plaintiff alleging the contract resulted from some fraud (and as a result, the plaintiff mistakenly entered into the contract); (ii) was mistakenly entered into on the basis of a misrepresentation; or (iii) was obtained by some

unconscionable act: *Swan City Taekwon-Do* at paras 143,144. In this case, the Trustee SOC has neither included any of those claims nor stated any facts that would support such claims.

[277] Further, to obtain equitable rescission, “it must be possible to restore the parties substantially to their pre-contract position”: *Kingu* at para 18(g). Notwithstanding that the Trustee stated that it was only challenging the Asset Transaction (see paragraph 261 of this decision, above), its proposed application of “equitable rescission” would have to apply to the Aggregate Transaction, including the shares of PEOC. In this case, that is not possible. The Trustee does not have the shares of PEOC. 198Co owns them. Further, PEOC (now Sequoia Resources) is a bankrupt corporation. The *Sidmay* case is supportive of this conclusion.

[278] It is not possible to return the beneficial interest in the Goodyear Assets to POT some years after the Asset Transaction. To do so would be an attempt at partial rescission, which is not possible under the current framework of the law. No such remedy is known at common law or equity: *Kingu* at para 18.

[279] Finally, rescission is only available between parties to a contract: *Topgro Greenhouses Ltd v Houweling*, 2006 BCCA 183 at para 81 leave to appeal to SCC refused 31508 (14 September 2006). In this case, the Trustee is standing in the shoes of Sequoia Resources (formerly known as PEOC). Sequoia Resources was not a party to the Share Purchase Agreement. This is a fatal bar to the Trustee seeking rescission of the Share Purchase Agreement.

[280] 198Co was a party to the Share Purchase Agreement, but it is not a party to this action. If the Trustee intended to claim relief that would affect 198Co, it would be necessary for 198Co to be a party to this action: *Topgro* at paras 82 and 92.

4. Conclusion

[281] Given the lack of facts in the Trustee SOC and my analysis of the law, I strike the Public Policy Claim under Rule 3.68 on the basis that it discloses no reasonable claim, and, in particular, no cause of action in respect of the Public Policy Claim. In summary: (i) an allegation that a contract is contrary to public policy is not a cause of action: *Brooks* at para 122; (ii) neither a breach of statutory duty nor illegality is a cause of action: *Brooks* at paras 116 to 117; and (iii) equitable rescission is not a cause of action: *Fridman Textbook* at 761. Further, the decision in *Redwater* extinguishes the Public Policy Claim because the ARO is not a liability, and the AER is not a creditor of PEOC.

[282] Notwithstanding my striking of the Public Policy Claim, the Trustee is not precluded from seeking an order setting aside the Asset Transaction and declaring the Asset Transaction void as against the Trustee. That is a remedy sought by the Trustee, and it was framed properly in the Trustee SOC. As stated above, the entitlement of the Trustee to seek an order to void the Asset Transaction is available in section 96 of the *BIA*.

[283] In making this decision, I recognize that there is no more important an arena for cooperative federalism than the environment: *Redwater* at para 60, describing dissenting reasons from 2017 ABCA 124 at para 107. That said, a cause of action premised on an overriding policy must be based on a contextual and purposive interpretation of a specific provision in a statute. To

search for an overriding policy not based on such a foundation is incompatible with my role as a judge.

[284] As a final comment on this point, searching for some overarching and unarticulated policy and using such an inferred policy to override the Asset Transaction would inappropriately place the formulation of a contract in the hands of the judiciary. Absent a specific legislative framework that requires me to execute such task, it is inappropriate for me to do so: see *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at paras 41, 42. I also note that absent a specific legislative framework directing such an undertaking, the execution of such a task would be of general concern because of the indeterminate effect it would have on the business community. While I concede that such challenges are available under the ITA, that is only because section 245 of the statute introduced the general anti-avoidance rule in 1988. I am not aware of any similar legislative frameworks in other statutes that could be applied to challenge the Asset Transaction, and none have been plead.

D. Is the Release a complete bar to claims against Ms. Rose?

[285] The decision in *Redwater* nullifies the Trustee's assertions concerning the Release. Further, *Redwater* extinguishes any suggestion that Ms. Rose breached her duties, including her fiduciary duty and duty of care, because that case determine that ARO is not liability. As a consequence, the Director Claim embodies no reasonable cause of action. I make further comments on the "Director Claim" below: see part VI. E., below.

[286] Notwithstanding the impact of *Redwater*, I provide the following comments in respect of the Release.

1. Incremental Facts and Context

[287] The Share Purchase Agreement was negotiated between sophisticated parties. Each of those parties was represented by experience legal counsel.

[288] The Trustee does not challenge or seek to set aside the Share Purchase Agreement. Given that context, I find that the terms and conditions in the Share Purchase Agreement continue to stand.

[289] The Share Purchase Agreement stipulated the closing deliverables for Perpetual Energy, in its capacity as the vendor, including the following for the benefit of PEOC:

8.1(a)(xviii) resignations of all directors and officers of [PEOC] and a release from such directors and officers pursuant to which they release all Claims against [PEOC];....

[290] The Share Purchase Agreement also stipulated the closing deliverables of 198Co, in its capacity as the purchaser. These deliverables included the following reciprocal release in favour of Ms. Rose:

8.2(a)(xiii) releases signed by the new signing authorities of [PEOC] as appointed by the Purchaser releasing the directors and officers of [PEOC] from

any Claims related to such directors and officers acting as a director or officer of [PEOC];....

[291] The term “Claim” is defined broadly in the Share Purchase Agreement as “any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing”.

[292] As provided for in the Share Purchase Agreement, the new directors of PEOC signed the Release on behalf of PEOC. Those new PEOC directors did so under the new ownership of 198Co.

[293] PEOC and Perpetual Energy released Ms. Rose from any claims relating to her having acted as a director and officer of PEOC. The Release provides as follows:

Corporate Release

3. PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement), which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.

[294] As is evident from the above text in clause 3 of the Release, it includes an exclusion that provides that the Release does not apply if the Claim is based on the fraud, criminal conduct or deceit. None of the claims or particulars in the Trustee SOC allege fraud, criminal conduct or deceitful conduct in respect of Ms. Rose.

[295] The Release further provides:

Understanding & General

4. The parties acknowledge and declare that they have been provided with sufficient time and opportunity to consider all factors related to the execution of this Mutual Release and acknowledge a full awareness of its consequences and its voluntary execution. The parties acknowledge having received independent legal advice regarding the execution of this Mutual Release, or have voluntarily chosen not to receive such advice.

...

6. This Mutual Release shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.

2. The Law

[296] Releases are common in a variety of circumstances, including in purchase and sale agreements and where the parties have no previous relationship. The purpose of a release is typically to deal with events that are, or may be, yet to come.

[297] A release is an agreement. Its effectiveness is judged on the basis of ordinary contractual principles: *Fotini's Restaurant Corp v White Spot Ltd* (1998), 38 BLR (2d) 251 at para 8, [1998] BCJ No 598 (SC).

[298] The wording of a release typically suggests an intent to wipe the slate clean. The parties may look to make that fresh start when, for example, they wish to end a particular relationship or one party may be seeking to sever a connection with a prior relationship: *Bank of Credit and Commerce International SA (in Liquidation) v Ali*, [2001] 1 All ER 961 (HL) [*Ali*] at 970.

[299] A release is the abandonment, in whole or in part, of a right or claim: *Covia Canada Partnership Corp v PWA Corp* (1993), 105 DLR (4th) 60 at 75, [1993] OJ No 1757 (Ont Ct (Gen Div)), aff'd (1993), 106 DLR (4th) 608 (ONCA); *Keats v Arditti* (2000), 233 NBR (2d) 291 at para 104, [2000] NBJ No 498, (NBQB), aff'd 2001 NBCA 88, leave to appeal to SCC refused 28982 (20 June 2002); and *Re Donnell*, [1930] 4 DLR 1037 at 1037, [1930] OJ No 433 (Surr Ct). The essence of a release is that one party discharges the other party from an action: *Abouchar v Ottawa-Carleton (conseil scolaire de langue française section publique)* (2002), 58 OR (3d) 675 at 678, [2002] OJ No 1249 (SC).

[300] The intent of a release is to unchain a party from any liability or obligation to another party arising out of particular circumstances, and to do so once and for all: *Abundance Marketing Inc v Integrity Marketing Inc*, 2002 CanLII 23605 (ONSC) at para 22, 117 ACWS (3d) 227, [2002] OJ No 3796. That is, a release extinguishes the underlying liability. As a consequence, a release can be held up as a bar to a claim.

[301] The person requesting a release typically seeks to obtain a relinquishment of rights, which can be used as a bar against a future claim. Even where a release is not effective to bar a particular proceeding, it may still be relevant to bar the merits of the issues in that proceeding or in relation to the remedies that otherwise may be available: *Keewatin (Regional Health Board) v Peterkin* [1997] NWTR 93 at paras 7, 27, 29 CCEL (2d) 190 (NWTSC), at 198. Under long-standing common law principles, a release serves this purpose because it can be raised as a bar to an action on a debt or claim that has been discharged: *Brown v Owen*, [1939] OWN 522, 4 DLR 732 (SC); *Carey v Freeman*, [1938] 4 DLR 678 (Ont CA) at 681, [1938] OR 713; *Heitman Financial Services Ltd v Towncliff Properties Ltd* (1981), 35 OR (2d) 189 at 192-193, 12 ACWSC (2d) 294 (HCJ).

[302] A valid and enforceable release affords a complete defence to an action because its effect extinguishes the underlying cause of action. There is no need for the party relying on the release to make out a case that the commencement of the action constitutes a breach of contract. There is no necessity for pleading a counterclaim: *Carey* at 681.

[303] The effect of a release is to extinguish a cause of action in a manner similar to the expiry of a limitation period: *British Columbia Electric Railway Co v Turner* (1914), 49 SCR 470 at 496. The Judicial Committee of the Privy Council accepted this proposition as being correct: *British Columbia Electric Railway Co v Gentile*, [1914] AC 1034 (PC) at 1042.

[304] When a release is signed, the releasee is typically seeking to achieve finality. In this regard, authoritative courts have recognized that finality is an objective of both parties, and that the parties to a release do not confine the scope of the document to known claims: *Ali* at 970-71.

[305] The finality associated with judgments of a court are recognized as an important feature of the justice system in Canada, both for the parties involved in any specific litigation and for the community at large: *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 OR (3d) 257 at 275, 165 DLR (4th) 268 (CA) [*Tsaoussis*], leave to appeal to SCC refused, 26945 (28 January 1999).

[306] In *Tsaoussis*, the Ontario Court of Appeal considered a motion to set aside a judgment approving an infant settlement. For the parties, the Court noted that finality is an economic and psychological necessity: *Tsaoussis* at 275. The appellate Court in that case commented that finality “places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation”: *Tsaoussis* at 275. While the context in that case was not commercial, the premise remains the same. Courts emphasize the high value placed upon finality by our justice system.

[307] It is important that there be a point in time when parties can proceed on a basis that matters have been decided, and rights and obligations finally determined. Parties need to be secure in their knowledge that issues have been concluded on a final basis: *Tsaoussis* at 276. The common law recognizes this contractual entitlement in the form of a release.

3. Application of the Law to the Facts

[308] It is standard industry practice to release outgoing directors when there is a change of control. It would be highly unusual for a director not to seek protection in the form of a release.

[309] As I understand the Trustee’s argument, it seeks monetary damages from Ms. Rose on the theory that Ms. Rose caused Perpetual Energy to require 198Co to agree to the Release. On the balance of probabilities, I find that this allegation is without merit for the following reasons.

[310] First, there is no evidence that Ms. Rose caused Perpetual Energy to do anything. Indeed, the evidence is to the contrary. Perpetual Energy is a public company. It has its own board of directors. Further, there is no evidence that Ms. Rose controlled Perpetual Energy. Given that context, I find that Ms. Rose did not control Perpetual Energy.

[311] Second, the Release confirmed that Ms. Rose acted as a director and officer of PEOC at the request of Perpetual Energy.

[312] Third, counsel for the Trustee conceded in court that “[t]his was Perpetual Energy doing this transaction through a subsidiary.”

[313] Fourth, PEOC was a special purpose corporation that was a wholly owned subsidiary of Perpetual Energy. That being the case, legal control flowed from the parent corporation, which was Perpetual Energy, to the subsidiary, which was PEOC.

[314] Fifth, 198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate Transaction with the assistance of experienced legal counsel. There is no evidence that 198Co was forced or "required" to agree to anything in respect of the Release.

[315] Sixth, the terms of the Release acknowledge that the parties have been provided with sufficient opportunity to consider all factors related to the execution of that document. Also, the parties specifically acknowledged a full awareness of its consequences, and its voluntary execution.

[316] The Trustee also alleges that Ms. Rose breached her duties to PEOC by acting contrary to section 122(3) of the *ABCA*. Section 122(3) of the *ABCA* provides as follows.

(3) Subject to section 146(7) [unanimous shareholder agreements], no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director from any liability for a breach of that duty.

[317] Section 122(3) of the *ABCA* embodies the principle that officers and directors may not contract out of existing duties owed to the corporation. The object of that statutory provision is to ensure that existing directors of the corporation comply with their duties to the corporation while they are in office.

[318] I struggle with the argument advanced by the Trustee. If the Trustee's position is that section 122(3) of the *ABCA* precludes a corporation from entering into a mutual release with a former director, that would be extraordinary for the following five reasons.

[319] First, the use of a mutual release by business people in transactions is common practice. If I accepted the position advanced by the Trustee, it would displace decades of business convention.

[320] Second, the implication inherent in the position of the Trustee is that directors can never be released in transactions that involve an acquisition of control. If that was the law, directors would be exposed to liability for an indeterminant length of time.

[321] Third, there are books written on the use of releases. My review of that literature does not support the proposition advanced by the Trustee.

[322] Fourth, there is a need for finality: *Tsaoussis* at 275. But for releases, a director may never achieve finality. As a matter of contract, the proposition advanced by the Trustee would be ironic in that it was PEOC (now Sequoia Resources) that negotiated and signed the Release. The implication of the Trustee's apparent position would be that Sequoia Resources could walk away from the very bargain that it negotiated.

[323] Fifth, the evidence is that Ms. Rose took her responsibilities as a director and officer of PEOC seriously, considered the best interests of PEOC, its stakeholders, and then exercised her business judgment to the best of her ability. Importantly, her evidence was to the effect that the

ultimate decision to enter into the Aggregate Transaction was that of Perpetual Energy and its board of directors.

[324] The evidence before me is that the Release was negotiated at arm's length between Perpetual Energy and 198Co, and that the Release was signed on behalf of PEOC by the new directors, who were appointed by 198Co.

[325] As noted above, the parties to the Release acknowledged and declared that they were provided with sufficient time and opportunity to consider all factors related to the execution of the Release, and they acknowledged a full awareness of its consequences and its voluntary execution. The parties also acknowledged having received independent legal advice regarding the execution of the Release, or voluntarily chose not to receive such advice.

[326] These acknowledgments distinguish the circumstances of this Release from the one referred to in *Tongue v Vencap Equities Alberta Ltd* (1994), 148 AR 321, 17 Alta LR (3d) 103 (QB), aff'd 1996 ABCA 208. In *Tongue* at paras 139 and 141, the Court stated that the Release did not allow the directors to contract out of their duties. The decision in that case turned on disclosure, and the Court stated that the Releases did not contemplate liability for certain breaches because certain confidential information was not disclosed during the transaction: *Tongue* at paras 135-136. In contrast to *Tongue*, there is no suggestion in this case that there was not full disclosure. Further, the evidence is that both parties to the Release had experienced legal counsel advising them.

[327] Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee's claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be no damages against Ms. Rose and she is shielded from financial exposure.

4. Conclusion

[328] The Trustee's claims against Ms. Rose are solely in relation to her having acted as a director of PEOC. I find this to be directly contrary to the express terms of the Release.

[329] The Trustee's segregation of the Asset Transaction from the Aggregate Transaction puts it in the unusual position of conceding that the Release was part of the negotiated transaction, but somehow disconnected from the Asset Transaction. This inconsistency cannot be reconciled.

[330] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

1. Incremental Facts and Context

[331] For convenience, I include key facts here notwithstanding that they may have been included above.

[332] The value of the Goodyear Assets received by PEOC on the Asset Transaction was alleged in the Trustee SOC to be no more than \$5,670,200. This amount does not include any value attributed to the Gas Marketing Contract, which the evidence indicates was \$12.9 million. Further, this amount does not include additional information from the models that the Trustee compiled.

[333] The evidence provided by the Trustee estimated the liabilities assumed by PEOC in the Asset Transaction to be as follows: (i) ARO abandonment costs of \$98,855,218; (ii) ARO reclamation costs of \$93,272,056; and (iii) ARO facility costs of \$26,831,000. These ARO liabilities aggregate to a total of \$218,958,274.

[334] The evidence provided by the Trustee alleged municipal property taxes in the amount of \$10,047,744. Based on my review of the evidence, I note that those municipal property taxes were from a 2015 listing. Since the Asset Transaction was effected in 2016, I focused on the municipal property taxes associated with that calendar year. Based on my review of the evidence, I find the relevant outstanding municipal property tax to be in the amount of \$1,560,890.

[335] During my review of the evidence, I did not see any record of the municipalities issuing notices of default in respect of the property taxes that are associated with the Goodyear Assets.

[336] The Trustee asserted that Asset Transaction resulted in a net deficit of \$217,580,800. In my review of that calculation, in conjunction with a detailed review of the evidence, I identified an amount of “value” that was deducted twice (\$5,765,000).³ There also were some minor rounding adjustments (\$18, being a net amount).

[337] The Trustee SOC alleges that Ms. Rose determined that the Goodyear Assets were high liability assets. It further asserts that Ms. Rose failed as a director of PEOC to consider the implications of ARO as a liability of PEOC.

[338] Ms. Rose filed the application before me, amended twice, for summary dismissal and striking pleadings. She asked that this action against her be summarily dismissed pursuant to Rule 7.3, or in the alternative to be struck pursuant to Rule 3.68.

2. The Law

[339] *Redwater* has a significant impact on the Director Claim. I have already commented on *Redwater* extensively above. To the extent it is relevant, I incorporate by reference my above comments on *Redwater*.

[340] In addition, *Daishowa* touches on the alleged liability issue from a different perspective. The comments of the Supreme Court of Canada in *Daishowa* on the alleged liability issue are instructive, including at paras 3, 29, 37 and 40:

³ See Exhibit N to the Darby Affidavit. The alleged net deficit of \$223,241,000 already reflects a reduction of \$5,765,000. When the \$223,241,000 is reduced again by the amount of \$5,670,200, the net result of \$217,570,800 is recorded. That matches the amount claimed, but the double deduction of value was required to come to that “net amount”.

[3] The issue in this case is whether [Daishowa-Marubeni International Ltd. (“DMI”)] was required to include in its “proceeds of disposition” for each sale an estimate of the cost of the reforestation obligations that the purchasers assumed. In my view, DMI was not required to do so. The obligation to reforest areas harvested in accordance with a forest tenure in Alberta is a future expense that is embedded in the tenure. As such, the obligation serves to depress the value of the forest tenure. It is not a separate existing debt of the vendor that is assumed by the purchaser as part of the sale price of the forest tenure.

...

[29] I agree with Mainville J.A., DMI and the industry interveners that the assumed reforestation obligations are not appropriately 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.

...

[37] In sum, the reforestation obligations imposed by Alberta law on DMI’s forest tenures are embedded in those tenures and, as such, are future expenses tied to ownership of the property. They are not a liability that can be separated from the forest tenure, the assumption of which would form part of the sale price of the tenure.

...

[40] However, DMI’s argument that the reforestation obligations should not be included in its proceeds of disposition because they are a “contingent liability” is misplaced and appears to have caused some confusion in the courts below. The argument is problematic because, in focusing on whether the reforestation obligations are contingent or absolute, it implicitly accepts that the cost of reforestation is a liability of the vendor that is not embedded in the forest tenure and would constitute proceeds of disposition but for the contingent nature of the liability; see Frankovic, at p. 4. This implicit assumption is incorrect. As I have explained above, the cost of reforestation is not a distinct existing liability of the vendor. The assumption of the cost of reforestation would thus be excluded from proceeds of disposition independent of whether the cost is absolute or contingent.

3. Analysis

[341] I have already indicated that the Director Claim embodies no reasonable cause of action when the Trustee SOC is read as a whole in the context of what fiduciary duty and duty of care mean: see paragraph 285 of this decision, above. That is fatal to the Director Claim. I make this comment because *Redwater* held that ARO is not a liability, which nullifies the Trustee’s arguments concerning fiduciary duty and duty of care.

[342] While *Redwater* and the consequential lack of a cause of action are sufficient to strike the Director Claim, Ms. Rose also sought summary dismissal of this matter. For completeness, I will address the question of summary dismissal of the Director Claim.

a. Summary Dismissal

[343] I am required to assess whether it is possible to resolve the Director Claim on a summary basis, based on the record before me. I find that there is sufficient evidence for me to do so.

[344] For purposes of this analysis, I will use the Trustee's alleged value of consideration received, being the amount of \$5,670,200. Concerning the liabilities associated with the ARO and municipal property taxes, the alleged liabilities will be examined through the lens of the law as it currently stands.

[345] In considering summary dismissal, I must assess whether Ms. Rose has demonstrated on a balance of probabilities that, on the facts as proven, there is no merit to the Director Claim.

[346] The Alberta Court of Appeal has cautioned that a summary dismissal should not be considered if there is a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor. I considered that issue above. That is a question of law, and *Redwater* is relevant. To the extent the parties dispute the application of *Redwater*, I find that the Trustee's position is without merit. That being the case, *Redwater* should be considered in Ms. Rose's summary dismissal application.

[347] The Trustee alleges that Ms. Rose had determined that the Goodyear Assets were high liability assets. The Trustee also alleges that Ms. Rose was aware that PEOC was unable to meet the obligations associated with Goodyear Assets.

[348] In contrast, Ms. Rose argues that the above allegation has no relevance to her duties to PEOC, and that she acted in accordance with her statutory duties under the *ABCA*.

[349] Notwithstanding Ms. Rose's arguments, I will address the liability issue because that is the foundation of the Trustee's argument. To do this, it is necessary to consider the Asset Transaction in the context of the liability issue.

[350] The Perpetual Energy Defendants assert that the ARO is not a liability. They take this position on the authority of *Redwater*.

[351] In contrast, the Trustee asserts that the Supreme Court of Canada in *Redwater* did not address the broader question of whether the AER was a creditor for any purpose. The Trustee also argued that *Redwater* would have no effect on its standing to advance various claims, and that the concept of a "provable claim" was not relevant to the oppression analysis that the Court needed to address.

[352] PWC asserted in the Trustee's June 2019 Submission that the "provable claim" issue was a red herring. It advanced this argument apparently because it is of the view that *Redwater* impacts a definition in the *BIA* that is not relevant to the analysis that the Court must undertake on other fronts. I disagree.

[353] The Trustee also submits that the Defendants' assertions that *Redwater* holds that the ARO is not a liability are without merit based on the facts in *Redwater* and *Daishowa*. To support its position, the Trustee refers to the following:

- a. All licenses held by Redwater were received by it, subject to the end-of-life obligations that would one day arise: *Redwater* at para 157.
- b. The issue in *Daishowa* was whether the reforestation obligations assumed by the purchaser depressed the value of the tenures sold or were separate liabilities to be included in the seller's proceeds of disposition for tax purposes: *Daishowa* at paras 6, 7 and 25, 26. The Trustee argues that, as in *Redwater*, there is no dispute in *Daishowa* that the reforestation obligations were a form of liability: see Trustee's June 2019 Submission at para 12.
- c. The ARO associated with the assets transferred to PEOC had a present effect on the fair market value of those assets, the same as if the associated costs had been paid upfront: *Redwater* at para 157.

[354] To properly consider the nature of Trustee's assertions, I need to review the definition of "liability". The nature of the "liability" issue is important to the Director Claim because it will assist in determining whether there is any merit to that claim, as framed by the Trustee.

[355] Based on my review of the evidence in the context of the law as it currently reads, the record allows me to make a finding on this liability issue. Indeed, the Trustee, by its own admission, asserted that "...facts are not complex or disputed".⁴ The Trustee also states that "...there is no reason why complex *legal* issues require a trial and cannot be determined on an application" (emphasis in the original).⁵

[356] Based on the evidence before me, I find that the ARO does not represent a liability for the following four reasons.

[357] First, the Trustee asserts that the ARO is a liability because *Redwater* referred to that regulatory responsibility as an end-of-life obligation that would one day arise: *Redwater* at para 157. Contrary to the Trustee's position, I find that judicial comment supports the position that ARO is not a liability. In particular, that judicial comment in *Redwater* recognizes that an obligation will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability.

[358] Concerning this point, the issue of whether a current liability exists is binary. There is no middle ground. A liability either exists or it does not. Further, a liability is quite different from a future obligation, particularly one that can be quantified only by reference to broad assumptions. While financial statements may record an accounting provision for various obligations, such accounting provisions do not, in and of themselves, create a liability that is recognized in Canada under the laws of general application.

⁴ See paragraph 28 of the Trustee's Brief. See also the Trustee's statement in paragraph 11 of its Brief where it asserts that "[t]he relevant facts are simple." The Trustee also states that "[t]he complexity of a transaction or the amount involved does not, on its own, preclude the Trustee from proceeding by way of a summary application": see paragraph 27 of the Trustee's Brief. Given that statement, I am of the view that the argument goes both ways to permit applications to be brought against the Trustee as well.

⁵ See paragraph 29 of the Trustee's Brief.

[359] Second, the Trustee relies on *Daishowa* to assert that there is no dispute that the reforestation obligations were a form of liability: *Daishowa* at paras 25, 26. As I understand the Trustee's position, it asserts that a "form of liability" is therefore a liability.

[360] I find that assumption to be in error because a "form of liability" is, at best, a contingent liability. A contingent liability is not a liability in law. This very point has been made by the Supreme Court of Canada: *Daishowa* at para 40 (which is stated above at paragraph 340 of this decision).

[361] Third, the Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: *Hordo* at para 15. Absent a creditor, there cannot be a liability. One goes with the other because they are linked inextricably.

[362] Fourth, during the hearing of this matter, the Trustee made an unqualified admission to the effect that ARO associated with the Goodyear Assets was not a PEOC liability. While the Trustee's June 2019 Submission suggests that the Trustee is retreating from that admission, that concession during argument highlights the weak ground on which the Trustee stands.

[363] Based on the evidence before me, the current state of the law and my analysis above, I find that the AER, on the balance of probabilities, was not a creditor of PEOC at the time of the Asset Transfer and that PEOC was not subject to a current or enforceable liability in respect of the ARO that was allegedly associated with the Goodyear Assets. As a result, I also find that Ms. Rose has demonstrated, on the balance of probabilities, that, on the facts proven, there is no merit to the Director Claim. Restated, if the AER is not a creditor, the foundation of the Trustee's argument concerning the Director Claim is nullified.

[364] I am able to make these findings based on the nature and quality of the evidence before me. The record was sufficient to consider this "liability" issue on a summary application, and there was no "credibility" issue that had to be tested (in contrast to my finding above in respect of the *BIA* Claim).

[365] Having found that there is no merit to the Director Claim, I find that Ms. Rose discharged her burden. That said, I need to assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the Director Claim: *Weir-Jones* at para 30, 47. This latter assessment will be based on the nature of the issues and their merits.

[366] Undoubtedly, the Trustee is of the view that there is a genuine issue requiring a trial. As I noted above, the Trustee asserts that the Supreme Court of Canada in *Redwater* did not address the broader question of whether the AER was a creditor for any purpose. The Trustee also asserted that *Redwater* has not determined the liability issue. In particular, the Trustee takes the position that the argument that the ARO is not a liability is without merit.

[367] Before Supreme Court of Canada decision in *Redwater*, I may have considered the argument advanced by the Trustee. However, on the authority of *Redwater*, I find that the AER is not a creditor in respect of the ARO associated with the Goodyear Assets. Consistent with that finding, I also conclude that the ARO associated with the Goodyear Assets was not a liability of PEOC (Sequoia Resources) at the time that the Asset Transfer was effected.

b. Financial Review – *Redwater* Impact

[368] My conclusion is supported by the financial component of the “Value and Consideration” in respect of the Asset Transaction. That financial result is as follows (see the “**Post-Redwater**” column):

| | Trustee SOC | Post-<i>Redwater</i> |
|--|------------------------|-----------------------------|
| Alleged Value of Consideration Received | <u>\$5,670,200</u> | <u>\$5,670,200</u> |
| Trustee Estimate of Liabilities Assumed: | | |
| • ARO abandonment costs | 98,855,218 | NIL |
| • ARO reclamation costs | 93,272,056 | NIL |
| • ARO Facilities | <u>26,831,000</u> | <u>NIL</u> |
| Alleged Aggregate ARO | 218,958,274 | NIL |
| Alleged Aggregate Property Taxes | <u>10,047,744</u> | <u>1,560,809</u> |
| Sub-Total | 229,006,018 | 1,560,809 |
| Reconciling Adjustment ⁶ | <u>(5,765,018)</u> | <u>NIL</u> |
| Alleged Aggregate Liabilities | <u>223,241,000</u> | <u>1,560,809</u> |
| Net Asset (Deficit) | <u>(\$217,570,800)</u> | <u>\$4,109,391</u> |

[369] In effect, the decision in *Redwater* extinguishes the Trustee’s assertion that the Asset Transaction resulted in a significant net deficit. This “**Post-Redwater**” determination further demonstrates that there is no merit to the Director Claim insofar as it was premised on the ARO being a liability. Accordingly, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

[370] Given the above facts and analysis, I find that the Trustee has not established that there is a genuine issue requiring a trial in respect of the Director Claim because the Trustee’s foundation for the Director Claim was premised on the ARO being a liability. That position has been nullified by *Redwater*.

[371] Given this determination, the guidelines in *Weir-Jones* require that I take one last step. That is, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the Director Claim: *Weir-Jones* at para 47(d); see also *Geophysical Service* at para 40. Based on my review, I am satisfied that the state of the records permits me to exercise discretion to summarily dismiss the Director Claim.

⁶ This adjustment is included in order to reconcile with the figure that the Trustee used. See footnote 3, above.

4. Conclusion

[372] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

VII. Summary of Conclusions

[373] For convenience, I summarize my above conclusions as follows.

A. *BIA* Claim – Was the Asset Transaction an arm’s length transfer for purposes of section 96(1) of the *BIA*?

[374] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[375] Given the above facts and analysis, I will not strike the *BIA* Claim.

B. Oppression Claim – Is the Trustee a “complainant” that is entitled to bring an oppression claim under section 242 of the *ABCA*?

[376] Given the above facts and analysis, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I do so on the basis that the Trustee is not a “proper person” that would accord it standing as a “complainant”, and, alternatively, because the Trustee has no cause of action in respect of the Oppression Claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

[377] Given the above facts and analysis, I strike the Public Policy Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

D. Is the Release a complete bar to claims against Ms. Rose?

[378] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

[379] Given the above facts and analysis, I strike the Director Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

[380] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3.

VIII. Costs

[381] If the parties cannot otherwise agree, they may speak to costs at their convenience.

Heard on the 08th and 09th day of November, 2018 and the 17th day of December, 2018.
The parties provided further written submissions on June 4, 2019, June 11, 2019 and June 14, 2019.

Oral Reasons for Judgment given on 15th day of August, 2019.

Written Reasons for Judgment dated at Calgary, Alberta this 13th day of January, 2020.

D.B. Nixon
J.C.Q.B.A.

Appearances:

Mr. Rinus de Waal and Mr. Luke Rasmussen
for the Plaintiff

Mr. Daniel McDonald Q.C. and Mr. Paul Chiswell
for Perpetual Energy Inc.

Mr. Steven Leidl and Mr. Aditya Badami
for Susan Riddell Rose

PWC v Perpetual Energy
(Court Action No. 1801 — 10960)

THE TRUSTEE'S RESPONSE TO

Requests from, and Questions for, the Parties

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| 1 | <p><i>Please provide the court with the closing agendas concerning following transactions.</i></p> <p><i>a. The September 26, 2016 transaction in respect of the Share Purchase and Sale Agreement between Perpetual Energy Inc. ("PEI") and 1986114 Alberta Inc. ("198Co") regarding the shares of Perpetual Energy Operating Corp. ("PEOC") (the "Share Purchase Agreement").</i></p> <p><i>b. The October 1, 2016 transaction in respect of the Purchase and Sale Agreement between Perpetual Operating Trust ("POT") and PEOC regarding the transfer of certain hydrocarbon interests, tangibles and miscellaneous interests (collectively, the "Goodyear Assets") (the "Asset Transfer Agreement").</i></p> |
| | <p>The Trustee assumes that PEI will respond to this request.</p> |
| 2 | <p><i>Please provide the Court with Schedule "I" to the Share Purchase Agreement.</i></p> |
| | <p>Schedule I is attached to Exhibit H to the Rose Affidavit.</p> |
| 3 | <p><i>A pleadings binder was provided to the Court by covering letter that is dated August 31, 2018 (the "Pleadings Binder"). The Affidavit of Paul J. Darby is under Tab 3 of the Pleadings Binder (the "Darby Affidavit"). Based on my initial review of the PEOC financial information under Exhibits I and J to the Darby Affidavit, there appears to be an inconsistency.</i></p> <p><i>a. Please reconcile the financial information in Exhibits I to J to the Darby Affidavit.</i></p> <p><i>b. Is the PEOC balance sheet as at June 30, 2016 representative of the PEOC balance sheet as at September 30, 2016?</i></p> |
| | <p><i>a. Exhibit I consists of the PEOC entity statements as is (see notes). Exhibit J is the PEOC ASSETS pro-forma income statement. The pro-forma results show a \$(4.7) million operating loss on the Goodyear Assets for the six months ended June 30, 2016 and do not include G&A, interest, taxes, depletion, ARO costs (see note #1)</i></p> <p><i>b. Prior to the closing of the Asset Transaction - yes on a legal entity basis. Exhibit I only. There was no balance sheet prepared based on the assumptions under Exhibit J</i></p> |
| 4 | <p><i>Clause 5 of the Statement of Claim filed on August 2, 2018 ("PWC Statement of Claim") states that under the Asset Transfer Agreement "...PEOC, as trustee of POT, purchased the Goodyear Assets". I seek clarification of this statement. Did PEOC purchase the Goodyear Assets for itself or as trustee of POT?</i></p> |

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| | PEOC purchased the Goodyear Assets for itself, from POT, while it was trustee for POT. |
| 5 | <p><i>Clause 6.6 of the PWC Statement of Claim effectively states that when PEOC purchased the Goodyear Assets "...no value was attributed to the assumption by PEOC of the ARO or for the indemnities provided by PEOC." I seek clarification of this statement.</i></p> <p>a. <i>Do the parties agree that clause 2.01 of the Asset Transfer Agreement provides that the Goodyear Assets were transferred "[u]pon the terms and subject to the conditions of..." that contract?</i></p> <p>b. <i>Does the Asset Transfer Agreement recognize that the conveyance involved an assumption of liabilities?</i></p> <p>c. <i>As a stand-alone asset, did the Goodyear Assets have value at the time that they were conveyed to PEOC?</i></p> <p>d. <i>Paragraph 21 of the Darby Affidavit states that PEOC would buy the Goodyear Assets for a "...nominal purchase price..."? Did PEOC purchase the Goodyear Assets for a nominal amount?</i></p> <p>e. <i>What evidence is there to support the assertion that the liabilities associated with the Goodyear Assets exceeded the value of the Goodyear Assets at the time of the conveyance?</i></p> <p>(a) Yes, this is an express term of the Asset Transfer Agreement.</p> <p>(b) Yes, this is expressly dealt with in clause 2.06. Although no specific assumption was required, clause 2.06(b) confirms that:</p> <p style="padding-left: 40px;"><i>"under Applicable Law, the Abandonment and Reclamation Obligations and the Environmental Liabilities associated with the Assets are inextricably linked with such Assets so that Purchaser will be liable for Abandonment and Reclamation Obligations and Environmental Liabilities associated with the Assets in the absence of the specific assumption of such obligations by Purchaser in this Agreement or otherwise."</i></p> <p>(c) It is not clear whether the reference to "stand-alone asset" refers to the value of the assets without the associated ARO.</p> <p>If the ARO is disregarded, the Goodyear Assets would presumably have had some value. However, as the Agreement confirms, the ARO is inextricably linked to or embedded in the assets and, as in the <i>Daishowa-Marubeni</i> case (Rose Authorities, Tab 13 at paragraphs, 29, 30, 31 and 37), decreases the amount a prospective purchaser would be willing to pay for those assets.</p> <p>As set out in the Darby affidavit, the respondents' own evidence shows that at best, the positive value associated with these assets was no more than \$5,670,200 and the negative value "embedded in" or "inextricably linked" to these assets were no less</p> |

than \$223,241,000 (Darby Affidavit, paragraphs 33-44).

Accordingly, the “value” of the Goodyear Assets, in the sense of what a reasonably prudent purchaser would have been prepared to pay for them, would have taken the ARO into account.

d. Yes. PEOC purchased the Goodyear Assets for a stated purchase price of \$10 (Rose Exhibit D, clauses 1.01(kk), read with 2.03. The PEOC shares were then purchased for \$1, which represented the full extent of the financial interest of 198 in the transaction.

e.) The PEI Goodyear Presentation shows that the liabilities associated with the Goodyear Assets far exceeded the value of the Goodyear Assets (where “value” used in this context does not take the ARO into account). For example:

- Darby Affidavit, Exhibit C, page 22 shows the removal of \$131 million of ARO as compared to strip pricing NPV10 \$(42) million (page 18) and McDaniel April pricing NPV10 \$(4) million (page 19);
- Darby Affidavit, Exhibit G shows an LMR shortfall of \$15.9 million, excluding pipelines;
- Darby Affidavit, Exhibit M shows municipal taxes owing and relating to these assets of ±\$10 million;
- Darby Affidavit, Exhibit O confirms that the Goodyear Transaction removed \$133 million in ARO and resulted in an increase of the net asset value of PEI of \$28.5 million;
- Darby Affidavit, Exhibit P, the September 30, 2016 financial statement, shows the value of the assets held for sale as \$109 million and the liabilities associated with those assets as \$131 million. This is further explained in Note 3.

In fact, all the evidence shows that the liabilities associated with the Goodyear Assets exceeded the value of the Goodyear Assets at the time of the transfer. There is no evidence to the contrary.

6 *Is paragraph 20 of the Darby Affidavit something on which this Court can rely upon for purposes of this hearing?*

Yes – as Mr. Darby states, all these steps in fact occurred. This is confirmed in the evidence and none of this is in dispute. PEI sold all its shares in PEOC to 198, Rose resigned as director of PEOC and PEOC’s name was changed immediately after closing of the Share Transaction.

- As in *Attila Dogan*, Mr. Darby gained personal knowledge by reviewing the records provided by the Defendants, including the records attached to his affidavit (*Attila Dogan v. AMEC Americas Ltd.*, 2015 ABQB 120, at paras. 64-75)

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| | <ul style="list-style-type: none"> • In <i>Attila Dogan</i>, the Court cited with approval <i>Principal Savings</i>, a decision where the liquidator of a savings and trust company sought summary judgment relying on an affidavit sworn by its representative (<i>Principal Savings</i> (1991) 1 C.P.C. (3d) 206). The Court found that he did not have “first-hand” personal knowledge but acquired personal knowledge by reviewing the records of the company in liquidation (para. 13). • In a bankruptcy situation, it is unlikely the officers or employees of the bankrupt will be willing or able to provide first-hand personal knowledge. Courts have recognized this in accepting affidavit evidence from the Trustee’s representative. For example: <ul style="list-style-type: none"> • In <i>Anderson</i>, the trustee sought summary judgment on its s. 96 claim. The Court accepted the trustee’s belief, set out in an affidavit, “that the Bankrupt did not acquire any substantial net assets between 2002 and 2005 (2012 BCSC 956, at para. 3(11)). • In <i>Meyers Norris Penny Ltd. v. Barcellona</i>, the Court granted summary judgment on a s. 95 claim relying on affidavit evidence from the trustee’s representative expressing his belief that the respondents were “insolvent for the purposes of [the BIA] at the time of the transfer of property” (2005 MBQB 10, at paras. 11, 46 and 51). • In <i>National Telecommunications</i>, another decision concerning a summary judgment application by a trustee, accepted the trustee’s affidavit evidence that the bankrupt was insolvent (2017 ONSC 1475, at paras. 27-28). |
| 7 | <p><i>Exhibit G to the Darby Affidavit summarizes the Licensee Liability Rating (“LLR”) for the “Northern Wells and Facilities and for the Southern Wells and Facilities.”</i></p> <ol style="list-style-type: none"> a. <i>Do the “Northern Wells and Facilities and the Southern Wells and Facilities” comprise the Goodyear Assets?</i> b. <i>Is there any evidence that the actual value of the Goodyear Assets equals the difference between the “Deem Assets” and “Deemed Liabilities”, as those latter two phrases are defined in Alberta Energy Regulator (“AER”) Directive 006 (“Directive 006”), effective February 17, 2016?</i> c. <i>Should this Court make findings based on “Deemed Assets” and Deemed Liabilities”, as those phrases are defined in Directive 006 or should this Court only make findings based on actual asset values and obligations?</i> d. <i>Are the Deemed Liabilities for the LLR calculated on a discounted or undiscounted basis?</i> <ol style="list-style-type: none"> a. The Trustee has no independent knowledge of this document. It was a record produced by PEI which had been included in the data room for the sale of the Goodyear Assets, so it presumably relates to those assets. b. Not directly. However, as stated earlier, the liabilities associated with the assets will |

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| | <p>directly affect the price a purchaser will be prepared to pay for those assets. For the s.96 analysis, the question is whether there was a conspicuous difference between the "consideration" given and received by PEOC. The negative aspects of the value of the Goodyear Assets must necessarily involve something other than an "actual value", so the deemed liabilities do factor into the determination of what a prospective purchaser may pay for these assets.</p> <p>c. The Court should consider all evidence relating to value, including the deemed liabilities. Again, because of the big difference between the positive and negative aspects of the value of the Goodyear Assets, it is not necessary to determine the value of the assets (actual or deemed) for a finding that the consideration received by PEOC was conspicuously less than the consideration it provided in taking over the assets and associated liabilities.</p> <p>d. On an undiscounted basis.</p> |
| 8 | <p><i>Paragraph 20 of the Darby Affidavit states that PEOC was unable to pay the abandonment and reclamation costs ("ARO"), the municipal property tax liabilities or other liabilities associated with the Goodyear Assets and was insolvent at the time of, or immediately after, the asset transaction.</i></p> <p>a. <i>What weight should the Court give this assertion?</i></p> <p>b. <i>In swearing the Darby Affidavit, did Mr. Darby determine the liabilities of PEOC on discounted or undiscounted basis?</i></p> <p>We assume the reference is to paragraph 31 of the Darby Affidavit.</p> <p>a. This is an inevitable conclusion from the uncontested facts. PEOC had no other assets or sources of revenue when it received the 2,500 cash-flow negative wells, inextricably linked to financial obligations which far exceeded the most optimistic valuations of PEI.</p> <p>b. The Trustee's numbers are presented on an undiscounted basis.</p> |
| 9 | <p><i>Paragraphs 32 and 33 of the Darby Affidavit reconcile all of the PEOC/Sequoia wells with the various agreements by which they were acquired and confirms the status of those wells. A review of Exhibit K to the Darby Affidavit indicates that the status of those wells was as at March 23, 2018. Given that the disputed transaction occurred on October 1, 2016, of what relevance is the status of the PEOC/Sequoia wells as at March 23, 2018?</i></p> <p>The reconciliation confirms that the Trustee had tracked all the assets, so that the evidence regarding the ARO associated with the Goodyear Assets, for example, is credible from that perspective.</p> |
| 10 | <p><i>Paragraphs 44 and 51 of the Darby Affidavit explicitly state that opinions are being expressed.</i></p> |

a. *How should the Court deal with each of those opinions for purposes of this hearing?*

b. *Paragraph 104.1 of the PWC Brief states that "[t]he Trustee's evidence is that the difference between the consideration given and received by the PEOC in the Asset Transaction was at least \$217,570,800" (emphasis in original). On what basis does Mr. Darby determine this difference? Is Mr. Darby an expert in valuation?*

a. With respect to paragraph 44 of the Darby Affidavit, the Trustee was obliged by s.96(2) to state its opinion regarding these issues:

"... the trustee shall state what, in the trustee's opinion was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor..."

The Court must make its findings under s.96 on the values stated by the Trustee, in the absence of evidence to the contrary:

"... and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee."

The Defendants have deliberately not presented evidence to the contrary (yet). Accordingly, for the present purposes, the Court has to make its findings on the basis of the opinions of the Trustee set out in paragraph 44.

The Court may disregard the opinion of the Trustee in the first sentence in paragraph 51. The last two statements in paragraph 51 are matters of fact, consistent with the evidence of Ms. Rose and uncontradicted (as yet) by anyone on behalf of 198, who – according to Ms. Rose – was conducting the negotiations and may have been considering the creditors of PEOC.

The decisions cited above reflect the courts approach to the affidavit evidence of trustees in this context (*Anderson, Barcellona, National Telecommunications*).

b. The submission refers to paragraph 44 of the Darby Affidavit, in which he sets out the opinions of the Trustee, as he was required to do pursuant to s.96(2). The basis for his conclusions is explained in the previous paragraphs, starting at paragraph 32.

Mr. Darby is not an expert in valuation, but the Trustee has statutory authority and a statutory obligation to state its opinions. The statute also directs the Court to accept those opinions in the absence of evidence to the contrary. As submitted earlier, the Defendants intentionally did not deal with valuation in these applications, so they have put nothing forward to contradict the Trustee's values.

11 *Are paragraphs 46 and 47 of the Darby Affidavit providing opinions to the Court? If so, how should the Court deal with each of those opinions for purposes of this hearing?*

No, insolvency in this context is not a matter of opinion. The factual basis underlying

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| | <p>the statements in these paragraphs is the Defendants' own version, which is all in evidence.</p> <p>See <i>Anderson, Barcellona</i> and <i>National Telecommunications</i> as examples of similar trustee affidavit evidence used in support of summary judgment motions.</p> |
| 12 | <p><i>Paragraph 49 of the Darby Affidavit states that "Rose personally benefited from the Goodyear Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of the PEOC." Is this statement an opinion? If so, how should the Court deal that opinion for purposes of this hearing?</i></p> <p>The evidence is that Ms. Rose was a shareholder of PEI and that PEI shed approximately 71% of its liabilities and increased its net asset value by \$28.5 million as a result of the Goodyear transaction. Every shareholder of PEI, including Ms. Rose, benefited from the Goodyear Restructuring, as a matter of fact, not opinion (and whether the market immediately reflected that, or not).</p> |
| 13 | <p><i>In paragraphs 52 to 56 of the Darby Affidavit a number of comments are made concerning the Orphan Well program. In what capacity does Mr. Darby make these statements? In particular, is an opinion being expressed in paragraph 56 of the Darby Affidavit? If so, how should the Court deal with that opinion for purposes of this hearing?</i></p> <p>Mr. Darby states these facts as a witness, representing the Trustee. He refers to public information provided by the OWA and then states the inevitable conclusion regarding the relative impact the addition of 2,500 wells would have to the inventory of the OWA, to support his earlier statements in paragraph 51.</p> |
| 14 | <p><i>The last sentence in paragraph 57 of the Darby Affidavit states, in part, that since the Goodyear Assets are "... cash flow negative, PEOC has no ability to pay the taxes." Is this statement an opinion? If so, how should the Court deal that opinion for purposes of this hearing?</i></p> <p>The statement is not an opinion, but the logical conclusion on the undisputed facts. PEOC had no assets or revenue, then received a large number of cash-flow negative wells with associated liabilities (employees, trade creditors, surface owners, etc.). Stating the obvious conclusion is not an opinion, when the underlying facts allow no other conclusion.</p> <p>For that obvious reason, it is submitted, the conclusion was not challenged in the Defendants' evidence or in cross-examination of Mr. Darby.</p> <p>See <i>Anderson, Barcellona</i> and <i>National Telecommunications</i> as examples of similar trustee affidavit evidence used in support of summary judgment motions.</p> |
| 15 | <p><i>Do all parties agree that PEOC was solvent as at the end of business on September 30, 2016? If not, please direct the Court to the evidence that supports a contrary conclusion.</i></p> <p>No. If it was personally liable for property tax on the properties it held in its own name</p> |

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| | (as trustee, on behalf of POT), it was not solvent. |
| 16 | <p><i>Do all parties agree that PEOC and 198Co were not related to PEI at the end of business on October 1, 2016?</i></p> <p>Agreed. After the closing of the Share Transaction, there was no relationship between PEI and 198/PEOC</p> |
| 17 | <p><i>Paragraph 99.1 of the PWC Brief states that "POT was an 'entity' and the PEOC, its trustee, was 'a person who controls the entity, if it is controlled by one person'.</i></p> <p>a. On what authority is POT an "entity" for purposes of the <i>BIA</i>? While a trust is treated as an individual for Canadian tax purposes, that is because of deeming rules within the <i>Income Tax Act</i>.</p> <p>b. As I understand the laws of general application, a trust a relationship. To restate that understanding as a question, isn't a trust relationship created when property is transferred by a settler to another person who acts as a trustee, and that trustee holds the property for the benefit of one or more beneficiaries?</p> <p>c. For purposes of this hearing, what are the implications if POT is a relationship and not an entity?</p> <p>a. The provisions of the <i>BIA</i></p> <ul style="list-style-type: none"> • S. 4(1) of the <i>BIA</i> defines an "entity" as a "person other than an individual". • Section 2 of the <i>BIA</i> provides an inclusive, not exhaustive definition of "person" that includes "a partnership" and an "unincorporated association". • Like a trust, a partnership is traditionally defined as a relationship rather than a separate legal entity. • The <i>Partnership Act</i> defines "partnership" to mean "the <i>relationship</i> that subsists between persons" carrying on a business in common with a view to profit. • In <i>Lehndorff General Partner, Re</i>, a decision in the <i>CCAA</i> context, Justice Farley noted that "the preponderance of case law" supported the contention that "a partnership including a limited partnership is not a separate legal entity." ([1993] O.J. No. 14, at para. 19). • There is no provision in the <i>BIA</i> suggesting the definition of "person" excludes a trust. • In <i>Alberta Health Services v. Networc Health Inc.</i>, Justice Romaine noted that the <i>BIA</i> was "remedial legislation" that should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (2010 ABQB 373, at para. 20). <p>b. Yes.</p> <p>c. If POT is not an "entity", "person" or "party", the other "party" to the Asset Transaction is PEI, the beneficiary of POT.</p> <ul style="list-style-type: none"> • It is common ground that PEI was the sole shareholder of PEOC until after the |

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| | <p>closing of the Asset Transaction.</p> <ul style="list-style-type: none"> • There is no dispute that PEOC is an entity and PEI was “a person who controls the entity, if it is controlled by one person”. • Even if POT is removed from the equation, the Asset Transaction is still a related party transaction under s. 96. |
| 18 | <p><i>Paragraph 111 of the PWC Brief refers to "...the Asset Transaction closed on October 1, 2018." Can I assume that date should be October 1, 2016?</i></p> <p>Yes.</p> |
| 19 | <p><i>Paragraphs 111 and 116 of the PWC Brief refers to "provable claim".</i></p> <p><i>a. In what context is the phrase "provable claim" being used in these two paragraphs?</i></p> <p><i>b. When is the concept of "provable claim" relevant for purposes of this hearing?</i></p> <p><i>c. If POT is not an entity, is the concept of "provable claim" as framed by PWC relevant?</i></p> <p>a. In paragraphs 111 to 116, and the Trustee’s Brief generally, the term “provable claim” has the meaning ascribed to “claims provable” under the <i>BIA</i>, including s. 121.</p> <p>b. The phrase originates from the Statements of Defence filed by the Defendants, which say that none of the creditors on bankruptcy were “creditors of PEOC with provable claims at the time of the Transaction.” The Trustee’s brief responds to these allegations.</p> <ul style="list-style-type: none"> • Although they make the allegations in their Statements of Defence, the Defendants have not provided any argument or authority for the proposition that the concept of a “provable claim” is relevant to the Court’s oppression analysis. • It appears the Defendants conflate the definition of “creditor” under the <i>BIA</i> and the definition of “creditor” under the <i>ABCA</i>. <ul style="list-style-type: none"> ○ In the <i>BIA</i>, a creditor is defined as a “person having a claim provable as a claim under this Act”. ○ s. 242(2) of the <i>ABCA</i> provides that oppressive conduct is conduct that “is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer”. ○ The <i>ABCA</i> is a statute of general application. There is no basis to conclude that the <i>ABCA</i> definition of “creditor” should be limited to the <i>BIA</i> definition. • In <i>Apotex</i> (Rose, Tab 39), for example, the Court confirmed that a creditor need only be an “actual or potential” creditor at the time of the oppressive conduct |

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| | <p>(para. 38)</p> <p>c. The concept of a “provable claim” is not relevant to the Court’s oppression analysis. As we have pointed out, even plaintiffs who were, at best, potential judgment creditors, have been recognized by the Courts as proper “complainants” for the purposes of oppression claims (<i>Apotex</i>, para. 39, <i>Downtown Eatery</i>, para. 61 (Trustee’s Authorities, Tab 24), <i>Gestion-Trans-Tek</i>, para. 28 (Rose, Tab 44))</p> |
| 20 | <p><i>Paragraph 125 of the PWC Brief refers to a copy of the Proof of Claim submitted by AER on April 11, 2018.</i></p> <p>a. <i>The stated obligation of the AER Proof of Claim for the Goodyear Asset as at April 11, 2018 is in the range of \$1 to \$225,500,636.</i></p> <p>b. <i>What is the stated obligation of the AER Proof of Claim for the Goodyear Asset as at October 1, 2016?</i></p> <p>The obligation to abandon and reclaim arose when the wells were drilled, so the intervening period between October 1, 2016 and April 11, 2018 would have made no difference in the ARO obligations.</p> |
| 21 | <p><i>Paragraph 127 of the PWC Brief asserts that the Court of Appeal in Redwater confirmed that regulatory obligations are claims under the BIA. Is this assertion in the PWC Brief correct?</i></p> <p>a. <i>The majority in the Court of Appeal in Redwater appears to acknowledge, for example that an environmental obligation may qualify as a provable claim: see paragraph 60 of Redwater. However, before it qualifies as a provable claim, doesn't the alleged obligation have to satisfy a three-part test?</i></p> <p>b. <i>If PWC concurs that the alleged obligations need to satisfy a three-part test, my question is whether the tests have been satisfied in this case. If so, what is the evidence that PWC is relying on in this case to support the assertion that the alleged obligations have satisfied the three-part test?</i></p> <p>c. <i>Given this discussion on the issue of “provable claim” in the context of this case, I ask for your observations concerning the minority analysis at para 160 of Redwater.</i></p> <p>In approaching the issues on this appeal, I have considered, first, whether the regulatory regime governing Alberta’s oil and gas industry creates a provable claim that is subject to the bankruptcy scheme. I then considered whether the regulatory regime conflicts with the BIA, either by way of operational conflict or by reordering bankruptcy priorities so as to frustrate the BIA’s purpose of ensuring equitable distribution to creditors. I have concluded that the answer to both questions is “no”.</p> <p>[Emphasis added.]</p> |

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| | <p>As discussed in response to the question in paragraph 19 above, the “provable claim” issue is a red herring: it is a <i>BIA</i> definition not relevant to the Court’s oppression analysis under s. 242 of the <i>ABCA</i>.</p> <p>a. The three-part test from <i>AbitibiBowater</i> is set out at paragraph 120 of the Trustee’s brief. The Trustee agrees that it a regulator cannot satisfy those three requirements, it will not have provable claim.</p> <p>b. It is not necessary for the Trustee to establish that the AER’s claims satisfy the three-part test in <i>AbitibiBowater</i> in order to pursue its oppression claim. As in <i>Apotex</i>, <i>Downtown Eatery</i> and <i>Gestion Trans-Tek</i>, even a potential creditor at the time of the oppressive conduct can seek relief from oppression.</p> <p>c. It is not necessary for the Court to determine whether the AER had a provable claim at the time of the Asset Transaction.</p> |
| 22 | <p><i>Paragraph 144 of the PWC Brief refers to the cross-examination of Mr. Darby. In that cross-examination Mr. Darby states that “[t]he benefit she received as a stakeholder of Perpetual as a significant shareholder is clear in the increase in the asset base.... The benefit is clear.” Is this statement by Mr. Darby an opinion? If so, how should the Court deal that opinion for purposes of this hearing?</i></p> <p>For the reasons submitted with respect to paragraph 12 above, the statement that a shareholder benefits from an increase in the net asset value of a corporation is a matter of fact, not opinion.</p> <p>Put differently, nobody can hold that a shareholder is prejudiced (or not benefited) from an increase in the value of a corporation, so that there could be different <i>opinions</i> about this.</p> |
| 23 | <p><i>Paragraph 161 of the PWC Brief refers to Ms. Susan Rose being in breach of her directors' duties. Please articulate the director duty that was breached.</i></p> <ul style="list-style-type: none"> • In paragraph 161 of its brief, the Trustee refers to breaches by Ms. Rose of her fiduciary duty and duty of care. • Ms. Rose breached the duty of care she owed to PEOC as its sole director to, <i>inter alia</i>, to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, in accordance with s. 122(1)(b) of the <i>ABCA</i>. • Ms. Rose also breached the fiduciary duties she owed to PEOC as its sole director, including: <ul style="list-style-type: none"> ○ To act honestly and in good faith with a view to the best interests of PEOC, in accordance with s. 122(1)(a) of the <i>ABCA</i>; ○ To disclose to PEOC that (i) the Transactions, including the Asset Transaction, were not reasonable or fair to PEOC and were not in its best interests (ii) that the Transactions were highly prejudicial to PEOC’s interests; (iii) she benefited from |

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| | <p>the Transactions at the expense of PEOC, as a beneficial shareholder and director of PEI.</p> |
| 24 | <p>Paragraph 165 of the PWC Brief states that section 122(4) of the Business Corporations Act, RSA 2000, c B-9, only applies where (i) there are multiple directors, and (ii) one of more directors is elected or appointed.</p> <p>a. Where are these two prerequisites found?</p> <p>b. Paragraph 165 of the PWC Brief states that section 122(4) of the Business Corporations Act has no application to Ms. Susan Rose. Why not?</p> <p>c. If section 122(4) is available, what are its boundaries?</p> <p>a. The notion that a director is elected or appointed by a particular group with particular interests (as opposed to everyone entitled to elect or appoint a director), <i>necessarily implies</i> that the director is not simply elected or appointed in the normal course – in which case such a director would not have the interests of any particular group to consider – and that there must therefore be more than just the one director who was elected or appointed by the (smaller) group.</p> <p>b./ Ms. Rose was elected or appointed by PEI. She represented all the shareholders (PEI), not just a particular group.</p> <p>c. S.122(4) does not apply to Ms. Rose. If section 122(4) were interpreted to apply to a sole director elected by all of a corporation's shareholders, it would allow a director to give "special" consideration to the interests of shareholders generally.</p> <ul style="list-style-type: none"> • This would be inconsistent with the director's duty <i>to the corporation</i>, set out s. 122(1)(a) and referred to by our Court of Appeal in <i>Pocklington</i>, where it rejected the interpretation of s. 122(4) presently being advanced by Ms. Rose. • Section 122(4) is intended to protect the interests of minority stakeholders by allowing directors appointed by them to give special consideration to their interests. As stated above, it applies where a board of directors is composed of multiple directors representing different groups of stakeholders. |
| 25 | <p>Paragraph 169 of the PWC Brief states that "...a director elected or appointed by the holders of a particular class or series of shares is required to act in the best interests of the corporation and may not act in a way detrimental to the corporation." PWC goes on to indicate that the actions of Ms. Susan Rose were detrimental to PEOC.</p> <p>a. On what evidence is this "detrimental" assertion made?</p> <p>b. If there is evidence, what elements should the Court consider in weighing the detrimental actions?</p> <p>a. As a result of the actions (and omissions) of Ms. Rose, PEOC received a large number of cash flow negative assets with significant (\$133mm plus) ARO</p> |

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| | <p>obligations, with no means to pay operating or other costs, because that benefited PEI to the tune of \$28.5 million in increased net asset value.</p> <p>b. The Court should consider the Defendants' own assessment of the financial impact of the transactions, from the PEI perspective.</p> <p>There is nothing before the Court to suggest that the Asset Transfer was in the best interests of PEOC, except the continued insistence that "<i>PEOC's interests were Perpetual's interests</i>", that "<i>the best interests of PEOC were the best interests of Perpetual</i>", that "<i>PEOC had no interests independent of the interests of Perpetual</i>" and that "<i>the proposition that PEOC had an independent and different set of interests is artificial and commercially absurd.</i>"</p> |
| 26 | <p><i>In addition to other arguments mentioned in paragraph 196 of the PWC Brief, the Trustee pleads that the Asset Transfer "unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors". PWC asserts that the Asset Transfer Agreement had the following consequences.</i></p> <p>a. <i>It rendered PEOC insolvent. PWC also stated that PEOC might have been insolvent before the Asset Transfer.</i></p> <p>b. <i>It rendered PEOC unable to pay the municipal property taxes with respect to the Goodyear Assets; and</i></p> <p>c. <i>It rendered PEOC unable to pay the ARO associated with the Goodyear Assets.</i></p> |
| 27 | <p><i>Concerning the consequences referred to in the above paragraph, my questions are as follows, in the above sequence.</i></p> <p>a. <i>Is PWC asserting that the Asset Transfer rendered PEOC insolvent as at October 1, 2016? If so, what evidence is there that the Asset Transfer rendered PEOC insolvent on that date? To the extent that it is relevant, what evidence is there that PEOC was insolvent before the Asset Transfer Agreement was effected?</i></p> <p>b. <i>What evidence is there that the Asset Transfer rendered PEOC unable to pay the municipal property taxes with respect to the Goodyear Assets?</i></p> <p>c. <i>What evidence is there that the Asset Transfer rendered PEOC unable to pay the ARO associated with the Goodyear Assets?</i></p> |
| | <p>a. The evidence in the Rose Affidavit suggests that PEOC was liable to pay the municipal property taxes associated with the POT assets, which PEOC held in its own name as trustee for POT. Schedule I (Rose Exhibit K) shows current liabilities as at October 1, 2016 of \$5,732,701, relating to payments owing with respect to POT assets, as well as acquired assets. The PEI evidence also shows that PEOC had no assets and no revenue prior to the transfer of the Goodyear Assets. Accordingly, PEOC was insolvent prior to the transfer on October 1, 2016.</p> <p>Even if PEOC was not liable for municipal property tax payments before October 1,</p> |

2016, the transfer of ~2,500 wells with their associated ARO, tax obligations, trade creditors and employees when the evidence is that these assets had been “a major drain” on PEI and that all the cash generated were “swallowed up” by taxes, must have meant that PEOC was unable to pay its debts as they became due. This is consistent with its inability to pay the outstanding property taxes after the transfer.

- b. In addition to what is mentioned above, Ms. Rose confirmed (Rose Affidavit, paragraphs 70 and 71 and Exhibit Z, Rose cross-examination) that PEOC did not pay just over \$1.5 million in taxes to three municipalities, but agreed to pay a penalty for late payment. The only reasonable conclusion, when all the other taxes were paid, is that there were insufficient funds to pay the additional \$1.5 million. Some of this was never paid
- c. On PEI’s own version, the ARO associated with the Goodyear Assets amounted to anything from \$52 million (the amount as the “ARO Estimate – Goodyear” in the data room, Exhibit 9 to the cross-examination of Ms. Rose) to \$133 million (Darby Affidavit, Exhibit O – PEI news release on September 27, 2016). And on PEI’s own version, taking the most favourable reserve report, the Goodyear Assets were worth less than \$6 million, substantially less than the ARO associated with those assets.

28 *Paragraph 197 of the PWC Brief infers that the current and contingent creditors of PEOC are “persons for whose protection” the Alberta oil and gas “Regulatory Regime” was created. For purposes of this hearing, I have two preliminary questions.*

- a. *First, when you refer to Regulatory Regime, please outline the statutes on which you are relying.*
- b. *Second, please identify the statutory provisions that identify the factors that I need to consider in the identification of the “persons for whose protection” the “Regulatory Regime” was created.*

a. For the purposes of this case, the main components of the Regulatory Regime are:

- i. *The Oil and Gas Conservation Act*
- ii. *The Responsible Energy Development Act (particularly s.3(g) to (j))*
- iii. *The Environmental Protection and Enhancement Act (particularly s.137)*
- iv. *The Municipal Government Act (particularly s.304 and s.331)*
- v. *AER Directive 006*

“The purpose of the Alberta Energy Regulator (AER) LLR Program and licence transfer process as set out in this directive is to prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR Program from being borne by the public of Alberta should a licensee become defunct, and minimize the risk to the Orphan Fund posed by the unfunded

liability of licences in the program.”

- vi. *Bulletin 2016-10* (Obligations of Licensees When in Insolvency or When Otherwise Ceasing Operations)
- vii. *Panamericana de Bienesy Servicios SA v. Northern Badger Oil & Gas Ltd.* 1991 ABCA 181, par 33

“The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them.”.

- viii. *Redwater*, paragraphs 12-14, 110-111

[12] When oil and gas wells are producing, they are very valuable assets. However, when they cease to be productive they quickly turn into significant liabilities. For public safety and environmental reasons, the Alberta Energy Regulator has specific “end-of-life” rules on how a spent well must be rendered environmentally safe by being shut-in and “abandoned”. In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to “cap” the well, and to restore the surface to its original condition: Alberta Energy Regulator Directive 020: Well Abandonment; Environmental Protection and Enhancement Act, RSA 2000, c. E-12, s. 137. Compliance with those requirements can be expensive.

[13] Many oil and gas licensees will have both producing assets and non-producing assets that are candidates for abandonment. One particular concern of the Alberta Energy Regulator is that the licensee not sell off all of its valuable assets, while keeping all of its non-producing assets, unless it will have sufficient resources (after payment of its debts) to fund the required abandonments. The Regulator might insist on the purchaser acquiring all of the assets (both producing and non-producing) and taking on all the end-of-life obligations, it may require the posting of security for the costs of abandonment, it may require that abandonment work be done before the transfer, or it may impose other conditions on the sale to the same effect.

[14] The Regulator’s overall approach is not new. It has always regulated the environmental impact of the industry, and particularly the shutting-in of spent wells. The regulatory techniques have undoubtedly changed and become more sophisticated, but the overall objectives are unchanged. From a legal perspective, the Regulator has set its policies in accordance with the provincial legislation, as interpreted in cases like

Northern Badger (discussed infra, para. 49), which up until the trial reasons in this case was thought by some to reflect the law.

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From the dissenting decision:

[110] Redwater's trustee in bankruptcy, the respondent Grant Thornton (Trustee), has invoked the constitutional law doctrine of paramountcy. The Trustee argues that the *BIA*, when read in the manner it proposes, allows it to take the benefit of profitable wells and walk away from the rest. In particular, it asserts that the Trustee is entitled to: (1) segregate out and sell only the 20 profitable wells from among Redwater's 127 licensed assets; (2) transfer those 20 licences to a party of the Trustee's choosing; (3) retain all proceeds for the secured creditors; and (4) and, most significant for this appeal, renounce the end of life obligations imposed by Alberta and assumed by the licensee to secure access to the resources in the first place. On this theory, Redwater walks away from its legislated obligations and public environmental duties in respect of the remaining 107 licensed assets. The sites Redwater used will either never be properly abandoned and reclaimed, or the end of life licensing obligations from its activities will be downloaded onto others: either the public or the industry. Both results breach the Alberta legislation and offend the underlying "polluter-pay" principle.

[111] Further, and as explained in more detail later, the most common situation in Alberta is that a company like Redwater exploits publicly owned oil or natural gas on lands it does not typically own and which most often belong to others. Therefore, when remediation work is not completed as required by law, the many deleterious and potentially dangerous impacts are often felt most acutely by the third-party landowners, usually farmers and ranchers, because it is their lands which were used to extract the resource. Wells and facilities that are abandoned in the colloquial sense, without being abandoned and remediated in the legal sense, continue to exist on their lands and serve as a reminder of unfulfilled statutory obligations and broken licence conditions. The Trustee argues that when the province insists on compliance with its generally applicable licence conditions, it is really trying to gain a position superior to that permitted under the *BIA*. The Trustee claims that the provincial legislation conflicts with and frustrates the federal and must give way. The Regulator disagrees.

- b. The underlined portions of the first part of this response identifies the persons for whose protection the regulatory regime was created – "the public of Alberta" "every citizen of the Province", "industry" and "third-party landowners, usually farmers and ranchers."

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| 29 | <p><i>Paragraph 175.1 of the PWC Brief defines the phrase "Regulatory Regime" by reference to the "...public policy reflected in Alberta's oil and gas regulatory regime."</i></p> <p><i>a. For purposes of this hearing, on what statutes are you relying upon for the relevant Regulatory Regime?</i></p> <p><i>b. For purposes of this hearing, what persons is PWC relying upon to protect for purposes of the Regulatory Regime?</i></p> |
| | <p>a. Please see the first part of the response to question #28.</p> <p>b. See the second part of the same response.</p> |
| 30 | <p><i>Paragraph 26 of the Brief in respect of Ms. Susan Riddell Rose (the "Rose Brief"), states that the Trustee saw no reason to ask Harold Wang and Wentao Yang about their participation in the negotiation of the subject transaction.</i></p> <p><i>a. In the quest for a full hearing, would not evidence concerning the participation of Harold Wang and Wentao Yang in both the Asset Transfer Agreement and the Share Purchase Agreement be instructive to the Court in respect of the issues raised in the underlying allegations connected to this hearing?</i></p> <p><i>b. Considering the PWC allegations, on one hand, and the positions taken by the Defendants, on the other hand, would not evidence concerning the operations between October 1, 2016 and the date of bankruptcy be instructive to the Court in respect of the issues raised in the underlying allegations connected to this hearing?</i></p> |
| | <p>a. The suggestion is that the Trustee was somehow remiss in not interviewing Messrs. Wang and Yang and that the Trustee's evidence is therefore "partially informed, hearsay-based interpretations" of selected past events.</p> <p>i. The Trustee was not involved in these discussions or transactions. Its case must necessarily be informed by the records and evidence of others.</p> <p>ii. The Trustee's case is presented on the Defendants' own version and records, not on hearsay. The Trustee is not asserting the truth of anything the Respondents' records show – just that that is what the Respondents' own records show.</p> <p>iii. Asking Messrs. Wang and Yang what happened, would in fact elicit hearsay information. The Trustee cannot use any Wang and/or Yang evidence to contradict the evidence or records of PEI or Ms. Rose. There is therefore no benefit to the Trustee for the present purposes in talking to those individuals, when the Defendants' records are available and complete in every material respect.</p> <p>iv. The Defendants, on the other hand, are asserting that Messrs. Wang and Yang had an interest in negotiating the best possible terms on behalf of PEOC and that the "Purchaser Team" in fact did just that. It will be incumbent on the Defendants to present the evidence of those witnesses to support those (hearsay)</p> |

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| | <p>statements.</p> <p>b. For the s.96 analysis and the oppression claim, the relevant facts all relate to the time of the transfer or the oppressive conduct. It is the insolvency of PEOC at the time of the transfer that is relevant, not the bankruptcy of PEOC more than a year later.</p> <p>The five-year review period under s. 96(1)(b) is strong evidence that the Trustee is not required to establish any nexus between <i>insolvency</i> at the time of impugned transfer and the entity's ultimate <i>bankruptcy</i>.</p> |
| 31 | <p><i>Paragraph 26 of the Rose Brief asserts that under Alberta law, the opinions stated in the Darby Affidavit are inadmissible. While this assertion ties into some of my points above, I raise the following questions for completeness.</i></p> <p>a. <i>Unless evidence of Mr. Darby is being tendered as an expert, is it appropriate for his affidavit to contain opinions? See Ferreira v Cardenas, 2014 ONSC 7119 at para 14.</i></p> <p>b. <i>A lawyer should not express personal opinions on anything that is properly subject to legal proof, cross examination challenge: see Ferreira at para 15. As an officer of the Court, should Mr. Darby be guided by a frame of reference that tracks with Ferreira?</i></p> <p>a. It is appropriate for Mr. Darby's affidavit to contain opinions. See s. 96(2) and <i>Anderson, Barcellona and National Telecommunications</i>, discussed above, as examples of similar trustee affidavit evidence used in support of summary judgment motions.</p> <p>b. The position of a trustee in bankruptcy is not analogous to that of a lawyer, representing a client.</p> <ul style="list-style-type: none"> • Section 96(2) <i>requires</i> a Trustee to provide its opinion in support of its s. 96 application. • In contrast, the professional rules governing lawyers provide that, subject to limited exceptions, lawyers <i>should not</i> provide evidence in a proceeding in which they appear as advocates. |
| 32 | <p><i>Paragraph 26 of the Rose Brief asserts that Mr. Darby had established a "...final and unbending view" that "... 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."</i></p> <p>a. <i>Is that statement a fair characterization of the PWC position?</i></p> <p>b. <i>Is POT an "entity" for purposes of section 4 of the BIA?</i></p> <p>c. <i>Is there any provision in the BIA that deems a trust to be an entity?</i></p> <p>d. <i>Assuming that POT is not an "entity" for purposes of section 4 of the BIA, does the</i></p> |

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| | <p><i>PWC position still stand?</i></p> <p>a. That is not a fair characterization of the Trustee's position.</p> <ul style="list-style-type: none"> • The Trustee understands that the presumption in s. 4(5) can be rebutted, <i>if the Defendants can establish</i> that PEOC received appropriate consideration for the Asset Transaction and it took place in the ordinary course of business (<i>Legge</i>, at para. 15 (Trustee's Authorities, Tab 21); <i>Dover Financial</i>, at para. 19) • However, PEOC did not receive appropriate consideration and the Asset Transaction did not take place in the ordinary course of business. <p>b. Yes, please see the response to the question in paragraph 17.</p> <p>c. A trust comes within the inclusive definition of "person" and an "entity" is defined as a person other than an individual.</p> <p>d. Yes, as discussed in response to the question in paragraph 17.</p> |
| 33 | <p><i>Paragraph 26 of the Rose Brief comments that PWC had asserted that Ms. Susan Rose benefitted personally from the Asset Transfer.</i></p> <p>a. <i>Was this proposition intended to refer to the aggregate of the Asset Transfer and the Share Transaction, rather than just the Asset Transfer?</i></p> <p>b. <i>Am I correct in assuming that the PWC position is reflected in the Darby Cross-Examination on October 22, 2018 at page 72, lines 10 to 14? The text of that cross-examination reads "[t]he benefit she received as a stakeholder of Perpetual as a significant shareholder is clear in the increase in the asset base; removal of the high, mature, negative cash-flowing assets and a significant portion of their liabilities. The benefit is clear."</i></p> <p>c. <i>Are the comments that Mr. Darby provided fact or opinion? If opinion, how should the Court deal with that opinion for purposes of this hearing?</i></p> <p>d. <i>How does PWC define "benefit" for purposes of this hearing?</i></p> <p>e. <i>How should the Court define "benefit" for purposes of this hearing?</i></p> <hr/> <p>a. It was intended to refer to the Asset Transaction.</p> <p>b. That is the Trustee's position.</p> <p>c. Fact/conclusions based on fact. "Benefit" as a concept is a conclusion, not a fact.</p> <p>d. Section 96(3) defines benefit broadly in defining a privy as a person not dealing at arm's length with a party to the transfer who "by reason of the transfer, directly or indirectly, receives a benefit or cause a benefit to be received by another person".</p> |

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| | <p>e. The Court should be guided by the definition in s. 96(3). Whether a person received a benefit would depend on the facts and would include, but not be limited to, financial benefit.</p> |
| 34 | <p><i>Paragraph 38 of the Rose Brief states that it is common ground that the Share Purchase Agreement was an arm's length agreement, which was extensively negotiated between sophisticated parties. Paragraph 39 of the Rose Brief states that the Trustee does not challenge or seek to set aside the Share Purchase Agreement.</i></p> <p><i>a. Does PWC concur that the Share Purchase Agreement was an arm's length agreement?</i></p> <p><i>b. If the Share Purchase Agreement was negotiated at arm's length, does PWC concede that the "Resignation & Mutual Release" (the "Release") was a bona fide component of that contract?</i></p> <p>a. The Trustee does not concur that the Share Purchase Agreement was an arm's length transaction. The Trustee simply has no standing to set aside or challenge the Share Purchase Agreement, as it was entered into between PEI and 198.</p> <p>Assuming PEI and 198 were unrelated parties, it remains a "question of fact" whether or not they dealt with each other at arm's length (<i>BIA</i>, s. 4(4); <i>McLarty</i>, para. 62; <i>Piikani Energy</i>, para. 28).</p> <p><i>Juhasz</i> (PEI Authorities, Tab 12) concerned alleged non-arm's length relationship between unrelated parties. The transferor of equity in property was on verge of insolvency so economic interest in equity had shifted to creditors and she had no economic incentive to engage in "ordinary commercial dealing" (<i>Juhasz</i>, para. 43). Even though parties were unrelated, the transaction did not reflect arm's length bargaining.</p> <p><i>Juhasz</i> has been cited with approval in <i>National Telecommunications</i>, another decision concerning unrelated parties where Court found it was a non-arm's length transaction (<i>National Telecommunications</i>, para. 45). Citing <i>Juhasz</i>, Court found bankrupt did not make transfers with a view to advancing its own self-interest and "maximizing its value," so the transaction did not reflect arm's length bargaining.</p> <p>Economic analysis was also cited with approval in <i>Stalt</i> (PEI Supp. Authorities), another decision considering whether unrelated parties dealt with each at arm's length.</p> <p>The court in <i>Stalt</i> described the approach as "considering the degree to which the transaction departs from what would otherwise be considered normal commercial incentives" (<i>Stalt</i>, para. 38). The evidence was that 198, like the bankrupt in <i>Juhasz</i>, was not concerned with downside risk in transaction. As in <i>Stalt</i>, the transaction was a non-arm's length transaction because the "transaction departs from what would otherwise be considered normal commercial incentives".</p> <p>If PEI were negotiating with a normal commercial counterparty, the counterparty would be concerned about incurring substantial net liabilities. In this case, the "Base Price"</p> |

for the shares was \$1.00, so it is clear that asset value was negligible: getting something worth, at most, nothing (Share Purchase Agreement, s. 1.1(j)).

The purchaser was aware that it was acquiring a net liability, so it was clearly only concerned with the potential upside. It negotiated the Retained Interests Agreement with PEI to conceal PEOC's negative LMR post-Asset Transaction. Section 5.1(c)(viii) retained interests in LMR-positive assets shifts back to PEI if PEOC's own LMR becomes 1.1 or higher in the future.

The acquisition of Goodyear Assets was structured as share transaction, not an asset transaction: Goodyear Assets held in PEOC, so there was no exposure for 198 in the event of PEOC's bankruptcy.

- b. The Trustee is not challenging the validity of the Resignation & Mutual Release generally. However, the release portion is invalid to the extent that the Release purports to release Ms. Rose from liability for breaches of her statutory duties as a director.

35 Paragraph 43 of the Rose Brief states that 198Co, PEI and PEOC negotiated at arm's length and agreed to the Release.

- a. Does PWC concur that the Release was negotiated at arm's length?
- b. If not, what are PWC's comments regarding the fact that the new directors of PEOC (under the new ownership of 198Co) signed on behalf of PEOC?

a. The Trustee does not concur that the Release was negotiated at arm's length .

- The evidence shows that nobody represented PEOC in all of this.
- Section 8.2(xiii) of Share Purchase Agreement provides that one of 198's closing deliveries were releases "releasing the directors and officers of the Corporation from any Claims related to such directors and officers acting as director or officer of the Corporation".
- Ms. Rose executed the Share Purchase Agreement on September 26 on behalf of PEI. Ms. Rose was the sole director of PEOC, and in a non-arm's length relationship with PEOC, at the time she was negotiating *against PEOC's interest* for a full release in favour of herself.
- Even if Share Purchase Agreement is viewed in isolation, it is still not an arm's length transaction because 198 was not driven by "normal commercial incentives": it was getting PEOC for nominal consideration so it was only concerned with upside risk, not liabilities.

b. The Trustee's comments regarding the execution of the Mutual Release & Resignation are as follows:

- Delivery of the release in favour of Ms. Rose was a condition of closing Share Purchase

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| | <p>agreement (s. 8.2(xiii)).</p> <ul style="list-style-type: none"> • There is no evidence that the new directors were aware of potential claims against Ms. Rose at time release executed • A fiduciary cannot rely on a release if there was non-disclosure (<i>Tongue v. Vencap</i>, Rose Tab 11, paras. 135 and 141). • The release will not be construed to cover claims releasing party was not aware of (<i>Mostcash v. Fluor</i>, Rose Tab 7, para. 51) • In any event, it is not relevant to the enforceability of the Release |
| 36 | <p><i>Paragraph 51 of the Rose Brief asserts that the Release provides Ms. Susan Rose with a bulletproof defence in respect of the claims that PWC has made against her.</i></p> <p>a. <i>Given the wording of section 122(4) of the ABCA, why isn't the Release a bulletproof defence?</i></p> <p>b. <i>PWC asserts that Ms. Susan Rose was not entitled to rely on the Release because she had breached a duty. As authority, for its position, PWC referenced section 122(3) of the ABCA and <i>Tongue v Vencap Equities Alberta Ltd.</i>, [1994] 5 WWR 674 at para 1 and 2. What is Ms. Susan Rose's response to this assertion by PWC?</i></p> <p>a. For the reasons discussed above, s. 122(4) has no application to Ms. Rose because PEOC only had one shareholder and one director. Section 122(3) also does not provide any defence to Ms. Rose:</p> <ul style="list-style-type: none"> • The wording of s. 122(3) is not supportive of Ms. Rose's position. Ms. Rose argues that s. 122(3) is merely prospective, prevents directors from contracting out of their duties. • In <i>McKay-Cocker</i> (Rose, Tab 10) Court found that inclusion of "liability for a breach thereof" is retrospective" (para. 16). • The Court found that "former directors and officers are equally affected" and cannot contract out of liability for breaches incurred "while they held such position with the corporation (para. 16). • The words "or relieves the director or officer from liability for a breach of that duty" in s. 122(3) are retrospective, apply to releases in favour of former directors and officers as well. <p>b. This question is addressed to Ms. Rose</p> |
| 37 | <p><i>Paragraph 162 of the PWC Brief states that "...Rose cannot rely on the Release...". Paragraph 52 of the Rose Brief states that the Statement of Claim does not seek to set</i></p> |

aside the Release.

- a. *Does PWC acknowledge that the Release is a valid document?*
- b. *Isn't the purpose of section 122(3) of the ABCA to prevent directors from seeking a release from liability for future breaches.*
- c. *What authority in respect of section 122(3) of the ABCA bars a former director from the benefit of a release?*

- a. The Trustee does not seek to set aside the entire Mutual Release & Resignation document. However, Ms. Rose cannot rely on the portion that purports to release her from claims relating to breaches of her director's duties.
 - The purpose of s. 122(3) is to "regulate the conduct of directors and officers".
 - It achieves that prospectively and retrospectively, as in *McKay-Cocker*, by ensuring that former director that breached a duty cannot be released.
 - A prohibition on contracting out of duties would be sufficient to cover prospective application.
 - Words "or relieves the director or officer from liability for a breach of that duty" are prospective, cover former directors and officers.
 - *McKay-Cocker* (Rose's Tab 10) dealt with analogous situation, confirms that Ontario version of s. 122(3) applies to prevent former director from relying on release of liability for breaches of statutory duties
- b. No. The purpose of s. 122(3) is to regulate the conduct of directors and officers. This is achieved prospectively, by preventing them from contracting out of their duties, and retrospectively, by preventing them from contracting out of liability for breaches of their duties.
- c. In *McKay-Cocker*, the Court considered this same issue. The Court confirmed that Ontario's equivalent of s. 122(3) applied to prevent a former director from obtaining a release from liability for breaches of his director's duties (para. 16).

38 *Is PWC asserting that section 122(3) of the ABCA precludes a corporation from entering into a mutual release with a former director? If so, when would a release be available?*

- The Trustee is not challenging the validity of the Mutual Release & Resignation generally.
- The Trustee is also not suggesting that that a corporation cannot enter into a mutual release with a former director.
- However, to the extent that the corporation purports to release the director from liability

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| | <p>for breaches of his or her director's duties pursuant to the ABCA, the release would contravene s. 122(3) and be of no effect.</p> <ul style="list-style-type: none"> • Section 122(3) is a statutory obligation, not merely contractual, it reflects the public interest in ensuring directors comply with their statutory duties. • It is analogous to a release of liability for criminal conduct. A corporation is not entitled to release a claim that belongs to the public, society at large. • A corporation can release a former director for other claims, like negligence, breach of contract, etc. |
| 39 | <p><i>If the Asset Transfer Agreement had been entered into, but the Share Transfer Agreement had not existed, would Ms. Susan Rose have breached her fiduciary duties to PEOC? In considering this hypothetical question, assume that all of the operational objectives that Harold Wong, Wento Yong and their colleagues had as of October 1, 2016 continued, and that those individuals were employees of PEOC on and after that date.</i></p> <ul style="list-style-type: none"> • Yes. • Again, although PEOC would still have been part of the Perpetual corporate group, the toxic Goodyear Assets assets would have been separated from the good assets and collected in an entity with no ability to deal with them, or their associated liabilities. • Viewed from PEOC's perspective, the effect for PEOC and the breach by its director would have been the same. • In the Asset Transaction, PEOC received nominal consideration in exchange for acquiring net liabilities of at least \$223,241,000 from POT, or PEI if POT is viewed as simply a relationship (Darby Affidavit, para. 44). • The Asset Transaction benefited PEI and Ms. Rose, as a shareholder and director of PEI, at the expense of PEOC. • There is no evidence that Ms. Rose disclosed any of this to PEOC, which is a further breach of fiduciary duty (<i>Midland Resources v. Shtaif</i>, at paras. 148-156) |
| 40 | <p><i>My reading of the Darby cross examination of October 22, 2018 is that the ARO is not liability. I ask PWC to confirm that as at October 1, 2016 there was not liability in respect of the ARO.</i></p> <ul style="list-style-type: none"> • Mr. Darby's evidence was that ARO is a provision, which is a form of liability • As IAS 37 (Exhibit 4 to Mr. Darby's cross-examination) confirms, a provision is a form of liability • A provision is defined in IAS 37 as "a liability of uncertain timing or amount" |

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| | <p>(Transcript, p. 92, lines 2-4)</p> <ul style="list-style-type: none"> • PEI itself considered its ARO to be a liability. In its September 30, 2016 financial statements it lists \$131,024,000 in “<i>liabilities</i> associated with assets held for sale” (Darby Affidavit, Exhibit P, p. 1) • In any event, the provision issue is a red herring. • The Supreme Court in <i>Daishowa</i> (Rose Tab 13) confirmed that the future cost of complying with regulatory obligations were embedded in the asset and had a present effect on the fair market value of the asset (para. 31) |
| 41 | <p><i>For purposes of this hearing, who are the creditors and other stakeholders of PEOC that PWC is representing?</i></p> <p>The Trustee represents all the creditors of PEOC.</p> |
| 42 | <p><i>Who were the creditors of PEOC as at October 1, 2016?</i></p> <p>The creditors of PEOC as at October 1, 2016 included the AFR and the municipalities listed in the PEI document included at Exhibit M to the Darby Affidavit. Immediately after the transfer, surface rights owners, farmers, trade creditors, employees – all would have been creditors of PEOC.</p> |
| 43 | <p><i>Paragraph 73 of the PWC Brief refers to the phrase “with the permission of the inspectors?”</i></p> <p>a. <i>Have inspectors been appointed in this case?</i></p> <p>b. <i>Given the preamble to section 30(1)(d), have inspectors given permission for PWC to bring these legal proceedings.</i></p> <p>a. Yes.</p> <p>b. Yes.</p> |
| 44 | <p><i>The purpose of an oppression remedy is to allow a person to seek relief for something that has been done, or is being done, which is oppressive or unfairly prejudicial to the complainant or that unfairly disregards his interests.</i></p> <p>a. <i>What is the oppressive conduct in this case?</i></p> <p>b. <i>When is the oppressive conduct measured?</i></p> <p>c. <i>If the conduct that is alleged arose out of a contract that was negotiated between arm's length parties, why should a court consider the matter?</i></p> <p>i. <i>Is PWC seeking oppression claim in the capacity of a creditor?</i></p> |

- ii. *If it is pursuing the oppression claim on the basis that it is a creditor, on what authority does PWC seek that relief without asking the Court to confirm that it is a proper person to do so?*
- d. *Should a trustee be allowed to advance a creditor-based oppression claim that just concerns two particular creditors?*
- e. *Should a trustee be allowed to advance a creditor-based oppression claim if there is no prima facie case at the time of the impugned conduct?*
- f. *How does this case satisfy the test for oppression, as outlined in BCE 2008 SCC 69?*
- g. *Should the Court exercise its discretion under section 239(b)(iii)(B) and section 239(b)(iv) of the ABCA to allow PWC to pursue this oppression claim? If so, on what basis should the discretion be exercised?*
- h. *Concerning the oppression claim, the interests of PEOC should not be confused with the interests of its creditors. That being the case on what basis is PWC a proper person to advance a claim under the oppression provisions of the ABCA?*
- a. In the Asset Transaction, the Goodyear Assets and associated liabilities were transferred to PEOC without adequate consideration, leaving PEOC with significant liabilities and no ability to pay them
- In *Downtown Eatery* (Trustee’s Authorities, Tab 24), a corporate reorganization was oppressive where it left the entity facing a wrongful dismissal claim unable to pay a potential judgment (paras. 48-56).
 - The complainant was not required to establish that the reorganization was undertaken with the intention of harming him (para. 56).
 - *Gestion Trans-Tek* (Rose Tab 44) also concerned a transfer of assets between related corporate entities. The existing entity was facing claims and transferred its assets to a newly incorporated entity (paras. 7-8). The Court found the conduct was oppressive, citing *Downtown Eatery* (paras. 32-39).
 - In *JSM v. Brick Furniture* (Rose Tab 22), the Ontario Court of Appeal stated a “creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself” is in a different position from a creditor who voluntarily assumes risks in entering into an agreement with the debtor (para. 66).
- b. The oppressive conduct is measured at the time it occurs. In the case of the Asset Transaction, this would be October 1, 2016.
- A creditor cannot obtain relief from oppression if it only became a creditor *as a result* of the alleged oppression (*Apotex*, Rose Tab 39, at para. 41).
 - However, the creditor can be a “potential” creditor at the time of the alleged oppression

(Apotex, para. 39).

- In both *Downtown Eatery* (paras. 49-50) and *Gestion Trans-Tek* (paras. 8-9, 32) the oppressed creditor had not established its claims at the time of the oppressive conduct
- c. The oppressive conduct arose out of the Asset Transaction, which was entered into between related parties: PEOC and POT (or PEOC and PEI, its sole shareholder, if POT is viewed as a mere relationship)
- PEOC's creditors were not parties to the Asset Transaction.
 - As in *Downtown Eatery*, *Gestion Trans-Tek* and *Brick Furniture*, the Asset Transaction was an "internal corporate manoeuvre" that left one corporate entity unable to pay its obligations, for the benefit of the entity's principal and related corporate entities.
 - There is no evidence to suggest PEOC's creditors had any opportunity to protect themselves
- (i) – The Trustee seeks relief from oppression in its capacity as the Trustee, as the representative of all of the creditors of PEOC (now SRC). See: *Dylex*, paras. 16-17, *Olympia & York*, para. 30, *Essar Global*, at para. 116, *Dorais*, at para. 13 (Trustee's Authorities, Tabs 10, 11, 12, 13 and 15)
- (ii) – In its Statement of Claim, the Trustee pleads that it is a proper person entitled to be a complainant and seeks an Order under Part 19 of the BCA, which would include a s. 239 Order granting it "complainant" status.
- There is no authority for the proposition that the Trustee is required to obtain a "Standing Order" as Ms. Rose contends. The authorities she cites support the opposite conclusion.
 - In *Levy-Russell Ltd. Shieldings Inc.* (Rose Tab 25), the Court dismissed the corporation's application challenging the creditor's standing as a complainant (para. 36).
 - In *Zimmer v. DenHollander* (Rose Tab 26), the Court noted that the ABCA "does not make leave of the court precondition to filing a statement of claim" (para. 4).
 - In *Newcastle Projects* (Rose Tab 27), the Court noted that the "recent trend" is to decide the standing issue at the same time as the substantive oppression allegations (para. 29). Standing could be challenged earlier, but "obviously it will be up to the defendants to raise the question" by making an application (para. 31).
 - In *Ratner* (Rose Tab 28), Court said "in an appropriate case" standing *can be* raised and judicially determined as a separate question (para. 21).
 - In *HSBC Capital* (Rose Tab 29), standing was dealt with at the same hearing as the substantive oppression relief (para. 2).

- In *Boychuck* (Rose Tab 30), the Court stated that the “ABCA does not make leave of the court” a precondition to commencing an oppression action (para. 24). The Court exercised its discretion to require receiver to obtain preliminary determination of complainant status.
- d. The Trustee represents all the creditors of PEOC. The evidence discloses that, on October 1, 2016, PEOC’s creditors included the AER and a number of municipalities.
- e. The Asset Transaction was oppressive, as discussed above in response to the question at paragraph 44(a).
- f. This case satisfies the test for oppression outlined in *BCE*:
- In *BCE* (Rose Tab 20) the Supreme Court confirmed that “the reasonable expectation of stakeholders is simply that directors act in the best interests of the corporation” (para. 66). Ms. Rose breached this reasonable expectation of PEOC’s creditors by failing to act in the best interests of PEOC.
 - Ms. Rose allowed PEOC to enter into the Asset Transaction, which was detrimental to both PEOC and the interests of its creditors, for the benefit of PEI and herself.
 - The claim against Ms. Rose also satisfies the test for personal liability set out in *Wilson* (Rose Tab 45).
 - Ms. Rose “exercised – or failed to [...] exercise” her powers as PEOC sole director in a way that effected the oppressive conduct (para. 47).
 - Ms. Rose breached her personal duty as PEOC sole director *and* received an immediate financial advantage (paras. 49 and 50).
- g. The Court should exercise its discretion on the basis set out in the following authorities: *Dylex*, paras. 16-17, *Olympia & York*, para. 30, *Essar Global*, at para. 116, *Dorais*, at para. 13.
- h. The Trustee is a proper person to advance an oppression claim.
- In *Essar Global*, the Ontario Court of Appeal considered this issue in the context of an oppression claim advanced by a CCAA Monitor
 - The Court rejected the respondents’ submission that the action should have been brought as a derivative claim, rather than an oppression claim (paras. 128-133)
 - The Court noted that “the derivative action and the oppression remedy are not mutually exclusive and there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities” (para. 131)

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| | <ul style="list-style-type: none"> • The Court stated that “in short, there will be circumstances in which a stakeholder suffers harm in the stakeholder’s capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation” (para. 133) • As in <i>Essar Global</i>, the Asset Transaction harmed both PEOC <i>and</i> its creditors. The fact that the Asset Transaction also harmed PEOC does not preclude the Trustee from pursuing oppression relief. |
| [45] | <p><i>If the Asset Transfer was not in the best interests of PEOC on October 1, 2016, why did an arm's length party purchase all of the shares of that corporation on that date?</i></p> <ul style="list-style-type: none"> • The Trustee disagrees that Share Purchase Agreement was an arm’s length transaction. • As discussed in response to the question at para. 34, 198 is analogous to the transferor in <i>Juhasz</i> (PEI Authorities Tab 12): it acquired PEOC’s shares for nominal consideration and had an insufficient economic interest at stake to engage in “ordinary commercial dealing” (<i>Juhasz</i>, para. 43). • By acquiring PEOC’s shares, rather than the Goodyear Assets themselves, 198’s downside risk was limited to the \$1.00 it paid for PEOC’s shares. It had no exposure to the liabilities associated with the Goodyear Assets acquired by PEOC. • Given the terms of the Share Transaction, there was no downside risk for 198: as in <i>Juhasz</i>, the real “economic interest” in PEOC’s assets resided with PEOC’s creditors, not 198 (para. 43). • Any value 198 could extract from PEOC would justify its \$1.00 investment (Rose Affidavit, para. 43), following which it could simply return PEOC to its creditors and walk away, as it has. |
| [46] | <p><i>PWC asserts that PEOC was set up to fail. What evidence supports that assertion? If that assertion is true, why did 198Co purchase PEOC on October 1, 2016? Do the parties concede that 198Co was arm's length from PEI, but for the possible application of a deeming rule?</i></p> <ul style="list-style-type: none"> • The best evidence is in the terms of the Share Purchase Agreement and the Retained Interests Agreement. • In the Share Purchase Agreement, 198 acquired PEOC’s shares for \$1.00. It paid only nominal consideration and had no exposure to the liabilities transferred to PEOC in the Asset Transaction. • The Retained Interests Agreement shows that PEI and 198 were aware that PEOC’s deemed liabilities exceeded its deemed assets and took steps to conceal that fact, in particular from the AER. |

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| | <ul style="list-style-type: none"> The PEI records show that PEI reviewed the POT assets and identified the good assets it wanted to keep (“Keepco Assets”), identified the assets (and associated liabilities) it wanted to get rid of (the “Goodyear Assets”) and identified certain assets it wanted to retain, but would leave in PEOC for the time being (the “Retained Interests”). Eventually, PEOC was to hold only the Goodyear Assets. These assets were associated with 73% of PEI’s liabilities (if the Keepco Assets is taken into account). They were described as “mature, legacy assets”, they had been cash-flow negative for many years and were a drain on the company. Publicly, at various times, PEI represented that the ARO liabilities associated with the Goodyear Assets was \$128 million, \$131 million or \$133 million. They would require significant spending on ARO over the short term. They were collected in PEOC, a corporation with no other business or assets. |
| [47] | <p><i>Generally, a Court will not grant an oppression remedy if the complainant is not a creditor (or some other designated stakeholder) at the time of the impugned action. That being the case, who were the relevant creditors in this case at the time of the impugned action? In respect of those creditors identified, do their respective circumstances warrant this oppression claim?</i></p> |
| | <p>Please see the responses to questions at paragraph 42 and 44, above.</p> |
| [48] | <p><i>In determining whether a director benefitted personally from a particular transaction, what factors are relevant? Do those factors exist in this case? What is the evidence? How is the alleged benefit measured?</i></p> |
| | <ul style="list-style-type: none"> The Supreme Court in <i>Wilson</i> (Rose Tab 45) confirmed that it is not necessary to establish that a director benefitted personally in order to impose personal liability for oppressive conduct The imposition of personal liability can also be justified where the directors “breached a personal duty they owe as directors or misused a corporate power” (para. 49) A further consideration in favour of imposing personal liability is that “a remedy against a corporation would unduly prejudice other security holders” (para. 49) In <i>Wilson</i>, the Supreme Court found the imposition of personal liability was appropriate because one of the directors had “accrued a personal benefit as a result of the oppressive conduct”: he benefited from the dilution of the respondent’s shares and benefited from the conversion of his own Class C shares into common shares (paras. 60-63) The benefit Ms. Rose received as a director of PEI cannot be readily quantified However, the benefit she received as a shareholder of PEI can be quantified: it would be the benefit PEI received (\$223,241,000 in liabilities transferred to PEOC) multiplied by her shareholding in PEI: even if she owned only 1% of PEI’s shares, her share of the benefit to PEI would be over \$2 million |

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| | <ul style="list-style-type: none"> • However, the full effect of the Transactions and the extent of the benefit Rose received from the removal of 73% of PEI's liabilities from its balance sheet have not been determined in the limited context of the present application. |
| [49] | <p><i>What evidence should the Court consider in assessing the business judgment that Ms. Susan Rose exercised?</i></p> <ul style="list-style-type: none"> • Ms. Rose exercised no business judgment on behalf of PEOC. • She deliberately abandoned her role as PEOC sole director in favour of 198, a party acquiring PEOC's shares for \$1, with no exposure to its long-term liabilities. • In <i>Tarant v. Sphere Energy Corp.</i> this Court recently reviewed the business judgment rule (2018 ABQB 492, at paras. 38-49) <ul style="list-style-type: none"> • The Court will not "second guess" a director's decisions if it acted fairly and reasonably (para. 39). • Two dimensions to reasonableness analysis: process followed and outcome itself (para. 46). • Process followed is "subject to judicial scrutiny" and Court can assess "whether appropriate degree of prudence and diligence was exercised by the board in coming to its decision" (para. 46). • In <i>Sphere</i>, the board relied exclusively on a valuation performed by the corporation's majority shareholder (paras. 47-48). • This failure to consider <u>all</u> available information in determining fair market value brought the board's decision "outside of the bounds of reasonableness, and the protection of the business judgment rule" (para. 48). As a result, even though there was no dishonesty involved, decision not made in good faith (para. 48). • <i>Greenlight Capital Inc. v. Stronach</i> (Rose Tab 49), Court analyzes business judgment rule, process followed in that case and says this is what shareholders should expect (para. 79) <ul style="list-style-type: none"> • Special Committee created to evaluate transaction, with independent financial and legal advisors (paras. 34-37, 79). • As in <i>Sphere</i>, Court should look at two dimensions, process and outcome, in assessing Ms. Rose's business judgment. <ul style="list-style-type: none"> • With respect to outcome, Trustee's evidence is that Asset Transaction resulted in net liabilities of \$223,241,000 being transferred from POT (or PEI if POT is not an entity) to PEOC (Darby Affidavit, paras. 40 and 44). Evidence not contradicted by Defendants. |

- With respect to process, Ms. Rose admits that she allowed 198 to represent PEOC's interests in negotiating Asset Transaction (Rose Affidavit, para. 46).
- Ms. Rose's evidence is that "Purchaser Team" of Kailas/198 was "economically interested in" outcome for PEOC (Affidavit, para. 46).
- However, PEOC's shares were being purchased for \$1, so that was extent of Purchaser Team's economic interest in downside of Asset Transaction for PEOC. Further, by acquiring PEOC's shares rather than the Goodyear Assets directly, 198 had no exposure to PEOC's liabilities.
- As discussed above, that is why Asset Transaction does not reflect result of arm's length bargaining: a real commercial counterparty would be concerned with downside risk (see the economic interest analysis in *Juhasz, National Telecommunications* and *Stalt* referenced in response to the question in paragraph 34).

[50] *In considering the Duty of Care that was owed by Ms. Susan Rose in her capacity as a director of PEOC, what action did she take that caused injury to PEOC? What duty did Ms. Susan Rose breach; and how was it breached?*

- Ms. Rose did not consider that she had a duty of care (or any other duty) to PEOC. —
- Ms. Rose considered (and still considers) that "PEOC's interests were Perpetual's interests", that "the best interests of PEOC were the best interests of Perpetual", that "PEOC had no interests independent of the interests of Perpetual" and that "the proposition that PEOC had an independent and different set of interests is artificial and commercially absurd."
- Ms. Rose simply regarded PEOC as a convenient vehicle for PEI to use in the pursuit of its own financial interests, with no consideration of the interests of PEOC.
- The Supreme Court in *Peoples* (Trustee's Authorities Tab 14) discussed director's liability for breach of their duty of care (para. 67).
 - A director will not be held to be in breach of their duty of care "if they act prudently and on a reasonably informed basis" (para. 67).
 - Decisions they make must be "reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known".
 - Court can assess whether "reasonable degree of prudence or diligence was brought to bear" (para. 67).
- Ms. Rose caused, or permitted, PEOC to enter into the Asset Transaction, resulting in PEOC receiving net liabilities of \$223,241,000 from POT (or PEI if the trust is not considered an entity) without adequate consideration.

- As discussed in response to the question at para. 49, there was no “reasonable degree of prudence or diligence” brought to bear
- Ms. Rose admits that she allowed the Purchaser Team to negotiate the Asset Transaction on behalf of PEOC
- Purchaser Team’s interest in PEOC limited to \$1 it paid for its shares: Purchaser Team had no exposure to PEOC’s liabilities and was only concerned with upside risk

[51] *When considering the arm's length question, what evidence should the Court consider for purposes of this hearing? In particular, for purposes of section 96 of the BIA what "evidence to the contrary" should this court consider for purposes of this hearing?*

- The arm’s length question:
 - Section 96 expressly applies to transfers between
 - a party to the transfer (or any other person who is a privy to the transfer) and
 - the debtor.
 - Accordingly, for the purposes of this hearing, the “arm’s length question” is whether “*the party was dealing at arm’s length with the debtor*”.
 - The only transfer to which PEOC (the debtor) was a party, is the Asset Transfer from POT to PEOC. And “the party” must necessarily refer to POT.
 - So, the only question in this matter with respect to s.96 is whether POT (the party) was dealing at arm’s length with PEOC (the debtor). All the other relationships are irrelevant for the purposes of the s.96 analysis in this case.
- The evidence to be considered on the arm’s length question is clear. PEOC was the trustee of POT. Both were controlled by PEI and both were represented by the same sole director of PEOC at the execution of the Asset Transfer. They were clearly not at arm’s length to each other.
- Section 4(5) of the BIA provides that “in the absence of evidence to the contrary” related persons are deemed not to deal with each other at arm’s length for the purposes of s. 96
- In *PricewaterhouseCoopers v. Legge*, the Court held that related persons can rebut this presumption by showing that appropriate consideration was given for the transfer and took place in the ordinary course of business
- This test was approved in *Dover Financial Corp., Re* (2012 QCCS 68), a decision of the Superior Court of Quebec.

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| | <ul style="list-style-type: none"> • The evidence is that PEOC did not receive proper consideration for the Asset Transaction and it did not take place in the ordinary course of business. • The consideration given by PEOC in the Asset Transaction was at least \$223,241,000 and the consideration it received was at most \$5,670,000 (Darby Affidavit, para. 44) • The Asset Transaction was not an ordinary course of business transaction: minutes after PEOC received the Goodyear Assets from POT (or PEI if the trust is not an entity), PEI transferred all of its shares in PEOC to 198. |
| [52] | <p><i>Did beneficial entitlement to the Goodyear Assets change at any time before the Share Purchase Agreement closed?</i></p> <ul style="list-style-type: none"> • According to the Defendants, the Asset Transaction resulted in the beneficial interest in the Goodyear Assets moving from POT to PEOC (Rose Affidavit, para. 45) • The Asset Transaction closed at 12:01 a.m. on October 1, two minutes before the Share Transaction closed, at 12:03 a.m. on October 1, 2016. • As a result, PEI and Ms. Rose were able to ensure that the liabilities associated with the Goodyear Assets were transferred to PEOC <i>before</i> 198 assumed control of PEOC |
| [53] | <p><i>In considering the arm's length question, isn't the entire sequence of events which occurred on October 1, 2016 relevant? If not, why not?</i></p> |
| | <ul style="list-style-type: none"> • Whether the parties to the Asset Transaction are viewed as PEOC and POT or PEOC and PEI (as beneficiary of the POT trust), it was deemed to be a related party transaction pursuant to s. 4(5) • As discussed in response to the question at para. 51, the presumption can be rebutted if the Defendants can show that PEOC received proper consideration and the Asset Transaction was in the ordinary course of business • The Share Transaction and the Retained Interests Agreement could be relevant in assessing whether the Asset Transaction was in the ordinary course of business • However, the test in <i>Legge</i> and approved in <i>Dover</i> is conjunctive: if the Defendants cannot show that PEOC received appropriate consideration, the Court is not required to consider whether the Asset Transaction took place in the ordinary course of business |
| [54] | <p><i>The "related persons" provisions are in the BIA because there is always a concern that persons not dealing at arm's length will not reflect ordinary commercial dealings. However, where evidence suggests that the aggregate series of transactions reflect a deal between parties that are at arm's length (but for the possible application of a deeming rule), shouldn't the court consider that entire context?</i></p> |

- As discussed in response to the question at paragraph 34, transactions between unrelated persons do not necessarily reflect “ordinary commercial dealings” (see *Juhasz, National Telecommunications* and *Stalt*).
- A necessary part of the entire context would be that (i) the consideration paid by 198 for PEOC’s shares in the Share Purchase Agreement was \$1.00 and (ii) as it was a share purchase and not an asset purchase, 198 had no exposure to the liabilities transferred to PEOC in the Asset Transaction.
- 198’s “economic interest” in the downside risk for PEOC was limited to the \$1 it had invested.
- As the Goodyear Assets were held in PEOC, a separate entity, 198 could always simply walk away from the liabilities associated with the Goodyear Assets.
- As in *Juhasz*, the real economic interest in the downside risk for PEOC was with its creditors, not 198.
- Even if the entire context is examined, (i) the nominal consideration paid by 198 in the Share Transaction and (ii) the fact that the Goodyear Assets were held in a separate “bankruptcy remote” entity separate from 198 ensures that the “transaction departs from what would otherwise be considered normal commercial incentives” (*Stalt*, para. 38).

[55] What is PWC's response to paragraph 74 and 75 of the PEI Brief?

- This issue is addressed in paragraph 87 to 97 of the Trustee’s brief.
- The flawed assumption in the argument in paragraphs 74 and 75 of PEI’s brief is that deemed control by 198 pursuant to s. 4(3)(c) negates the actual *de facto* and legal control maintained by PEI until the closing of the Share Transaction, following the closing of the Asset Transaction.
- As the Court found in *Green Gables*, the same shares can be in two places at once for the purposes of s. 4 (see paragraphs 87 to 97 of the Trustee’s brief).
- PEI also argues that Article 4 of the Share Purchase Agreement “effectively gave 198 control over PEOC following the execution of the Share Purchase Agreement” (para. 75).
 - Article 4 actually confirms that PEI maintained control over PEOC until the closing of the Share Transaction, minutes after the closing of the Asset Transaction.
 - Article 4.1(a) provides that “Vendor” (defined as Perpetual Energy Inc.) “shall cause the business of the Corporation to be conducted in accordance with past practice”.
 - Article 4.3 simply provides that “Vendor” could not take certain steps other than in

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| | the ordinary course of business without the approval of 198. |
| [56] | <p><i>In paragraph 175 of the PWC Brief, PWC pleads that each of the Asset Transfer, Share Transaction and the Retained Interests Transactions are void. Later in its Brief, PWC seems to only assert that the Asset Transfer is void. I ask for clarification on this matter.</i></p> <ul style="list-style-type: none"> • In its Statement of Claim, the Trustee pleads that the Asset Transaction, the Share Transaction and the Retained Interests Transaction are void (Trustee’s brief, para. 175; Statement of Claim, para. 24). • However, in the relief sought in its Statement of Claim, the Trustee only seeks an Order setting aside the Asset Transaction or declaring it void. • The Trustee does not seek an Order setting aside the Share Transaction and Retained Interests Transaction and declaring those transactions void. • With respect to the Share Transaction, PEOC/SRC was not a party and has no interest in its own issued and outstanding shares or who owns them. • The validity of the Retained Interests Transaction is moot, for reasons not disclosed in the evidence. |
| [57] | <p><i>What statutes is PWC relying upon when it asserts the contracts are illegal?</i></p> <p>See the response to the question at paragraph 28.</p> |
| [58] | <p><i>Is PWC making a claim for equitable rescission or a claim based on "equitable grounds"? If PWC is making a claim for rescission, on what stakeholders is it focused?</i></p> <ul style="list-style-type: none"> • The Trustee seeks rescission of the Asset Transaction on equitable grounds. • As PEI points out equitable rescission is available, <i>inter alia</i>, where a contract is obtained by some unconscionable acts that make the entire agreement questionable (PEI brief, at para. 91, citing <i>Swan City</i>, Tab 24, at paras. 141-143). • The focus of the equitable analysis is the fiduciary relationship between PEOC and Ms. Rose, as its sole director. |
| [59] | <p><i>To the extent that the Darby Affidavit contains hearsay, how should this Court deal with that content?</i></p> <ul style="list-style-type: none"> • Rule 13.18 Rule 13.18(3) only applies to evidence “used in support of” a summary application. • A party <i>responding</i> to an application for summary dismissal is entitled to rely on hearsay (<i>Paramount Mortgage Corp v. Avenue AH Construction GP Corp</i>, 2014 ABQB 84, at para. 38). |

- Even where a party seeks summary judgment, Rule 13.18 does not prohibit hearsay evidence, as the Defendants contend.
- In *Attila Dogan*, the Court confirmed that Rule 13.18 does not impose a higher standard than would apply at trial: hearsay admissible at trial is admissible under Rule 13.18 (para. 81).
 - Business records, for example, are admissible as an exception to the rule against hearsay (*Attila Dogan*, at paras. 83-84).
 - The hearsay rule also does not prevent evidence of communications if they are not being relied on to prove the truth of their contents. In a classic example, a witness can give evidence someone yelled “fire” in a theatre but not to prove there actually was a fire (*First Capital Holdings v. Metropolitan Ventures*, 2015 ABQB 54, at paras. 50 and 75). In the present case, the Trustee is only saying what PEI had said – regarding the intent with the transactions, the purpose and objectives of each transaction, the values of the Goodyear Assets and their associated liabilities and the overall objective of the transactions, collectively.

[60] *Paragraph 72 to the Affidavit of Susan Riddell Rose, sworn on October 19 (the "Rose Affidavit"), 2018 outlines how oil and gas industry partners were advised of the sale of the Goodyear Assets. A copy of the industry notice is attached as Exhibit CC to the Rose Affidavit (the "October Industry Notice"). Paragraph 2 of that October Industry Notice refers to PEOC resigning as the trustee of POT, and Perpetual Operating Corp ("POC") being appointed as the successor trustee. To assist the Court in its efforts to ensure all relevant questions are asked, the following is requested.*

- a. *Copies of the documentation that effected the resignation of PEOC as the trustee of POT.*
- b. *Copies of the documentation that effected the appointment of POC as the trustee of POT.*
- c. *A copy of the trust deed in respect of POT, and any other constating documents that may be informative for the Court.*

This request is directed at the Perpetual Defendants.

COURT FILE NUMBER 1801-10960

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

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

DOCUMENT **BRIEF OF THE RESPONDENT**
PRICEWATERHOUSECOOPERS INC.,
LIT

For the Commercial List hearing on November
8, 2018 at 10:00 a.m. before Mr. Justice D.B.
Nixon

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INTRODUCTION

1. The Plaintiff is the trustee in bankruptcy (the “**Trustee**”) of the estate of Sequoia Resources Corp. (“**SRC**”, “**Sequoia**” or “**PEOC**”), formerly known as Perpetual Energy Operating Corp.
2. The Trustee commenced an action against Perpetual Energy Inc. (“**PEI**”), Perpetual Operating Trust (“**POT**”) and Perpetual Operating Corp. (“**POC**”) (jointly, the “**Perpetual Defendants**”) and against Ms. Susan Riddell Rose (“**Rose**”). The Trustee filed an application for substantially the same relief (the “**Trustee’s Application**”).
 - 2.1. The Trustee seeks an order declaring a sale and transfer of assets by POT to PEOC (the “**Asset Transaction**”) void as against the Trustee. Alternatively, the Trustee seeks judgment against the Defendants for the difference between the consideration given and received by PEOC.
 - 2.2. The claim is based on s. 96 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) as a transfer at undervalue, on the breach by Rose of her duties as the sole director of PEOC at the time of the Asset Transaction, on the oppression provisions of the *Alberta Business Corporations Act* (the “**ABCA**”) and on public policy, statutory illegality and equitable grounds.
3. In response, the Defendants filed two separate Statements of Defence – one by the Perpetual Defendants and one by Rose. They say, *inter alia*, that the Asset Transaction was only “an imbedded step” in a larger transaction, in which PEI sold all the shares in PEOC to an arm’s length purchaser (the “**Share Transaction**”) after the legal and beneficial interests in the assets had been combined in PEOC through the Asset Transaction.
4. At the same time, each of the Defendants also filed two essentially similar applications. These four applications (the “**Defendants’ Applications**”) are the subject-matter of the hearing scheduled for November 8, 2018.
5. In the “**Stay Applications**”, the Defendants seek an order:

- 5.1. directing that their summary dismissal application be heard before the Trustee's Application; and
 - 5.2. permanently or temporarily staying the Trustee's Application pursuant to Rule 7.1(c).
6. In the "**Summary Dismissal and Striking Applications**", the Defendants seek an order:
- 6.1. striking various claims made by the Trustee, including the Trustee's oppression claims and its claims against Rose, pursuant to Rule 3.68; and
 - 6.2. summarily dismissing the Trustee's s. 96 claim, its oppression claims and its claims against Rose, pursuant to Rule 7.3.
7. The two Stay Applications are essentially similar, except that Rose also alleges that:
- the pleadings and proceedings establish good grounds to conclude that the Plaintiff's claim against Rose personally is a vexatious litigation tactic that is abusive of the process of this Honourable Court and injurious to Rose. Rose deserves the opportunity to demonstrate that the claim against her should be dismissed at an early stage.¹
8. The two Summary Dismissal and Striking Applications are also essentially similar, except that Rose also alleges that:
- the Plaintiff has no authority or standing to maintain the allegations of breaches of fiduciary duty and duty of care, and the allegations disclose no reasonable cause of action²
- and that:
- by virtue of the Resignation and Mutual Release Agreement, PwC is barred and estopped from making the claims against Rose in this proceeding.³
9. The Defendants' Applications rely on the same evidence. Both Stay Applications rely only on the affidavit of Mr. Mark Schweitzer ("**Schweitzer**"), the CFO of PEI, and both Summary Dismissal and Striking Applications rely on the affidavit of Rose.

¹ Rose's Stay Application, at para. 3.

² Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 3(a).

³ Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 3(b).

10. For practical purposes, we will address the Stay Applications and the Summary Dismissal and Striking Applications together.

PART I – STATEMENT OF FACTS

11. The relevant facts are simple. We do not propose to repeat the facts set out in the affidavit of Paul Darby, sworn on August 2, 2018, which are undisputed.
12. Until October 1, 2016, PEOC was the trustee of POT. It had no assets or operations and existed solely to act as trustee for POT. All the shares of PEOC were held by PEI, the beneficiary of POT. Rose was a director and shareholder of PEI. She was also the sole director of PEOC.
13. Sometime in the first or second quarter of 2016, PEI decided to sell “its” shallow gas wells in Eastern Alberta (the “**Goodyear Assets**”).
- 13.1. The Goodyear Assets were “mature legacy assets” of PEI.⁴ They had been “operating on a negative cash flow basis for a long time”, not just as a result of the drop in natural gas prices in 2016 and were subject to high fixed operating costs including “extremely high municipal property taxes”. The Goodyear Assets were also associated with high future asset retirement obligations (“**ARO**”).
- 13.2. However, the legal interests and licenses for the Goodyear Assets were held by PEOC, in its capacity as trustee for POT, which owned the beneficial interests in the Goodyear Assets. As a result, the sale by POT of the beneficial interests in the Goodyear Assets to PEOC required no transfers and no regulatory process or approval.
14. The sale of the Goodyear Assets was effected in steps, through a restructuring of the Perpetual corporate group and a number of agreements.
- 14.1. First, POT sold its beneficial interest in the Goodyear Assets to PEOC pursuant to the Asset Transaction.

⁴ Transcript of Cross-Examination of S. Rose, Exhibit 7.

- 14.2. Then, PEOC transferred legal title to all the remaining POT assets, except 1% of the legal title to four strong producing East Edson wells (the “**Retained Interests**”) to POC, as the new trustee for POT.
- 14.3. Finally, PEI sold all the shares in PEOC pursuant to the Share Sale to a numbered company (“**198**”). Rose resigned as the sole director of PEOC, PEOC changed its name to Sequoia Resources Corp. and POC demanded transfer of the Retained Interests.
15. Approximately 18 months later, PEOC, then known as Sequoia, assigned itself into bankruptcy.
16. Where required, the facts will be referred to in more detail in the context of the discussion of specific topics below.

PART II – ISSUES

17. The Stay Applications raise two issues.
- 17.1. The first of the two issues raised by both Stay Applications (that the Defendants’ Summary Dismissal and Striking Applications be heard before the Trustee’s Application), is moot – both Summary Dismissal and Striking Applications are in fact being heard before the Trustee’s Application.
- 17.2. The remaining issue in both Stay Applications is whether the Trustee’s Application should be permanently or temporarily stayed pursuant to Rule 7.1(c) (“**Issue 1**”).
18. The Defendants’ Summary Dismissal and Striking Applications also raise a number of issues. Although the Defendants state that they seek to strike various claims under Rule 3.68 “in the alternative” to summary dismissal under Rule 7.3,⁵ the threshold Rule 3.68 issues should be dealt with first. These issues include:

⁵ Perpetual Defendants’ Application for Summary Dismissal, at para. 1(b); Rose’s Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 1(b).

- 18.1. whether a trustee in bankruptcy can have standing to pursue oppression claims (“**Issue 2**”); and
 - 18.2. whether a trustee in bankruptcy can have standing to pursue claims against a director for breaches of his or her director’s duties (“**Issue 3**”).
19. The Rule 7.3 issues raised by the Defendants’ Summary Dismissal and Striking Applications are:
- 19.1. whether the parties were dealing with each other at arm’s length, within the meaning of the *BIA* (“**Issue 4**”)
 - 19.2. whether the Trustee is a proper “complainant” entitled to seek oppression relief under s. 242 of the *ABCA* (“**Issue 5**”)
 - 19.3. whether the Trustee’s claims against Rose should be dismissed, including on the basis that it is “barred and estopped” from making claims against Rose by the Resignation and Mutual Release Agreement (“**Issue 6**”).
20. Finally, although it is not a threshold issue, the Defendants’ Summary Dismissal and Striking Applications raise the further issue of whether the Trustee’s claim for relief on grounds of public policy, statutory illegality and equitable rescission should be struck (“**Issue 7**”).

PART III – ARGUMENT

Issue 1: Whether the Trustee’s Application Should be Permanently or Temporarily Stayed Pursuant to Rule 7.1(c)

1. The Rule does not provide for a permanent stay

21. The Defendants seek an order “permanently or temporarily staying the Plaintiff’s Application pursuant to rule 7.1(c)”.⁶
22. Rule 7(1)(c) provides:

Application to resolve particular questions or issues

7.1(1) On application, the Court may

- (a) order a question or an issue to be heard or tried before, at or after a trial
 ...
 (b) ...
 (c) stay any other application or proceeding *until the question or issue has been decided ...*⁷[Emphasis added.]

23. Accordingly, Rule 7.1(c) does not provide for a permanent stay of an application.

2. It makes no sense to stay the application pending trial

24. Because the Trustee’s Application and the action concern the same questions or issues, it makes no sense to stay the Trustee’s Application *until* the action has been decided.

3. The arguments for a stay relate to the merits of the Trustee’s Application

25. The Stay Applications:

- 25.1. argue that the Trustee seeks to set aside “a complex commercial transaction”, seeks “a significant monetary award based on complex issues concerning the value of assets and liabilities and relies on not only s. 96 of the *BIA* but the oppression remedy”; and

⁶ Perpetual Defendants’ Stay Application, at para. 1(b); Rose’s Stay Application, at para. 1(b).

⁷ *Alberta Rules of Court*, AR 124/2010, [s. 7.1\(c\)](#) [Trustee’s Authorities, Tab 1]

- 25.2. conclude that the Trustee's Application's should stayed on the basis that "it is inconceivable that the Plaintiff's Application could be determined summarily" as "both questions raise complex and disputed issues of fact and law requiring a trial."
26. As pointed out earlier, the Rose Stay Application also argues that:
- [T]he pleadings and proceedings establish good grounds to conclude that the Plaintiff's claim against Rose personally is a vexatious litigation tactic that is abusive of the process of this Honourable Court and injurious to Rose. Rose deserves the opportunity to demonstrate that the claim against her should be dismissed at an early stage.
27. The complexity of a transaction or the amount involved does not, on its own, preclude the Trustee from proceeding by way of a summary application.
28. In any event, as is shown below, the facts are not complex or disputed. The Trustee's Application relies on the facts *as presented by the Defendants*.
- 4. The Defendants' application for a permanent stay is inconsistent with the current law on the summary disposition of claims**
29. The law on the relevant issues is also not complex. In any event, there is no reason why complex *legal* issues require a trial and cannot be determined on an application.
30. The Defendants' Stay Applications are inconsistent with the guidance from our Court of Appeal in recent decisions considering Rule 7.3, including *Stefanyk v. Sobeys Capital Incorporated*⁸ and *Angus Partnership Inc. v. Salvation Army (Governing Council)*.⁹
31. In both cases, the Court allowed appeals from decisions declining to dispose of issues summarily under Rule 7.3,¹⁰ confirming that:

⁸ *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (*Stefanyk*) [Trustee's Authorities, Tab 2]

⁹ *Angus Partnership Inc. v. Salvation Army (Governing Council)*, 2018 ABCA 206 (*Angus Partnership*) [Trustee's Authorities, Tab 3]

¹⁰ *Stefanyk, supra*, at paras. 1 and 34 [Trustee's Authorities, Tab 2]; *Angus Partnership, supra*, at paras. 43 and 80 [Trustee's Authorities, Tab 3]

- 31.1. The standard of proof on a summary disposition application is the “balance of probabilities”.¹¹
- 31.2. A respondent cannot resist summary disposition simply by raising a “doubt”. It must put its “best foot forward” and the Court should not speculate about “future material evidence”.¹²
- 31.3. Summary disposition is appropriate where “the chambers judge can make any required fact findings from the summary dismissal record in a fair and just manner.”¹³

5. The Schweizer Affidavit does not address the question

32. The only evidence presented by the Defendants in support of the Stay Applications is the affidavit of Schweitzer.
33. Schweitzer’s affidavit expressly sets out evidence relating to issues he believes must be addressed “if”:

the Defendants’ summary dismissal applications are not heard and determined prior to the hearing of the Plaintiff’s application for judgment on the Statement of Claim.¹⁴

34. The Defendants’ Summary Dismissal and Striking Applications are in fact to be heard and determined prior to the Trustee’s Application.

6. The Schweitzer Affidavit does not support a stay

35. Schweitzer is the CFO of Perpetual.¹⁵ He has had access to and has reviewed the Perpetual records relating to the various transactions.¹⁶ However, he presents no evidence to show that

¹¹ *Stefanyk, supra*, at para. [14](#) [Trustee’s Authorities, Tab 2]; *Angus Partnership, supra*, at para. [42](#) [Trustee’s Authorities, Tab 3]

¹² *Stefanyk, supra*, at para. [16](#) [Trustee’s Authorities, Tab 2]; *Angus Partnership, supra*, at para. [42](#) [Trustee’s Authorities, Tab 3]

¹³ *Stefanyk, supra*, at para. [15](#) [Trustee’s Authorities, Tab 2]; *Angus Partnership, supra*, at paras. [44](#) and [79](#) [Trustee’s Authorities, Tab 3]

¹⁴ Affidavit of M. Schweitzer, at para. 9.

¹⁵ Affidavit of M. Schweitzer, at para. 1.

¹⁶ Affidavit of M. Schweitzer, at para. 5.

the Trustee's Application should not succeed.¹⁷ Instead, his affidavit and his evidence in cross-examination only emphasizes the evidence that is allegedly *not available* to the Defendants.¹⁸ He says, *inter alia*:

- 35.1. The Defendants do not know what the fair market value was of the consideration received by PEOC in the Asset Transaction, but the consideration received by PEOC was equivalent to the value given by PEOC in the Asset Transaction, because two parties negotiated and agreed on the terms of the agreement;¹⁹
- 35.2. The Defendants do not know what the fair market value was of the consideration given by PEOC in the Asset Transaction, but the consideration given by PEOC was "approximately equivalent" to the value received by PEOC in the Asset Transaction, again because the two parties negotiated and agreed on the terms of the Asset Purchase Agreement,²⁰ and
- 35.3. The Defendants will require evidence to address the solvency of PEOC before and after the Asset Transaction.²¹
36. Schweitzer confirmed that Perpetual had assigned some dollar value to the consideration given and received in the Asset Transaction, although he said he did not recall what those values were.²²
37. As in *Stefanyk and Angus Partnership*, a respondent cannot avoid a Rule 7.3 application simply by saying it will "require factual and expert evidence" to address the allegations. There is no obvious reason why the Defendants should still not be able to put forward *any defence* in response to claims that were articulated as much as 5 months ago, on May 28, 2018, on the basis of their own information.

¹⁷ Affidavit of M. Schweitzer, at paras. 15, 20, 23, 28 and 32.

¹⁸ Affidavit of M. Schweitzer, at paras. 15, 20, 23, 28 and 32.

¹⁹ Affidavit of M. Schweitzer, at paras. 14-15; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-6, p. 7, lines 1-9.

²⁰ Affidavit of M. Schweitzer, at paras. 19-20; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-8, p. 9, lines 1-8.

²¹ Affidavit of M. Schweitzer, at para. 23; Transcript of Cross-Examination of M. Schweitzer, at p. 9, lines 9-27, p. 10, p. 11, lines 1-19.

²² Transcript of Cross-Examination of M. Schweitzer, at p. 4, lines 8-24.

7. There is no evidence of “a vexatious litigation tactic”

38. In her affidavit, Rose has presented no evidence to suggest that the Trustee’s Application is “a vexatious litigation tactic” that is an abuse of the process of this Court. Schweitzer’s affidavit also provides no evidence to support this allegation.
39. The Trustee’s representative, Mr. Paul Darby was cross-examined extensively on this issue by counsel for the Perpetual Defendants and counsel for Rose. His evidence in cross-examination confirmed there is no merit to this allegation.
40. The Trustee submits that the Stay Application should be dismissed.

Issues 2 and 3: Whether a Trustee in Bankruptcy Can Have Standing to Pursue Claims for Oppression and Breaches of a Director's Duties

1. Rule 3.68(2)(b)

41. Although it is not clear from the Summary Dismissal and Striking Applications, it appears that the Defendants seek to strike the Trustee's oppression and breach of director's duties claims on the basis of Rule 3.68(2)(b). The Perpetual Defendants' Summary Dismissal and Striking Application states that:

The oppression claim is bound to fail. Alternatively, the oppression claim does not disclose a cause of action and should be struck.²³

42. Rose's Summary Dismissal and Striking Application states that:

The Plaintiff has no authority or standing to maintain the allegations of breaches of fiduciary duty and duty of care, and the allegations disclose no reasonable cause of action; and

[...]

Regarding the Plaintiff's claim against Rose for breach of fiduciary duty and oppression as pleaded in paragraphs 15-17 and 18-20 of the Statement of Claim, Rose applies to strike such pleadings pursuant to Rule 3.68.²⁴

43. It appears that the Defendants seek to strike the Trustee's oppression and breach of director's duties claim pursuant to Rule 3.68(2)(b) on the basis that a trustee in bankruptcy cannot have standing to pursue such claims.
44. Rule 3.68(2)(b) provides that a Court may strike out "all or any part of a claim or defence" on the basis that it "discloses no reasonable claim or defence to a claim."²⁵ Rule 3.68(3) provides that the Court may not consider any evidence in determining whether a claim should be struck pursuant to Rule 3.68(2)(b).²⁶
45. Our Court of Appeal considered Rules 3.68(2)(b) and 3.68(3) in *HOOPP Realty Inc. v. The Guarantee Company of North America*, which concerned an appeal from a chambers judge's

²³ Perpetual Defendants' Summary Dismissal Application, at para. 9.

²⁴ Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at paras. 3(a) and 4.

²⁵ *Alberta Rules of Court*, AR 124/2010, s. 3.68(2)(b) [Trustee's Authorities, Tab 1]

²⁶ *Alberta Rules of Court*, AR 124/2010, s. 3.68(3) [Trustee's Authorities, Tab 1]

decision declining to strike a claim under Rule 3.68(2)(b).²⁷ In dismissing the appeal,²⁸ the majority held that:

45.1. The chambers judge was required to determine whether the claim had a “reasonable prospect of success”.²⁹

45.2. Although the allegations in the Statement of Claim are assumed to be true, the wording must be placed “in the entire context of the pleading.”³⁰

45.3. The Court may also consider “the underlying litigation context of a claim, even one which does not give rise to a novel cause of action.”³¹

46. Although Justice Wakeling, concurring in the result, disagreed with the majority’s analysis, *HOOPP Realty* was cited with approval by this Court in *PR Construction Ltd. v. Colony Management Ltd.*, another Rule 3.68(2)(b) decision.³²

2. The Trustee was not required to obtain a “Standing Order”

47. In her Statement of Defence, Rose suggests that the Trustee was required to obtain a “Standing Order” prior to seeking relief from oppression under s. 242:

Insofar as PwC, in its capacity as trustee in bankruptcy of Sequoia, has the general authority to sue on behalf of the creditors of Sequoia, which is denied in the circumstances of this claim, it has no standing to sue Rose pursuant to s. 242 of the ABCA without first having obtained an order from this Court declaring that it is a proper person to do so (a Standing Order).

48. Leaving aside the case law to the contrary, Rose’s novel interpretation of s. 242 is problematic because of s. 240 and s. 239, which applies to both s. 240 and 242.³³

²⁷ *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336 (*HOOPP*) [Trustee’s Authorities, Tab 4]

²⁸ *Ibid.*, at para. 23 [Trustee’s Authorities, Tab 4]

²⁹ *Ibid.*, at para. 13 [Trustee’s Authorities, Tab 4]

³⁰ *Ibid.*, at paras. 14 and 15 [Trustee’s Authorities, Tab 4]

³¹ *Ibid.*, at para. 19 [Trustee’s Authorities, Tab 4]

³² *PR Construction Ltd. v. Colony Management Ltd.*, 2017 ABQB 600 (*Colony Management*), at para. 28 [Trustee’s Authorities, Tab 5]

³³ *Business Corporations Act*, RSA 2000, c. B-9, Part 19 [Trustee’s Authorities, Tab 6]

49. If a party is required to first obtain a “Standing Order” in order to commence a Part 19 proceeding, as Rose contends, then a party seeking leave to commence a derivative action under s. 240 would be required to make two Originating Applications:

49.1. First, it would have to apply for a “Standing Order” confirming that it is a proper “complainant” within the meaning of s. 239 and authorizing it “to make an application” under Part 19.

49.2. Then, having obtained a “Standing Order”, it would apply pursuant to s. 240(1) for leave to bring a derivative action “on behalf of a corporation or any of its subsidiaries”.

50. Part 19 expressly states any requirement that a party obtain leave prior to commencing a proceeding, as in s. 240. The interpretation advanced by Rose would lead to an absurd result by, in effect, introducing a leave application into s. 242 and a second leave application into s. 240, which would be inconsistent with the principle of statutory interpretation that:

Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature.³⁴

51. Rose’s proposed “Standing Order” is also inconsistent with the existing case law on Part 19.

52. In *Chen v. Sumwa Trading Co. Ltd.*, for example, Justice Dario recently considered an application under s. 240 for leave to commence a derivative action.³⁵ Having considered the facts, Justice Dario declared that the applicant was a “complainant” within the meaning of s. 239 and then granted leave to commence a derivative action under s. 240.³⁶ There was no suggestion that the applicant was somehow required to obtain a “Standing Order” pursuant to s. 239 prior to bringing her s. 240 leave application.

³⁴ *Regent Resources Ltd. (Re)*, 2018 ABQB 669, at para. 22, citing *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 66 [Trustee’s Authorities, Tab 7]

³⁵ *Chen v. Sumwa Trading Co. Ltd.*, 2018 ABQB 269 (*Sumwa Trading*), at para. 1 [Trustee’s Authorities, Tab 8]

³⁶ *Ibid.*, at paras. 47-50 [Trustee’s Authorities, Tab 8]

53. Similarly, in *AMFAM Trust v. Tallahassee Petroleum Inc.*, Master Robertson recently granted interim relief from oppression in favour of trust beneficiaries who were “not directors and not shareholders”,³⁷ stating that:

However, the definition of “complainant” in section 239(b) of the *ABCA* is not limited to minority shareholders, or directors who do not control the board of directors. A complainant may be another person who, in the discretion of the Court is found to be a proper person to make an application for oppression remedies – even if that person does not fit neatly into the defined categories. And a “complaint” might be a beneficial owner of a corporation or any of its affiliates, not just a shareholder or a director.

That would seem to allow the application to be brought here at least by the beneficiaries of AMFAM Trust, some of whom are named as plaintiffs. They are not directors and not shareholders. They are not in the same position as Mr. English in *Sylvan Lake Developments*.

54. As in *Sumwa Trading*, there is no suggestion that the plaintiffs in *Tallahassee Petroleum* were required to obtain a “Standing Order” prior to commencing a Part 19 proceeding.
55. Rose’s proposed “Standing Order” requirement is inconsistent with the wording of Part 19, in particular sections 239 and 240, and would lead to absurd results. It is also inconsistent with the case law interpreting Part 19, including s. 242.
56. There is no merit to this ground for striking the Trustee’s oppression claims.

3. A Trustee can be a proper “complainant” within the meaning of s. 239

(a) The Defendants’ argument

57. In their Statement of Defence, the Perpetual Defendants plead that:

The Plaintiff could only have standing to become a complainant if leave of the Court was granted pursuant to s. 239(b)(iv) of the *ABCA*. The Plaintiff has not sought and would not be entitled to leave because:

- (a) the Plaintiff, as Sequoia’s trustee in bankruptcy, could only be a complainant if Sequoia could have brought an oppression claim, which it could not;
- (b) an oppression claim under s. 242(1) of the *ABCA* is a personal remedy belonging to certain stakeholders of Sequoia;

³⁷ *AMFAM Trust v. Tallahassee Petroleum Inc.*, 2017 ABQB 16 (*Tallahassee Petroleum*), at paras. [39](#), [40](#), [57](#), [58](#) [**Trustee’s Authorities, Tab 9**]

(c) the Plaintiff, by reason of Sequoia's bankruptcy, is not in a better position to advance the claims of Sequoia's creditors; and

(d) none of Sequoia's creditors on bankruptcy, including the AER or municipalities, were creditors of PEOC with provable claims at the time of the Transaction.³⁸

58. These allegations are mirrored in Rose's Statement of Defence, with the additional reference to the Resignation and Mutual Release Agreement (the "**Release**"), discussed below.³⁹

59. The Defendants attempt to rely on the argument rejected by the Ontario Superior Court of Justice in *Dylex* and the Ontario Court of Appeal in *Olympia & York* and *Essar Global*, as discussed below.

(b) A Trustee can be a "proper person" entitled to be a "complainant"

60. Like the Defendants in the present action, the defendants in *Dylex* argued that the trustee had no legal capacity to pursue an oppression remedy. Their argument mirrors the argument advanced by the Defendants:

(a) A trustee can only bring a claim as a representative of Dylex where Dylex itself would have been entitled to bring the claim, except where statutory provisions otherwise allow;

(b) The right to obtain relief from oppression is a personal remedy, belonging only to the individuals who have been oppressed; and

(c) By reason of a bankruptcy, the trustee is not in a better position to advance the claim.⁴⁰

61. The Court's Reasons in *Dylex* provide additional detail regarding the defendants' argument:

[11] With respect to the first, Mr. Lax submits that as the trustee in bankruptcy *stands in the shoes of the company and has no greater rights than the bankrupt company had except where legislation confers greater rights, the trustee's capacity to assert a claim therefore depends on whether Dylex could have brought a claim*

³⁸ Perpetual Defendants' Statement of Defence, at para. 55.

³⁹ Rose's Statement of Defence, at paras. 18-22.

⁴⁰ *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (ONSCJ), at para. 10 [Trustee's Authorities, Tab 10]

prior to its bankruptcy. The moving parties submit that Dylex, prior to its bankruptcy, could not have applied for the oppression remedy against them.

[12] Mr. Lax argues that *Dylex itself could not have brought a claim under the oppression remedy provisions prior to bankruptcy* as the directors had approved the conduct. Once the directors have acted, those acts become the acts of the company; and the company itself cannot apply to bring an Oppression Remedy Claim because the impugned acts are acts of the company, not the directors. [Emphasis added.]

62. The Court in *Dylex* rejected the defendants' argument,⁴¹ citing with approval the following passage from Justice Farley's Reasons in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*:

It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt. While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person". It should be noted that s. 248(2) talks of act or omission that "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation or any of its affiliates..." (emphasis added). *Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the Margaritis characterization of the trustee in bankruptcy as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case.*⁴² [Emphasis added.]

63. The Court in *Dylex* concluded its analysis of the issue by stating that:

In this action, the Trustee pleads that the conduct and transactions at issue were oppressive and unfairly prejudicial to the interests of the creditors. The harm suffered allegedly arises as a result of the disastrous financial impact of the share acquisition on Dylex, thereby affecting the creditors as a whole. *The Trustee as the creditors' appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, in conjunction with the other claims it is asserting, all arising out of the same facts.* This is consistent with the *long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to bankrupt person or the creditors) shall vest exclusively in the trustee.*⁴³[Emphasis added.]

⁴¹ *Ibid*, at para. 16-17 [Trustee's Authorities, Tab 10]

⁴² *Ibid*, at para. 15, citing *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (*Olympia & York*), at para. 30 [Trustee's Authorities, Tab 11]

⁴³ *Ibid*, at para. 17 [Trustee's Authorities, Tab 10]

64. In *Olympia & York*, decided after *Dylex*, the Ontario Court of Appeal considered an appeal, *inter alia*, from Justice Farley’s determination that the trustee was a proper complainant under s. 248, Ontario’s equivalent to s. 242.⁴⁴ The Court dismissed the appeal.⁴⁵
65. In reaching its conclusion, the Court found that:
- 65.1. The trustee is “neither automatically barred from being a complainant nor automatically entitled to that status” where the bankrupt corporation was a party to the allegedly oppressive transaction.⁴⁶
- 65.2. Section 245(c), equivalent to *ABCA* s. 239(b)(iv), “confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings” and is “designed to provide the court with flexibility in determining who should be a complainant in a particular case”.⁴⁷
- 65.3. The “overall flexibility provided for is essential for the broad remedial purpose of these oppression provisions to be achieved”.⁴⁸
66. More recently, in *Ernst & Young Inc. v. Essar Global Funds Limited*, the Ontario Court of Appeal considered an appeal, *inter alia*, from the trial judge’s finding that a *CCAA* monitor had standing as a “complainant” to seek relief from oppression.
67. The Court cited *Olympia & York* with approval⁴⁹ and analyzed the monitor’s suitability to advance oppression claims by comparing its role with that of a trustee:

Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The

⁴⁴ *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2003] O.J. No. 5242 (*Olympia & York CA*), at paras. 39-45 [Trustee’s Authorities, Tab 12]

⁴⁵ *Ibid*, at para. 46 [Trustee’s Authorities, Tab 12]

⁴⁶ *Ibid*, at para. 45 [Trustee’s Authorities, Tab 12]

⁴⁷ *Ibid*, at para. 45 [Trustee’s Authorities, Tab 12]

⁴⁸ *Ibid* [Trustee’s Authorities, Tab 12]

⁴⁹ *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, at para. 115 [Trustee’s Authorities, Tab 13]

appellants did not direct us to any authority saying that a monitor could not be a complainant.⁵⁰

68. The Court concluded that the trial judge did not err in finding that the monitor was a proper complainant in the circumstances.⁵¹
69. As in *Olympia & York*, the Trustee is a “proper person” entitled to be a “complainant” under s. 239.
70. The Trustee pleads that “it is a proper complainant within the meaning of Part 19 of the ABCA, including sections 239 and 242”.⁵² In its Statement of Claim, the Trustee seeks an Order under Part 19 of the ABCA, which would include a s. 239(b)(iv) Order that it is a “proper person” entitled to be a complainant.
71. There is no merit to this ground for striking the Trustee’s oppression claims.

4. The Trustee has standing to advance claims against Rose for breaches of her duties as PEOC’s sole director

72. Beyond the repeated use of the word “standing”, it is unclear from Rose’s Statement of Defence and the Amended Amended Application for Summary Dismissal and Striking Pleadings on what basis the Trustee’s entitlement to assert claims on behalf of PEOC is being challenged.
73. Section 30(1)(d) and (f) of the *BIA* provide, *inter alia*, that “with the permission of the inspectors”, the Trustee may:

bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

[...]

employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors; [...].⁵³

⁵⁰ *Ibid*, at para. 116-117 [Trustee’s Authorities, Tab 13]

⁵¹ *Ibid*, at para. 120 [Trustee’s Authorities, Tab 13]

⁵² Statement of Claim, at para. 18.

⁵³ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 30 [Trustee’s Authorities, Tab 16]

74. In *Dylex*, discussed above, the Ontario Superior Court of Justice considered, *inter alia*, an application to strike for lack of standing claims brought by a corporation's trustee in bankruptcy against its former officers, directors and shareholders.⁵⁴
75. The Court declined to strike the trustee's oppression and breach of fiduciary duty claims on the basis of any lack of standing.⁵⁵ The Court stated that:

In this action, the Trustee pleads that the conduct and transactions at issue were oppressive and unfairly prejudicial to the interests of the creditors. The harm suffered allegedly arises as a result of a disastrous financial impact of the share acquisition of Dylex, thereby affecting the creditors as a whole. The Trustee as the creditors' appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, *in conjunction with the other claims it is asserting, all arising out of the same facts. This is consistent with the long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to the bankrupt person or the creditors) shall vest exclusively in the trustee.*⁵⁶ [Emphasis added.]

76. In *Peoples*, decided in 2004 after *Dylex*, the Supreme Court of Canada considered claims brought by the trustee of a bankrupt wholly-owned subsidiary against its former directors for breach of the fiduciary duty and duty of care they owed to the corporation.⁵⁷ The Court noted that the trustee's standing to sue was not questioned:

This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. *The standing of the trustee to sue was not questioned.*⁵⁸ [Emphasis added.]

77. Our Court of Appeal has also confirmed the broad scope of the trustee's s. 30(1)(d) power to initiate proceedings on behalf of the bankrupt's estate.
78. In *BDO Canada Ltd. v. Dorais*, the Court allowed the trustee's appeal from a case management judge's decision that the trustee was not entitled to pursue claims assigned to it by certain individual creditors.⁵⁹ In holding that the trustee was entitled to pursue the

⁵⁴ *Dylex, supra*, at para. 1 [Trustee's Authorities, Tab 10]

⁵⁵ *Ibid*, at paras. 22 and 35 [Trustee's Authorities, Tab 10]

⁵⁶ *Ibid*, at para. 17 [Trustee's Authorities, Tab 10]

⁵⁷ *Peoples Department Store Ltd. (1992) Inc., Re*, 2004 SCC 68 (*Peoples*), at para. 2 [Trustee's Authorities, Tab 14]

⁵⁸ *Ibid*, at para. 30 [Trustee's Authorities, Tab 14]

⁵⁹ *BDO Canada Ltd. v. Dorais*, 2015 ABCA 137 (*Dorais*), at paras. 7 and 17 [Trustee's Authorities, Tab 15]

“collective claims” that would accrue to the benefit of the general body of creditors, the Court stated that:

One of the core duties of the trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupt to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. *If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these types of claims on behalf of the general body of creditors is consistent with the Trustee's overall duties.* In that respect he is pursuing legitimate claims of the estates, and is not impermissibly “stepping into the shoes” of individual plaintiffs.⁶⁰ [Emphasis added.]

79. As the above authorities establish, s. 30(1)(d) confers on the Trustee the power to step into the shoes of the bankrupt and advance any claims the bankrupt may have had, for the benefit of the general body of creditors. As in *Dylex* and *Peoples*, this includes the bankrupt corporation’s claims against its former directors for breaches of the fiduciary duty and duty of care they owed to the corporation.
80. There is no merit to this ground for striking the Trustee’s claims.

⁶⁰ *Ibid*, at para. 13 [Trustee’s Authorities, Tab 15]

Issue 4: Whether the parties were dealing with each other at arm's length within the meaning of the *BIA*

1. The Defendants' argument

81. The Perpetual Defendants plead that the Asset Transaction was an arm's-length transaction on the following basis:

The Asset Purchase Agreement did not exist, and would not have occurred, except as part of the Transaction. Like the Share Purchase Agreement, it too was the product of arm's-length negotiations between the Purchaser Team on the one hand, and the Vendor Team on the other. At the relevant time, 198 exercised *de facto* control of PEOC prior to the Transaction:

(a) the terms of the Asset Purchase Agreement, including the consideration, were negotiated between the Purchaser Team and the Vendor Team, dealing at arm's length; and

(b) as the purchaser of all the shares of PEOC as part of the Transaction, 198 (and only 198) had a commercial interest in the terms of the Share Purchase Agreement as they affected.⁶¹

82. It appears that the Defendants view the determination of the arm's-length/non-arm's length issue as being governed by s. 4(4) of the *BIA*,⁶² which provides that:

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.⁶³ [Emphasis added.]

83. However, as discussed below, the Parties at issue, PEOC and POT, were "related persons" within the meaning of s. 4(2) of the *BIA*. They are *deemed not to deal with each other at arm's length* pursuant to s. 4(5) of the *BIA*, which provides that:

Presumptions

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 the absence of evidence to the contrary, deemed not to deal with each other at arm's length.⁶⁴

⁶¹ Perpetual Defendants' Statement of Defence, at paras. 46-46.

⁶² Transcript of Cross-Examination of P. Darby, p. 27.

⁶³ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(4) [Trustee's Authorities, Tab 16]

⁶⁴ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(5) [Trustee's Authorities, Tab 16]

2. Sections 4(2) and 4(3) of the *BIA*

84. Section 4(2) of the *BIA* provides that “related persons” include “an entity” and “a person who controls the entity, if it is controlled by one person”.⁶⁵

85. The *BIA* defines “person” broadly and simply provides that it “includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization [...]”. The definition does not exclude a trust like POT.

86. Section 4 defines an “entity” as a “person other than an individual.

87. Section 4(3)(a) provides that:

If two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other.⁶⁶

88. Section 4(3)(c) provides that:

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. [Emphasis added.]

89. Deemed ownership pursuant to s. 4(3)(c) is not exclusive: the Court in *Green Gables Manor Inc., Re* held that two parties can be the owners of the same shares at the same time for the purposes of s. 4.

90. *Green Gables* concerned a trustee's application to set aside a GSA granted by the bankrupt corporation in favour of an individual and a corporation.⁶⁷

91. The bankrupt corporation was the wholly-owned subsidiary of a numbered company, which was wholly-owned by another numbered company.⁶⁸ The individual respondent was a 30%

⁶⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 4\(2\)](#) [Trustee's Authorities, Tab 16]

⁶⁶ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 4\(3\)](#) [Trustee's Authorities, Tab 16]

⁶⁷ *Green Gables Manor Inc., Re*, 1998 CarswellOnt 2498, at paras. 1-8 [Trustee's Authorities, Tab 17]

⁶⁸ *Ibid*, at para. 6 [Trustee's Authorities, Tab 17]

shareholder in this ultimate parent company and the respondent corporation was solely owned and controlled by the 50% shareholder in this ultimate parent company.⁶⁹

92. The Court found that the bankrupt corporation and the respondents were "related persons" within the meaning of s. 4(2) of the *BIA*.

92.1. The individual respondent and the individual controlling the corporate respondent were president and secretary-treasurer of the bankrupt and two of the three directors of each corporation.⁷⁰ They were not related to each other by blood, marriage or adoption.⁷¹

92.2. However, the shareholder agreement between the shareholders of the holding company provided each shareholder could buy the other's shares.⁷²

93. Pursuant to s. 4(3)(c) of the *BIA*, each shareholder was deemed to own the shares it was entitled to purchase under the shareholder agreement for the purposes of s. 4(2).⁷³ Accordingly, both shareholders were deemed to control the holding company and therefore had *de jure* control over the bankrupt corporation, the wholly-owned subsidiary of its wholly-owned subsidiary.⁷⁴

94. The bankrupt and the individual respondent were a "corporation" and a "person who controls the corporation, if it is controlled by one person" making them "related persons" under s. 4(2). Similarly, the bankrupt and the corporate respondent were two corporations controlled by the same person, making them "related persons" under s. 4(2).

95. Having found that the respondents were "related persons", the Court proceeded to conclude that the GSA was a fraudulent preference within the meaning of, *inter alia*, s. 95 of the *BIA*.

⁶⁹ *Ibid* [Trustee's Authorities, Tab 17]

⁷⁰ *Ibid*, at para. 16 [Trustee's Authorities, Tab 17]

⁷¹ *Ibid*, at para. 18 [Trustee's Authorities, Tab 17]

⁷² *Ibid*, at paras. 23-25 [Trustee's Authorities, Tab 17]

⁷³ *Ibid*, at para. 25 [Trustee's Authorities, Tab 17]

⁷⁴ *Ibid*, at para. 27 [Trustee's Authorities, Tab 17]

96. The Court in *Green Gables* confirmed that a single share can be in several places at once for the purposes of s. 4: the shareholder agreement gave both shareholders deemed control even though the same shares could never be owned by both shareholders at the same time.
97. The same reasoning applies where a corporation is wholly-owned by one shareholder who has agreed to sell its shares to another shareholder: both the existing shareholder and future shareholder would be "related persons" because they are both "persons who control" the corporation.

3. PEOC, POT, PEI and 198 were all "related persons" within the meaning of s. 4

98. The relevant facts are not in dispute:
- 98.1. PEOC was the wholly-owned subsidiary of PEI;⁷⁵
- 98.2. PEOC was the trustee of POT;⁷⁶
- 98.3. PEOC executed the Asset Purchase PSA on its own behalf and as trustee for POT;⁷⁷ and
- 98.4. 198 entered into the Share Purchase Agreement on September 26, 2016, to purchase all of PEI's shares in PEOC.⁷⁸
99. In accordance with s. 4 of the *BIA*, PEOC, POT, PEI and 198 were all "related persons" at the time of the Asset Transaction:
- 99.1. POT was an "entity" and PEOC, its trustee, was "a person who controls the entity, if it is controlled by one person";
- 99.2. PEOC was an "entity" and PEI, the holder of 100% of its shares until the closing of the Share Purchase Transaction, was "a person who controls the entity if its controlled by one person";

⁷⁵ Rose Affidavit, at para. 12-13.

⁷⁶ Rose Affidavit, at paras. 10 and 13.

⁷⁷ Asset Purchase Agreement, p. 28, Rose Affidavit, Exhibit J.

⁷⁸ Rose Affidavit, at para. 40 and Exhibit H, p. 55.

99.3. 198 had “a right under a contract” to acquire 100% of PEOC shares from PEI, and was deemed to control PEOC after September 26, 2016; and

99.4. From September 26, 2016 to the closing of the Share Purchase Transaction, PEI and 198 were “two entities related to the same entity”, PEOC.

4. The effect of the deeming provision in s. 4(5)

100. There are a number of decisions dealing with the tripartite test under s. 4(4) for determining whether “persons *not related* to one another” were nonetheless in a non-arm’s length relationship: for example *Piikani Energy v. Piikani Energy Corp.*⁷⁹ and *Montor Business Corp. (Trustee of) v. Goldfinger*⁸⁰:

100.1. Was there a common mind which directs bargaining for both parties to a transaction;

100.2. Were the parties to a transaction acting in concert without separate interests; and

100.3. Was there *de facto* control.⁸¹

101. The s. 4(4) test derived from *McLarty v. R*⁸² is not applicable to “related persons”, which are deemed not deal with each other at arm’s length pursuant to s. 4(5).

102. The Court in *PricewaterhouseCoopers Inc. v. Legge* confirmed that s. 4(5) creates a rebuttable presumption that “related persons” were not dealing with each other at arm’s length.⁸³ The onus was on the parties seeking to uphold the transaction:

To rebut the presumption in favour of the Trustee those seeking to oppose are required to show that the transaction was one with appropriate consideration, in the normal course of business and with no view to insolvency”.⁸⁴

⁷⁹ *Piikani Energy v. Piikani Energy Corp.*, 2013 ABCA 293, at para. 29-30 [Trustee’s Authorities, Tab 18]

⁸⁰ *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 [Trustee’s Authorities, Tab 19]

⁸¹ *Ibid.*, at para. 29-30 [Trustee’s Authorities, Tab 19]

⁸² *McLarty v. R*, 2008 SCC 26 [Trustee’s Authorities, Tab 20]

⁸³ *PricewaterhouseCoopers Inc. v. Legge*, 2011 NBQB 255, at para. 15 [Trustee’s Authorities, Tab 21]

⁸⁴ *Ibid.*, at para. 15 [Trustee’s Authorities, Tab 21]

103. In the present case, the Defendants cannot rebut the presumption that the Asset Transaction, between PEOC and itself, as the trustee for POT, was a non-arm's length transaction.
104. The Defendants fall at the first hurdle as they cannot show that "the transaction was one with appropriate consideration":
- 104.1. The Trustee's evidence is that the difference between the consideration given and received by PEOC in the Asset Transaction was *at least* \$217,570,800;⁸⁵
- 104.2. The Trustee's evidence on this point is uncontradicted.⁸⁶ It was also confirmed by the Trustee's representation in cross-examination:

Q. MR. LEITL: Mr. Darby, going back to my questioning about the personal benefit that you opine on in your affidavit, the alleged personal benefit of Ms. Rose. Do you remember we talked about that?

A. Yes.

Q. And I think you said -- I'm obviously paraphrasing -- that it was just so obvious to you, you didn't need to ask Ms. Rose anything about it; right?

A. Yes.

Q. And if I heard you correctly, my notes are sketchy -- if I heard you correctly, you said in so many words that PEI was able to offload what you see as \$250 million in obligations; right?

A. 220 million.

Q. Okay.

A. Call it.

Q. And you'll agree with me that if a company was able to offload a company like PEI, \$220 million in obligations for no consideration, that would be material?

A. Yes.

Q. And you would expect that to have a positive impact on the share price?

A. Unless the shares were overvalued to start with.

Q. Unless they were overvalued to start with? Is that what you said?

A. Markets don't nationally make sense, so...

Q. But you do, all of -- other things being equal, assume and expect that the announcement by a company of an ability to offload \$220 million in debt at no cost would have a material positive impact on its share price?

⁸⁵ Affidavit of Paul Darby, at para. 44.

⁸⁶ Affidavit of Mark Schweitzer, at paras. 14 and 19; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-6, p. 7, lines 1-9.

A. It is positive for the company, yes.⁸⁷

105. Accordingly, the Defendants cannot rebut the presumption that the Asset Transaction was a non-arm's length transaction.

⁸⁷ Transcript of Cross-Examination of Paul Darby, at pp. 95-96.

Issue 5: Whether the Trustee is a proper “complainant” entitled to seek oppression relief under s. 242 of the ABCA

1. The Defendants’ argument

106. The Defendants make various legal arguments attacking the Trustee’s standing to seek relief under s. 242. These are without merit, as discussed above.

107. The Defendants also make the factual allegation that:

*none of Sequoia’s creditors on bankruptcy, including the AER or municipalities, were creditors of PEOC with provable claims at the time of the Transaction.*⁸⁸[Emphasis added.]

108. This allegation is mirrored in Rose’s Statement of Defence, which alleges that:

PWC does not qualify for standing as a complainant for the purposes of its claim against Rose because, *at the time of the closing of the Transaction:*

[22.1] *Sequoia’s current creditors were not creditors with provable claims against PEOC;*

[22.2] *specifically, neither the AER nor the municipalities to whom PEOC paid property taxes from time to time were creditors of PEOC with provable claims against PEOC; [...]*⁸⁹ [Emphasis added.]

2. PEOC had creditors at the time of the Asset Transaction

(a) PEOC’s municipal tax liabilities

109. The allegations above are inconsistent with the Defendants’ own evidence, provided by Rose in her October 19, 2018 affidavit. Rose states that:

[68] The provisions detailed above had the combined effect of assuring 198 that PEOC would be acquired without any debts at the time of closing, *with the exception of certain amounts expected to be paid in the fourth quarter of 2016 with respect to municipal property taxes that were identified in Schedule I to the Share Purchase Agreement* and materially offset by prepaid expenses related to periods after closing and deferred payment obligations to Perpetual related to recover of the Crown royalty deposit and Crown royalty credit.

[...]

[70] I understand that all 2016 municipal taxes associated with the Goodyear Assets were paid in full by either Perpetual or Sequoia, *with the exception of three*

⁸⁸ Perpetual Defendants’ Statement of Defence, at para. 55 [Trustee’s Authorities, Tab X]

⁸⁹ Rose’s Statement of Defence, at paras. 22, 22.1 and 22.2. [Trustee’s Authorities, Tab X]

municipalities (Athabasca County, Lamont County, and the Municipal District of Opportunity #17) which I understand voluntarily agreed with Sequoia at some time after closing to permit Sequoia to pay its 2016 municipal taxes without penalty in multiple payments over an extended payment period.

[71] While I do not have access to all of Sequoia's records relating to these municipalities, I am attaching at **Exhibit Z** copies of Perpetual's analysis of 2016 property tax payments associated with the Goodyear Assets. It shows total 2016 property taxes owing in the amount of \$6,374,201 which was paid either by Sequoia or Perpetual *with the exception of voluntary deferred payment amounts. With respect to the three municipalities referred to in the previous paragraph:*

(a) I am attaching a copy of a letter from Sequoia to the Municipal District of Opportunity No. 17 dated October 20, 2016 as **Exhibit AA** outlining Sequoia's request of the Municipal District of Opportunity #17 to defer 2016 property tax payments, and Municipal District of Opportunity #17's letter to Sequoia dated January 26, 2018 confirming the agreement to establish an extended payment plan for the 2016 municipal tax invoice as **Exhibit BB**; and

(b) I do not have copies of Sequoia's communications with Athabasca County or Lamont County but am advised by others that those counties stated that payment plans were also established for 2016 municipal tax invoices and that all payments were made according to the payment plans *with exception of payments due after 2016.*⁹⁰ [Emphasis added.]

110. Schedule I to the Share Purchase Agreement is also included as an Exhibit to the Rose Affidavit. Schedule I lists the following "Current Liabilities" of PEOC on October 1, 2016:

Current Liabilities

| | |
|---|----------------------|
| Payable to Municipalities on behalf of Perpetual Operating Trust (reimbursed through the statement of adjustments under the purchase and sale agreement dated September 30, 2016) | \$ (4,256,585) |
| Payable to municipalities on acquired assets – 2016 property taxes | \$(1,476,116) |
| TOTAL PAYABLE TO MUNICIPALITIES | \$(5,732,701) |
| Total Current Liabilities | \$(5,732,701) |

⁹⁰ Affidavit of Susan Riddell Rose, sworn October 19, 2018, at para.68-71.

111. Schedule I to the Share Purchase Agreement, referenced in the Rose Affidavit and included as an Exhibit is directly inconsistent with the Defendants' allegation that PEOC had no creditors with provable claims when the Asset Transaction closed on October 1, 2018.
112. In fact, Schedule I lists an amount of \$5,732,701 as a "current liability" that was "payable to the municipalities" as of October 1, 2016.
113. Rose's affidavit also confirms that at least \$1,560,809 of this amount was never paid. The table excerpted below is included at Exhibit Z to the Rose Affidavit:

| Municipality | Payment Due Date | 2016 Gross Property Tax Associated with Properties Sold to Sequoia | Property Taxes Paid by Sequoia | Property Taxes Paid by Perpetual | Property Tax Balance Outstanding | Source of Payment Information |
|-----------------------------------|------------------|--|--------------------------------|----------------------------------|----------------------------------|---|
| Municipal District of Opportunity | 6/30/2016 | 1,227,006 | 463,745 | - | 927,491 | Sequoia 3-year payment plan – letter received from MD of Opportunity. |
| Lamont County | 6/30/2016 | 902,319 | 303,553 | - | 605,689 | Sequoia 3-year payment plan – receipt from Lamont County. |
| Athabasca County | 7/31/2016 | 41,442 | 13,814 | - | 27,628 | Sequoia 3-year payment plan – phone call to Athabasca County. |
| | TOTAL | 6,374,201 | 4,182,960 | 2,608,767 | 1,560,809 | |

114. Contrary to the allegations in the Defendants' Statements of Defence, the table included as Exhibit Z to Rose's affidavit confirms that:
- 114.1. Municipal tax amounts payable by PEOC to the above three municipalities and totalling at least \$2,170,767 were "due" *by July 31, 2016, two months prior* to the closing of the Asset Transaction on October 1, 2016; and
- 114.2. At least \$1,560,809 of those amounts were never paid and remain "outstanding".
115. In cross-examination, Rose was asked about Exhibit Z to her affidavit:

So that's Exhibit Z. And the first three entries have payment due dates of prior to October 2016. You see those?

A. Mm-hm.

Q. Yes?

A. Yes.

Q. So these were all due prior to closing of the asset transaction?

A. No. They were not.

Q. So what does "payment due date" mean if it does not mean payment due?

A. Well, there's a provision, when you have your property tax, that you can choose to elect to pay it at a later date subject to a penalty.

...

Q. All right. Is it fair to say that the penalty then applies to amounts that were due but not paid on the due date, and then because there's an extension, there's an accommodation, the penalty is the price that you pay for that?

A. Could you repeat the question?

Q. Yes. The penalty situation applies where an amount is due on a particular date, and you then reach an accommodation or an agreement to extend that, and as a result, you have to pay a penalty. That's what I understand you to say.

A. Yes.⁹¹

116. It is respectfully submitted that an arrangement for late payment of a tax due, subject to penalty, does not mean that the municipality involved is no longer a creditor with a provable claim against the estate of the taxpayer

(b) PEOC's ARO

117. Both the Perpetual Defendants and Rose plead that:

None of Sequoia's creditors on bankruptcy, including the AER or municipalities were creditors of PEOC with provable claims at the time of the Transaction.⁹²

118. The shift from "Sequoia's creditors" to "creditors of PEOC" in the above allegation is without legal significance: there is no dispute that PEOC simply changed its name to Sequoia.⁹³

119. The allegation that no municipalities had provable claims prior to the Asset Transaction is dealt with above. The similar allegation made in respect of the AER's provable claims is also without merit.

⁹¹ Transcript of Cross-Examination of S. Rose, p. 50, lines 1-14, p. 51, lines 8-20.

⁹² Perpetual Defendants' Statement of Defence, at para. 55(d); Rose Statement of Defence, at para. 22.2.

⁹³ Transcript of Cross-Examination of M. Schweitzer on October 26, 2018, at p. 11, lines 20-27, p. 12.

120. In *Redwater*, our Court of Appeal confirmed an insolvent entity’s regulatory obligations to the AER were provable claims, satisfying the three-part test laid down by the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*⁹⁴

- (a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a “creditor” in insolvency proceedings (at para. 27);
- (b) The debt, liability or obligations must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have commenced (CCAA, s. 11.8(9); BIA, s. 14.06(8)); and
- (c) It must be possible to attach a monetary value to the debt liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims. That depends on whether there is “sufficient certainty” that the regulatory body will ultimately perform remediation and crystallize the claim (at para. 36). In assessing the certainty of the claim, the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.⁹⁵

121. Although the decision in *Redwater* has been appealed to the Supreme Court of Canada, Justice Wakeling dismissed the appellants’ stay application on the basis, *inter alia*, that the “precedential effect of a Court of Appeal opinion” could not be stayed.⁹⁶

122. Based on the Court of Appeal’s findings in *Redwater*, there is ample evidence to support the existence of a provable claim by the AER prior to the Asset Transaction.

123. The Trustee’s evidence is that the estimated “liabilities associated with the Goodyear Assets and assumed by PEOC as part of the Asset Transaction”, excluding property taxes, were:

⁹⁴ *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124 (*Redwater*), at paras. 60 and 73-91, citing *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [Trustee’s Authorities, Tab 22]

⁹⁵ *Ibid.*, at para. 60 [Trustee’s Authorities, Tab 22]

⁹⁶ *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, at para. 11 [Trustee’s Authorities, Tab 23]

[40.1] ARO of \$192,127,274 for the Goodyear Wells (abandonment costs of \$98,855,218 and reclamation costs of \$93,272,056);

[40.2] ARO of \$26,831,000 for the facilities associated with the Goodyear Wells, calculated as the costs attributable to the Goodyear Assets, proportionate to the total ARO for all POT facilities; [...].⁹⁷

124. These figures were confirmed by the Trustee's representative in cross-examination.⁹⁸
125. The Defendants include in their evidence a copy of the Proof of Claim submitted by the AER on April 11, 2018. Although Rose points out, on behalf of the Defendants, that "the alleged unsecured claim has a stated value as low as \$1 as of the date of bankruptcy", Rose does not point out that the stated value of the same unsecured claim is *between \$1 and \$225,500,636.25*.⁹⁹
126. In cross-examination, Rose's evidence on this issue was that:
- 126.1. The "ARO obligation represented by the properties" on Perpetual's September 30, 2016 balance sheet was 133.6 million", but this was only "how it was represented" in Perpetual's financial disclosure to the market, not what they "believed to be the actual liability".¹⁰⁰ The \$133.6 million figure did not "address the full context" of the future liabilities.¹⁰¹
- 126.2. The actual ARO number that Perpetual "landed on for the ARO for Goodyear" was higher than the \$52 million number estimated in June 2016 and was "about 87 million".¹⁰² This \$87 million ARO figure, however, "may still have been a good aspirational number" but was not an "auditable number".¹⁰³

⁹⁷ Affidavit of P. Darby, at para. 40.

⁹⁸ Transcript of Cross-Examination of P. Darby, at p. 92, lines 8-7, p. 93, p. 94-95, p. 96, lines 1-20.

⁹⁹ Affidavit of S. Rose, para. 75 and Exhibit DD.

¹⁰⁰ Transcript of Cross-Examination of S. Rose, p. 21, lines 15-27, p. 22, line 1.

¹⁰¹ Transcript of Cross-Examination of S. Rose, p. 23, lines 7-21, p. 24, lines 1-4.

¹⁰² Transcript of Cross-Examination of S. Rose, p. 34, lines 22-27, p. 35-37, p. 38, lines 1-15.

¹⁰³ Transcript of Cross-Examination of S. Rose, p. 38, lines 18-26.

127. Notwithstanding Rose’s opinion that ARO do not constitute a “creditor claim”,¹⁰⁴ the Court of Appeal in *Redwater* confirmed that regulatory obligations are provable claims under the *BIA*.¹⁰⁵
128. The Trustee estimates the ARO associated with the Goodyear Assets as \$192,127,274 for the Goodyear Wells and \$26,831,000 for associated facilities.
129. Although the Defendants’ ARO figures vary widely, between \$52 million and \$133.6 million, and include an \$87 million “aspirational number”, they cannot deny that significant ARO were associated with the Goodyear Assets transferred to PEOC as part of the Asset Transaction.
130. Accordingly, per *Redwater*, the AER had a significant provable claim at the time of the Asset Transaction.
131. There is no merit to the Defendants’ factual allegation that the Trustee lacks standing to pursue oppression because “none of Sequoia’s creditors on bankruptcy, including the AER or municipalities were creditors of PEOC with provable claims at the time of the Transaction”.¹⁰⁶

3. The Trustee’s s. 242 claim is a not a “personal claim” belonging to individual creditors

132. As discussed above, the Defendants’ assertion that an oppression claim is a “personal remedy belonging to certain stakeholders”¹⁰⁷ was rejected by the courts in *Dylex* and *Olympia & York*.
133. The trial decision in *Olympia & York* and the decision in *Dylex* both recognized the important role of the trustee in advancing claims on behalf of the bankrupt’s creditors generally. In *Olympia & York*, Justice Farley stated that:

Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the *Margaritis* characterization of the trustee in bankruptcy

¹⁰⁴ Rose Affidavit, at para. 74.

¹⁰⁵ *Redwater*, *supra*, at paras. 73-91 [Trustee’s Authorities, Tab 22]

¹⁰⁶ Perpetual Defendants’ Statement of Defence, at para. 55(d); Rose Statement of Defence, at para. 22.2.

¹⁰⁷ Perpetual Defendants’ Statement of Defence, at para. 55(b).

as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a “representative” oppression action on behalf of the creditors in a proper case.¹⁰⁸

134. The Court in *Dylex* stated that:

The Trustee as the creditors’ appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, in conjunction with the other claims it is asserting, all arising out of the same facts. This is consistent with the long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to the bankrupt person or the creditors) shall vest exclusively in the trustee.¹⁰⁹

135. Pursuant to s. 30(1)(d) of the *BIA*, the Trustee is empowered to bring claims that “relate to the property of the bankrupt”. The Trustee, however, is not permitted to advance the “personal claims” of individual creditors.

136. Our Court of Appeal in *BDO Canada Ltd. v. Dorais* interpreted the scope of s. 30(d) in allowing a trustee’s appeal from a case management judge’s ruling that it was not permitted to pursue claims assigned to it by certain creditors.¹¹⁰ The Court held that:

136.1. The trustee was not entitled to pursue claims for misrepresentations made to the creditors personally, rescission of their individual investment contracts or damages for their own personal losses.¹¹¹

136.2. However, the trustee was entitled to pursue “collective components” in the claims assigned by the individual creditors, including that funds belonging to the insolvent corporation were diverted to a party related to its former principal and were held in trust for the corporation.¹¹²

137. The Court stated that:

A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which be the general body of creditors [citation omitted].

¹⁰⁸ *Dylex, supra*, at para. 15, citing *Olympia & York*, at para. 30 [Trustee’s Authorities, Tab 10]

¹⁰⁹ *Ibid*, at para. 17 [Trustee’s Authorities, Tab 10]

¹¹⁰ *Dorais, supra*, at paras. 7 and 23 [Trustee’s Authorities, Tab 15]

¹¹¹ *Ibid*, at para. 10 [Trustee’s Authorities, Tab X]

¹¹² *Ibid*, at paras. 3, 4, 5 and 11.

One of the core duties of a trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupts to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these claims on behalf of the general body of creditors is consistent with the Trustee's overall duties. In that respect he is pursuing individual claims of the estates, and is not improperly "stepping into the shoes" of individual plaintiffs.¹¹³

138. As in *Dorais*, the Trustee is seeking relief from oppression "on behalf of the general body of creditors". Like the relief referred to by our Court of Appeal, any relief obtained by the Trustee under s. 242 would benefit the general body of creditors and not result in the preferential treatment of any particular creditor.¹¹⁴

4. The Defendants' conduct was oppressive within the meaning of s. 242

139. Section 242(2) provides that:

If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards *the interests of any security holder, creditor, director or officer*, the Court may make an order to rectify the matters complained of.¹¹⁵ [Emphasis added.]

i. The evidence

140. As discussed above, the Defendants' own evidence confirms that:

¹¹³ *Ibid*, at paras. 12-13 [Trustee's Authorities, Tab X]

¹¹⁴ *Ibid*, at para. 13

¹¹⁵ *Business Corporations Act*, RSA 2000, c. B-9, s. 242(2) [Trustee's Authorities, Tab 6]

- 140.1. PEOC had at least three creditors at the time of the Asset Transaction, the Municipal District of Opportunity No. 17, Lamont County and Athabasca County, to which payments of \$2,170,767 were due by end of July 2016.
- 140.2. \$1,560,809 of those amounts were never paid by Sequoia following the Asset Transaction and remain “outstanding”. The Proofs of Claim filed by these three municipalities total \$3,622,305.48.
141. Rose’s affidavit also confirms that Rose owned shares in PEI at the time of the closing of the Asset Transaction and still owns those shares.¹¹⁶
142. The Trustee’s evidence included that:

[48] As sole director of PEOC, which was the trustee for POT at the time of the Asset Transaction, Rose acted on behalf of both parties to the Asset Transaction.

[49] At the time, Rose was the President, CEO and a shareholder of PEI, which controlled POT through its trustee PEOC. Rose personally benefited from the Goodyear Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of PEOC. The Trustee has seen no disclosure in writing by Rose to PEOC, in the PEOC minute book or elsewhere, of her interest in the Asset Transaction or in any party to the Asset Transaction.

[50] Rose executed a written resolution as director of PEOC on October 1, 2016 to approve the Asset Transaction and to execute the Asset PSA. A copy of the Certified Resolution is attached, as Exhibit Q. Although the preamble to the resolution states that “the directors” believed it was in the best interests of PEOC to execute the Asset PSA and to accept the transfer of the Goodyear Assets, the Trustee has not identified any aspect of the Asset Transaction which benefited or was in the best interests of PEOC.

[...]

[57] As a result of the Asset Transaction, PEOC became liable for the municipal property taxes with respect to the Goodyear Assets, with no right to claim reimbursement from POT or anyone else. *As these assets were cash flow negative, PEOC has no ability to pay the taxes.*¹¹⁷

143. The Trustee’s evidence that PEOC was unable to pay the municipal taxes outstanding at the time of Asset Transaction because PEOC was only left with the “cash flow negative” Goodyear Assets was not challenged in cross-examination, by any of the Defendants.¹¹⁸

¹¹⁶ Affidavit of Susan Riddell Rose, at para. 79.

¹¹⁷ Affidavit of Paul Darby, at paras. 48-50, 57.

¹¹⁸ Transcript of the Cross-Examination of P. Darby on October 22, 2018.

144. The Trustee's evidence regarding the benefit received by Rose personally was confirmed repeatedly in cross-examination, first by counsel for the Perpetual Defendants:

Q. You never said, "Ms. Rose, did you receive a personal benefit," did you?

A. No, but the benefit's clear because she owns shares in an entity which was cleaned up by removing liabilities --

Q. I see.

A. -- and increasing its asset base. So any stakeholder received a benefit --

Q. So you were so --

A. -- for that transaction.

Q. -- resolute in your determination about the personal benefit that you saw zero value in asking Ms. Rose if she had an explanation? Is that right?

A. The removal of the liabilities, the increase of the asset base to all stakeholders of Perpetual was a benefit.¹¹⁹

[...]

Q. So sitting here today, you can't tell me why you didn't ask her?

A. The benefit she received as a stakeholder of Perpetual as a significant shareholder is clear in the increase in the asset base; the removal of the high, mature, negative cash-flowing assets and a significant portion of their liabilities. The benefit is clear.¹²⁰

145. The Trustee's representative was cross-examined on the same issue by counsel for Rose, and again confirmed his evidence:

Q. MR. LEITL: Mr. Darby, going back to my questioning about the personal benefit that you opine on in your affidavit, the alleged personal benefit of Ms. Rose. Do you remember we talked about that?

A. Yes.

Q. And I think you said -- I'm obviously paraphrasing -- that it was just so obvious to you, you didn't need to ask Ms. Rose anything about it; right?

A. Yes.

Q. And if I heard you correctly, my notes are sketchy -- if I heard you correctly, you said in so many words that PEI was able to offload what you see as \$250 million in obligations; right?

A. 220 million.

Q. Okay.

¹¹⁹ Transcript of Cross-Examination of P. Darby, at p. 71, lines 7-22.

¹²⁰ Transcript of Cross-Examination of P. Darby, at p. 72, lines 8-14.

A. Call it.

Q. And you'll agree with me that if a company was able to offload a company like PEI, \$220 million in obligations for no consideration, that would be material?

A. Yes.

Q. And you would expect that to have a positive impact on the share price?

A. Unless the shares were overvalued to start with.

Q. Unless they were overvalued to start with? Is that what you said?

A. Markets don't nationally make sense, so...

Q. But you do, all of -- other things being equal, assume and expect that the announcement by a company of an ability to offload \$220 million in debt at no cost would have a material positive impact on its share price?

A. It is positive for the company, yes.

Q. Yes. Did you study the share trading -- the share price history of PEI over the period?

A. No.

Q. You didn't even look at it?

A. No.

Q. So you just assumed it happened?

A. I didn't assume it went up at all.

Q. I see. Can you look at Exhibit EE to Ms. Rose's affidavit? Do you have that in front of you?

A. Yeah.

Q. And you'll see -- it's printed small, but if you look at the dates, under "9/26," September 26, the day before the Deal was announced, PEI's share price closed at \$1.78. Do you see that?

A. Yeah.

Q. And 30 days later you'll see at the very top it closed at \$1.57?

A. Yeah. That's a short-term window that you're looking at.

Q. Is that -- do you think --

A. And clearly --

Q. -- you're answering a question of mine now? Sir, do you think you're answering a question of mine? You're not, are you? My question was, do you see that 30 days later it closed at \$1.57, and you agree with me; right?

A. I can see what you're pointing to me, but I don't agree with --

Q. And now you're trying to --

A. -- the timeframe --

Q.

-- advocate a position for your client, and I would ask you to just answer the questions, okay? If your counsel has questions on re-examination, they can do it. I'm asking you not to be an advocate. Is that fair?

A. Yes.¹²¹

¹²¹ Transcript of Cross-Examination of P. Darby, at p. 95-98.

ii. The law

146. The foundational decision on personal liability for creditor oppression is the Ontario Court of Appeal's decision in *Downtown Eatery*, which concerned asset-stripping by directors carried out for their personal benefit.¹²²

146.1. A wrongfully dismissed employee obtained a substantial judgment against the corporation but was unable to enforce his judgment because the corporation had ceased operations in advance of the wrongful dismissal trial. The employee commenced a second action against the corporation's directors and affiliates, seeking, *inter alia*, relief from oppression under the Ontario *Business Corporations Act* (the "*OBCA*").¹²³

146.2. The trial judge in the second action dismissed the employee's oppression claim on the basis that the directors had not reorganized the corporations "for the purpose of" rendering his former employer judgment proof.¹²⁴

147. The Ontario Court of Appeal allowed the employee's appeal on the oppression issue:

147.1. The trial judge erred in failing to appreciate that oppressive conduct "need not be undertaken with the intention of harming the complainant."¹²⁵

147.2. A creditor has status to seek relief from oppression under the *OBCA*.¹²⁶

147.3. As a judgment creditor, the employee had a reasonable expectation that the directors would retain sufficient assets in the corporation to satisfy his claim.¹²⁷

¹²² *Downtown Eatery (1993) Ltd. v Ontario*, 54 OR (3d) 161 (*Downtown Eatery*) (ONCA) [Trustee's Authorities, Tab 24]

¹²³ *Ibid*, at paras. 3, 49 and 55 [Trustee's Authorities, Tab 24]

¹²⁴ *Ibid*, at para. 16 [Trustee's Authorities, Tab 24]

¹²⁵ *Ibid*, at para. 56 [Trustee's Authorities, Tab 24]

¹²⁶ *Ibid*, at para. 57 [Trustee's Authorities, Tab 24]

¹²⁷ *Ibid*, at para. 61 [Trustee's Authorities, Tab 24]

- 147.4. The directors and shareholders benefitted directly from their oppressive conduct: they stripped assets from the entity facing a judgment and transferred the assets to other entities they controlled.¹²⁸
- 147.5. The Court granted judgment against the directors personally, as well as the related corporations they controlled.¹²⁹
148. *Downtown Eatery* stands for the proposition that a director can be personally liable for oppression where he or she benefits personally from the oppressive conduct and that a creditor can be entitled to oppression relief where there is asset-stripping by the debtor
149. *Downtown Eatery* was cited with approval by this Court in *864789 Alberta Ltd. v. Haas Enterprises*, a decision concerning an application for oppression relief in the context of non-arm's length transactions between related corporations.¹³⁰ The facts relating to the allegedly oppressive transaction, as found by the Court, were that:
- 149.1. The corporate complainant ("**869**") was a minority shareholder in a corporation ("**Leasing**") and the complainant's principal was an employee of both Leasing and its wholly owned subsidiary, the operating entity ("**ACT**"). The director of Leasing and ACT also controlled the majority shareholder in Leasing, ("**Enterprises**").¹³¹
- 149.2. There was a USA in place, providing that upon termination of employment, there would be a compulsory buyout of 869's shares in Leasing.¹³²
- 149.3. The employment of 869's principal was terminated and 869 was unwilling to accept the price tendered for its shares in Leasing.¹³³

¹²⁸ *Ibid*, at paras. [60](#) and [62](#) [Trustee's Authorities, Tab 24]

¹²⁹ *Ibid*, at para. [64](#). [Trustee's Authorities, Tab 24]

¹³⁰ *864789 Alberta Ltd. v Haas Enterprises*, 2008 ABQB 555 (*Haas*) [Trustee's Authorities, Tab 25]

¹³¹ *Ibid*, at paras. [5-7](#), [40](#) [Trustee's Authorities, Tab 25]

¹³² *Ibid*, at para. [8](#) [Trustee's Authorities, Tab 25]

¹³³ *Ibid*, at para. [10-12](#) [Trustee's Authorities, Tab 25]

- 149.4. The respondents took the position that the buyout was no longer proceeding, on the basis that the USA did not apply because the employee was employed by ACT, not Leasing.¹³⁴
- 149.5. When another claim against ACT arose, ACT and Leasing transferred their assets and employees to another entity controlled by Enterprises, in which the Applicants had no interest. ACT and Leasing were then dissolved.¹³⁵
150. Justice Shelley found it was oppressive for the respondent director to terminate the business and transfers the assets of the parent and subsidiary in the face of the applicants' claims, "without maintaining any reserve for this potential liability."¹³⁶ Her Ladyship held that:
- The effect of not maintaining such a fund is itself oppressive, regardless of whether, as the Applicants claim, the Respondents deliberately planned to impede successful recovery on a judgment.¹³⁷
151. In determining the proper remedy, Justice Shelley noted that the applicant's shares in Leasing had been rendered worthless and that Leasing would be unable to pay any judgment made against it.¹³⁸ Although the applicants had sought to appoint a receiver in respect of ACT and Leasing, they had been wound up before the motion could be heard.¹³⁹
152. The Court determined that the most appropriate remedy was to grant judgment against Leasing and its director personally for the full value of the corporate complainant's Leasing shares prior to the asset-stripping transactions.¹⁴⁰ In deeming those transactions to have been set aside for the purposes of valuing the shares, Justice Shelley stated that:

The most appropriate remedy in the case before me is to restore [the complainant corporation] to the same position it would have been in had the oppressive conduct not occurred. Had [the director] not used his position as director to cause Enterprises to breach its contract obligation to purchase the [corporate complainant's] shares, and had the corporation not then been stripped of its assets and wound up, [the corporate complainant] would have been in a position to

¹³⁴ *Ibid*, at para. 13 [Trustee's Authorities, Tab 25]

¹³⁵ *Ibid*, at para. 14 [Trustee's Authorities, Tab 25]

¹³⁶ *Ibid*, at para. 51 [Trustee's Authorities, Tab 25]

¹³⁷ *Ibid* [Trustee's Authorities, Tab 25]

¹³⁸ *Ibid*, at para. 61 [Trustee's Authorities, Tab 25]

¹³⁹ *Ibid* [Trustee's Authorities, Tab 25]

¹⁴⁰ *Ibid*, at paras. 63-66 [Trustee's Authorities, Tab 25]

receive the full purchase price of the shares as at August 15, 2005, as originally contemplated by and required under the 2000 USA.¹⁴¹

¹⁴¹ *Ibid*, at para. 63 [Trustee's Authorities, Tab 25]

Issue 6: Whether the Trustee's Claims against Rose should be Dismissed on some Basis

1. The Release has no effect on the Trustee's claims against Rose

153. In her Statement of Defence, Rose pleads a clause from the Release, highlighting certain passages:

PEI and PEOC do hereby release and forever discharge Susan Riddell Rose from all Claims (as defined in the [Share Purchase Agreement]) which PEI and PEOC now have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having, acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose [Underlining in original.]

154. Rose pleads that "Claim" is defined broadly in the Share Purchase Agreement and therefore the Trustee is "barred and estopped" from making the claims against Rose set out in its Statement of Claim.¹⁴²

155. Rose also pleads that the Trustee "has no standing" under s. 96 of the BIA "to ask this Court to review the Resignation and Mutual Release Agreement."¹⁴³

156. In its Statement of Claim, the Trustee pleads that Rose took steps to cause PEI to obtain from 198:

[R]eleases executed by PEOC's new directors, *purporting to release Rose* from any claims by PEOC related to her conduct as a director of PEOC, *contrary s. 122(3) of the ABCA.*¹⁴⁴ [Emphasis added.]

157. Section 122(3) of the *ABCA* provides that:

Subject to section 146(7), *no provision in a contract*, the articles, the bylaws or a resolution *relieves a director or officer from the duty to act in accordance with this Act* or the regulations *or relieves the director or officer from liability for breach of that duty.*¹⁴⁵ [Emphasis added.]

158. This Court considered the effect of s. 122(3) in *Tongue v. Vencap Equities Alberta Ltd.*, which concerned, *inter alia*, claims for breach of fiduciary duty brought against a

¹⁴² Rose's Statement of Defence, at paras. 27-29.

¹⁴³ Rose's Statement of Defence, at para. 26.

¹⁴⁴ Statement of Claim, at para. 16.5.

¹⁴⁵ *Business Corporations Act*, RSA 2000, c. B-9, s. 122(3) [Trustee's Authorities, Tab 6]

corporation's directors.¹⁴⁶ In finding in favour of the plaintiffs, the Court rejected the directors' argument that they were entitled to rely on releases given by the plaintiffs.¹⁴⁷

159. Among the various grounds precluding the fiduciaries from relying on the releases was s. 122(3)'s *CBCA* equivalent, which the Court interpreted as follows:

Therefore, no provision in a contract, *including the Releases*, can relieve Negin, Schwartz, Siebel, Lindseth, Whittle and Edmond from their duty to act in accordance with the *C.B.C.A. or their liability for a breach of the C.B.C.A.* Directors cannot obtain a valid release from liability for future breaches of the *C.B.C.A.* These directors breached s. 131 of the *C.B.C.A.* thinking they were immune from liability because of the Releases. *They thought that directors could contract out of their duties under the C.B.C.A. in this manner. They were wrong.*¹⁴⁸ [Emphasis added.]

160. The Trustee is not seeking "to review the Resignation and Mutual Release Agreement pursuant to s. 96", as Rose contends.

161. As in *Vencap*, s. 122(3) simply precludes Rose from relying on the Release to relieve her "from liability for breach" of her directors' duties, including her fiduciary duty and duty of care. Like the directors in *Vencap*, Rose could not "contract out" of her directors' duties by purporting to obtain a release from PEOC.

162. As Rose cannot rely on the Release, there is no merit to this ground for dismissing the Trustee's claims against her.

2. Section 122(4) of the *ABCA* is of no assistance to Rose

163. Although Rose's Statement of Defence makes no reference to s. 122(3), it does refer to s. 122(4), which provides that:

In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, *if the director is elected by or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors*, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.¹⁴⁹

¹⁴⁶ *Tongue v. Vencap Equities Alberta Ltd.*, [1994] 5 W.W.R. 674 (*Vencap*), at paras. 1-2 [Trustee's Authorities, Tab 26]

¹⁴⁷ *Ibid*, at paras. 138-141

¹⁴⁸ *Ibid*, at para. 139.

¹⁴⁹ *Business Corporations Act*, RSA 2000, c. b-9, s. 122(4)

164. It is unclear from Rose's Statement of Defence how s. 122(4) is alleged to be applicable in the circumstances, or of assistance to her, if it is applicable. Rose simply pleads that:

Rose's fiduciary duty to PEOC concerned the best interests of PEOC, and Rose fulfilled her duty in that regard. PEI ratified and affirmed the conduct of Rose as a director of PEOC. PwC, as trustee in bankruptcy of Sequoia appointed 18 months after Rose's resignation, has no standing to assert otherwise. Rose pleads s. 122(4) of the ABCA.¹⁵⁰

165. Section 122(4) applies only where (i) there are multiple directors and (ii) one or more directors is elected or appointed:

165.1. by the holders of "a class or series of shares"; or

165.2. by "employees or creditors or a class of employees or creditors".¹⁵¹

166. It is common ground that PEOC was a wholly-owned subsidiary of PEI and that Rose was the sole director of PEOC until her resignation on October 1, 2016.¹⁵²

167. Rose was the *sole director* of PEOC, appointed by its *sole shareholder*, PEI. There is no suggestion that:

167.1. PEOC had more than one class or series of shares, each of which was entitled to elect or appoint a director.

167.2. The employees or creditors of PEOC were entitled to elect or appoint a director.

168. Accordingly, s. 122(4) has no application to Rose.

169. In any event, even where s. 122(4) is applicable, a director elected or appointed by the holders of a particular class or series of shares is required to act in the best interests of the corporation and may not act in a way detrimental to the corporation.

170. In *Horsehead Holding Corp., (Re)*, the Ontario Superior Court of Justice considered an application brought by the Canadian subsidiary of a U.S. parent company in the *CCAA*

¹⁵⁰ Rose's Statement of Defence, at para. 32.

¹⁵¹ *Business Corporations Act*, RSA 2000, c. B-9, s. 122(4).

¹⁵² Statement of Claim, at paras. 3 and 15.1; Rose's Statement of Defence, at paras. 6, 7, 10.1 and 10.2

context.¹⁵³ Three of the subsidiary's four directors were U.S. residents and also directors of related U.S. corporations.¹⁵⁴ The only Canadian director was a partner of the Canadian law firm representing the corporate group.¹⁵⁵

171. The Court reminded the directors of the Canadian subsidiary that their fiduciary duties were owed to the Canadian subsidiary:

The directors of Zochem [the Canadian subsidiary] *have fiduciary duties to Zochem*. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.* [citation omitted] Justice Farley stated clearly that 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 the 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).* [Emphasis added.]

172. Although corporate law has evolved significantly since Justice Farley's 1991 decision in *Ballard*, the core proposition recently cited with approval in *Horsehead* remains valid: even a director appointed by the holders of a class or series of shares owe their fiduciary duty to the corporation itself. They cannot simply follow orders from the controlling shareholder who appointed them.
173. Section 122(4) has no application to Rose because PEOC had only one director and shareholder. Even if it were applicable, s. 122(4) is of no assistance to Rose.
174. There is no merit to this ground for dismissing the Trustee's claims against Rose.

¹⁵³ *Horsehead Holding Corp., Re*, 2016 ONSC 958, at paras. 1-3 (*Horsehead*) [Trustee's Authorities, Tab 27]

¹⁵⁴ *Ibid*, at para. 9 [Trustee's Authorities, Tab 25]

¹⁵⁵ *Ibid* [Trustee's Authorities, Tab 25]

Issue 7: Whether the Trustee’s Claim for Relief on the Grounds of Public Policy, Statutory Illegality and Equitable Rescission should be Struck

1. The Defendants’ arguments

175. The Trustee pleads that the Asset Transaction, the Share Transaction and the Retained Interests Transactions (collectively, the “**Transactions**”) are void:

175.1. on public grounds, for being contrary to the public policy reflected in Alberta’s oil and gas regulatory regime (the “**Regulatory Regime**”);

175.2. on the basis of statutory illegality, as they were expressly or implied prohibited by the Regulatory Regime; and

175.3. on equitable grounds, for the reasons in the circumstances set out in the Trustee’s Statement of Claim.

176. The Trustee seeks an Order setting aside the Asset Transaction and declaring it void as against the Trustee.

177. The Defendants advance various arguments in favour of striking these claims on the basis that they do not disclose a reasonable claim, constitute an abuse of process and are frivolous irrelevant or improper:

177.1. The Trustee has no authority under the BIA to plead such claims;¹⁵⁶

177.2. This Court has “no jurisdiction to adjudicate such claims”;¹⁵⁷

177.3. The “doctrine of illegality, including conduct contrary to public policy, can only be used as a defence to oppose the enforcement of rights by a plaintiff”;¹⁵⁸ and

¹⁵⁶ Rose’s Statement of Defence, at para. 38.

¹⁵⁷ Rose’s Statement of Defence, at para. 39.

¹⁵⁸ Perpetual Defendants’ Statement of Defence, at para. 59.

177.4. Equitable rescission or other relief on equitable grounds “can only be granted in cases of fraud, innocent misrepresentation and where a contract is obtained by unconscionable acts, none of which is alleged nor exists”.¹⁵⁹

2. The Trustee is authorized to pursue these claims

178. The Defendants’ argument on this issue is a variation of their argument that the Trustee lacks standing to pursue non-*BIA* claims for oppression relief and breaches of Rose’s duties as a director. As discussed above, these arguments are without merit.

179. In *Dylex*, the Court declined to strike the Trustee’s claims for oppression relief and breach of fiduciary against the bankrupt company’s former directors.¹⁶⁰ In reaching this conclusion, the Court noted that “it has been well recognized that a trustee in bankruptcy is not limited to the remedies specifically available under the [*BIA*].”¹⁶¹ The Court cited a fraudulent preference action as a non-*BIA* claim that could be advanced by a trustee.¹⁶²

180. In *Dorais*, also discussed above, our Court of Appeal allowed a trustee’s appeal from a case management judge’s order that it was not permitted to seek a declaration that certain transfers were void or to advance a constructive trust claim against an individual related to its former director.¹⁶³ As in *Dylex*, the Court confirmed that the trustee was entitled to pursue non-*BIA* claims that would benefit the general body of creditors:

Actions under the [*Fraudulent Preferences Act*] are brought on behalf of all creditors, not just one prosecuting the action [citation omitted]. A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which would be the general body of creditors.¹⁶⁴

181. Advancing claims of this nature was “consistent with the Trustee’s overall duties” because it would benefit the general body of creditors and not result in any preferential payment or treatment of any particular creditor.¹⁶⁵

¹⁵⁹ Perpetual Defendants’ Statement of Defence, at para. 60.

¹⁶⁰ *Dylex*, *supra*, at para. 22 [Trustee’s Authorities, Tab 10]

¹⁶¹ *Ibid*, at para. 19 [Trustee’s Authorities, Tab 10]

¹⁶² *Ibid* [Trustee’s Authorities, Tab 10]

¹⁶³ *Dorais*, *supra*, at paras. 11 and 23 [Trustee’s Authorities, Tab 15]

¹⁶⁴ *Ibid*, at para. 12 [Trustee’s Authorities, Tab 15]

¹⁶⁵ *Ibid*, at para. 13 [Trustee’s Authorities, Tab 15]

182. The Trustee applies to set aside the Asset Transaction, *inter alia*, on grounds of public policy, statutory illegality and equitable grounds. As in *Dorais*, the Trustee is entitled to pursue this claim because:

182.1. The Trustee is not limited to pursuing *BIA* relief, as the Defendants contend.

182.2. Pursuant to ss. 30(1)(d) and 72 of the *BIA*, the Trustee can pursue non-*BIA* relief that accrues to the advantage of the general body of creditors; and

182.3. Setting aside the Asset Transaction would accrue to the benefit of Sequoia's creditors generally.

3. The Court has jurisdiction to adjudicate these claims

183. In her Statement of Defence, Rose pleads that:

This Honourable Court has no jurisdiction to adjudicate such claims. That the AER is dissatisfied with the scope of its mandate and power is a matter for the Legislature.¹⁶⁶

184. Without the benefit of Rose's submissions, it is difficult to "fill in the blanks" and anticipate what Rose's argument will be on this point.

185. However, Rose's allegation that the Court "has no jurisdiction to adjudicate such claims" appears inconsistent with the Perpetual Defendants implied admission that the Court *can adjudicate these issues*, but only when they are raised "as a defence to oppose enforcement of rights by a plaintiff".¹⁶⁷

186. There can also be no suggestion that the Court "has no jurisdiction to adjudicate" the Trustee's equitable rescission claim.¹⁶⁸ Even the Perpetual Defendants do not make that contention.¹⁶⁹

¹⁶⁶ Rose's Statement of Defence, at para. 1.

¹⁶⁷ Perpetual Defendants' Statement of Defence, at para. 60.

¹⁶⁸ Perpetual Defendants' Statement of Defence, at para. 60.

¹⁶⁹ Perpetual Defendants' Statement of Defence, at para. 60.

187. Accordingly, it appears that the real issue raised by the Defendants with respect to the public policy and statutory illegality issues is whether they can support a claim or can only be relied on as defences.

4. The Trustee is entitled to seek a declaration that the Asset Transaction is void, on the basis of public policy or statutory illegality

188. In their Statement of Defence, the Perpetual Defendants allege that:

The doctrine of illegality, including conduct contrary to public policy, *can only be used as a defence* to oppose the enforcement of rights by plaintiff.¹⁷⁰

189. This is not a correct statement of the law. A plaintiff may seek a declaration that the impugned agreement is void, as the Trustee has done in the present Action.¹⁷¹

190. In *Sidmay Ltd. v. Wehttam Investments Ltd.*, the Ontario Court of Appeal considered a mortgagee's appeal from a judgement in favour of the plaintiff mortgagor declaring that the mortgage was void and unenforceable on the basis of statutory illegality.¹⁷²

191. The Court allowed the appeal on the basis that the transaction at issue was not illegal.¹⁷³ However, it proceeded to consider the law governing statutory illegality, concluding that:

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 himself within the class of persons for whose protection the illegality of the contract was created.¹⁷⁴

192. The Court also noted the decision in *Chapman v. Michaelson*, which stands for the proposition that a trustee appointed in respect of a party to an illegal transaction may apply to the Court for a declaration as to the illegality of the transaction.¹⁷⁵

¹⁷⁰ Perpetual Defendants' Statement of Defence, at para. 59.

¹⁷¹ Statement of Claim, at para. 1.

¹⁷² *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] 1 O.R. 508 (*Sidmay*), at paras. 1 and 6 [**Trustee's Authorities, Tab 28**]

¹⁷³ *Ibid*, at paras. 42-44 [**Trustee's Authorities, Tab 28**]

¹⁷⁴ *Ibid*, at para. 58 [**Trustee's Authorities, Tab 28**]

¹⁷⁵ *Ibid*, at para. 54, citing *Chapman v. Michaelson*, [1908] 2 Ch. 612; aff'd [1909] 1 Ch. 238 [**Trustee's Authorities, Tab 28**]

193. Per *Chapman*, the Trustee is entitled to seek a declaration as to the illegality of the Asset Transaction.¹⁷⁶
194. Accordingly, the Perpetual Defendants' allegation that "no action can be brought to declare contracts void" is without merit.¹⁷⁷
195. In any event, the Court in *Sidmay* confirmed in *obiter* that a party can seek relief from the Court in relation to an illegal transaction as long as "it can bring himself within the class of persons for whose protection the illegality of the contract was created."¹⁷⁸
196. As in *Dorais*, the Trustee is entitled to seek relief on behalf of the general body of creditors.¹⁷⁹ The Trustee pleads that, in addition to being contrary to public policy and explicitly or implicitly prohibited, the Asset Transaction "unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors" including by:
- 196.1. Rendering PEOC insolvent, if it was not already insolvent;
 - 196.2. Rendering PEOC unable to pay the municipal property taxes with respect to the Goodyear Assets; and
 - 196.3. Rendering PEOC unable to pay the ARO associated with the Goodyear Assets.
197. The Defendants cannot establish that the creditors of PEOC, including its contingent creditors, are not "persons for whose protection" the Regulatory Regime was created.

5. The claim for equitable rescission should not be struck

198. In their Statement of Defence, the Perpetual Defendants plead that:

There is no basis for equitable rescission or other relief on equitable grounds. Such relief can only be granted in cases of fraud, innocent misrepresentation and where a contract was obtained by unconscionable acts, none of which is alleged or exists. In any event, a remedy of declaring the contract void for this reason is unavailable

¹⁷⁶ *Ibid*, at para. [54](#) [Trustee's Authorities, Tab 28]

¹⁷⁷ Perpetual Defendants' Statement of Defence, at para. 59.

¹⁷⁸ *Sidmay*, *supra*, at para. [58](#) [Trustee's Authorities, Tab 28]

¹⁷⁹ *Dorais*, *supra*, at paras. [12-13](#) [Trustee's Authorities, Tab 15]

because of the impossibility of restoring the parties to their pre-contractual position over two years after the Transaction.¹⁸⁰

199. With respect to the second issue raised in the above paragraph, the Perpetual Defendants allegation is inconsistent with the law on equitable rescission, cited by this Court in *Houle v. Knelsen Sand and Gravel Ltd.*:

[51] However, where the parties can be placed in a position equivalent to where they first started, equitable rescission is flexible and generous: [citation omitted.]. In *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank* [citation omitted.], Wacowich J. (as he then was wrote):

In rescinding a contract a Court strives to place the parties back in the position they were in before they entered into the contract. It is not always possible to restore the parties to precisely the same position. The position is succinctly stated in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas 1218 at 1278:

...the practice has always been for a Court of Equity to give this relief whenever by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. [Emphasis added.]

[52] ‘Practical justice’ is also noted by the Supreme Court of Canada in *Redican v. Nesbitt*, [1923] SCR 135 at para. 90.

[53] Courts can tailor relief by using mechanisms such as adjustments, compensation, indemnification and account of profits to ensure both sides find themselves in a position equivalent to the position they started in: *McInnis* at 1435.¹⁸¹

200. There is no evidence that the Defendants could not be placed in a position “equivalent to where they first started” before the Goodyear Assets were transferred to PEOC in the Asset Transaction.
201. In any event, this is not a basis to strike the Trustee’s equitable rescission claim.
202. The other basis advanced by the Defendants for striking the Trustee’s equitable rescission claim is that the agreement must have been “obtained by unconscionable acts, none of which is alleged or exists.”

¹⁸⁰ Perpetual Defendants’ Statement of Defence, at para. 60.

¹⁸¹ *Houle v. Knelsen Sand and Gravel Ltd.*, 2015 ABQB 659, at paras. 51-53, appeal allowed on other grounds, 2016 ABCA 247 [Trustee’s Authorities, Tab 29]

203. In its Statement of Claim, the Trustee pleads that the Asset Transaction is void “on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim.”¹⁸²
204. As our Court of Appeal pointed out in *HOOPP*, excerpted allegations in a Statement of Claim cannot be viewed in isolation; they must be placed “in the entire context of the pleading.”¹⁸³
205. The Trustee’s pleads that all the circumstances set out in the Statement of Claim constitute the grounds for equitable rescissions. The “unconscionable acts” the Defendants allege are required would include:
- 205.1. The Defendants causing PEOC, POT and POC to enter into the Retained Interests Agreement to support PEOC’s LLR so as “to allow the Asset Transaction and Share Transaction to be completed without regulatory intervention by the AER;¹⁸⁴ and
- 205.2. Rose breaching her duties as the sole director of PEOC, including by causing PEOC to enter into the Asset Transaction for her own benefit and at the expense of PEOC and its creditors.¹⁸⁵
206. Even if the evidence did not support these allegations, as it does, they must be assumed to be true for the purposes of an application to strike.¹⁸⁶
207. Accordingly, there is no basis to strike the Trustee’s equitable rescission claim.

¹⁸² Statement of Claim, at para. 24.3.

¹⁸³ *HOOPP, supra*, at paras. [14 and 15](#) [Trustee’s Authorities, Tab 4]

¹⁸⁴ Statement of Claim, at paras. 10-11.

¹⁸⁵ Statement of Claim, at paras. 15-20.

¹⁸⁶ *Colony Management, supra*, at para. [28](#) [Trustee’s Authorities, Tab 5]

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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

Plaintiffs

and

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

Defendants

PROCEEDINGS

Calgary, Alberta
August 30, 2018

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

3
4 August 30, 2018

Afternoon Session

5
6 The Honourable Justice
7 Jeffrey

Court of Queen's Bench
of Alberta

8
9 R. de Waal

For PricewaterhouseCoopers

10 L. Rasmussen

For PricewaterhouseCoopers

11 D. McDonald, Q.C.

For Perpetual et al

12 C. Wright

For Perpetual et al

13 A. Badami

For S. Riddell Rose

14 S. Leitl (by telephone)

For S. Riddell Rose

15 K. Salguero

Court Clerk

16
17
18 THE COURT:

Who's going first?

19
20 MR. de WAAL:

(INDISCERNIBLE). My Lord, Rinus de Waal

21 for the trustee, with my friend Mr. Luke Rasmussen. Mr. McDonald is here with, I believe,
22 Ms. Wright for Perpetual defendants.

23
24 THE COURT:

I'm sorry, I missed the name.

25
26 MR. de WAAL:

Ms. Wright.

27
28 THE COURT:

Thank you.

29
30 MR. de WAAL:

And then we have Mr. Leitl on the phone for the

31 defendant, Ms. Rose.

32
33 THE COURT:

Yes.

34
35 MR. de WAAL:

And his -- and his colleague Mr. Badami is in the

36 courtroom.

37
38 THE COURT:

Thank you.

39
40 MR. de WAAL:

That's all.

41

1 THE COURT: Mr. Leidl, can you hear us?

2
3 MR. LEIDL: Yes, thank you, My Lord.

4
5 THE COURT: Good, thank you. Okay, carry on.

6
7 **Submissions by Mr. de Waal**

8
9 MR. de WAAL: My Lord, very briefly, just to explain where we
10 are how we got here. On March 23rd, Sequoia Resources Corporation made an assignment
11 in bankruptcy. The trustees, PricewaterhouseCoopers investigated a number of
12 transactions leading to that bankruptcy. On March 28, it requested certain records to be
13 produced by the Perpetual defendants. Those were made available on June 6th and on June
14 26, the trustee requested information or an explanation, provided its preliminary
15 conclusions. None was provided and as a result, the present application and the Statement
16 of Claim was filed on August 2nd. It was -- formal service I think, was only admitted on
17 August 7th but that's when these proceedings started.

18
19 When we served the application, we said that we only have a half hour slot today and we
20 anticipate that this will be adjourned through the course of discussions with opposing
21 counsel. There was an indication that they were considering applications but then on
22 Monday this week, they filed and served applications, cross-applications, essentially the
23 same two applications on both sides, by Ms. Rose, and by the Perpetual defendants. And
24 those applications seek summary dismissal of the application on the basis that some of the
25 issues arising from the application should be decided separately and before the application,
26 and if those are successful, then the application will be dismissed. And they will also seek
27 a stay of the -- of the application. Now, that was the first time we became aware that this
28 would be contested. It was scheduled as an uncontested application.

29
30 The action very briefly, My Lord, if -- if you've looked at the -- at the documents, concerns
31 at Section 96, claim, some allegations relating to the directors' duties, oppression and then
32 public policy, statutory, legality, etcetera. So those are the -- those are the claims and they
33 -- those will be dealt with in the application itself.

34
35 So, for today, My Lord, the good news is that we seem to agree that all these applications
36 should be adjourned. The question as I understand it, is whether our application, the
37 trustee's application, should not proceed until the other applications - and by the way we
38 haven't seen an affidavit yet in support of those applications - but whether our application
39 can be schedule even, until those applications have been heard. And we say, in the first
40 place, those applications were not -- did not need to be returnable today. If you want to
41 apply for a stay, you can do so on a day before the hearing even. So, there's no reason why

1 the stay application, if it's successful next week, or the week after, would not simply stop
2 the proceedings, even though our application had been adjourned today, to a hearing date.

3
4 So we say, our application should be adjourned. We proposed a schedule for the steps
5 needed to take it to a -- to a hearing. We've circulated those, we've had feedback from --
6 from Mr. McDonald, but essentially, I think his position will be -- the dispute is whether
7 that should even be done while his applications are outstanding and have not yet been
8 heard.

9
10 So, My Lord, just to -- perhaps what I should say to you is, I circulated a form of order
11 yesterday with a -- with a particular schedule, and I've got -- I've got that here and it's --
12 and if we're going to discuss the schedule, what I -- I've also given you a document which
13 -- which essentially, sets out our initial proposal for scheduling in the first column, Mr.
14 McDonald's comments in the second column, and then what we have in that draft order in
15 the third column, that's in the (INDISCERNIBLE) that was handed up.

16
17 THE COURT: Okay.

18
19 MR. de WAAL: And My Lord, just to explain why there is a -- a
20 difference. You'll see that step 3, in the filing and service of any opposing materials, that
21 was contemplated when I first prepared the schedule, that has in fact now been filed on
22 Monday, so we don't need to schedule that step anymore. And that pushes everything back
23 by about a month.

24
25 THE COURT: There are none other possible?

26
27 MR. de WAAL: I -- I haven't heard anything more than --

28
29 THE COURT: Okay.

30
31 MR. de WAAL: As far as I know, those are the only applications
32 that are to be scheduled. So, in short then, My Lord, the -- the only other change in this
33 form of order to the one that I circulated was, I changed the cost provision, yesterday I said
34 no costs, today I say costs in the cause. But that's -- that's a form of order that I've just
35 handed up.

36
37 THE COURT: Okay.

38
39 MR. de WAAL: So, subject to that, My Lord, I say, in summary,
40 that if there is to be a stay application, we don't need to argue the merits now, that
41 application could be heard at any time between now and what we say the hearing date

1 should be. And if it's successful, then the hearing simply would proceed. We have
2 confirmed, I should say, My Lord, with the commercial coordinator, that the November
3 30th date is available the whole day, and he's also advised that he would schedule a reading
4 day the day before and that's available.

5
6 THE COURT: Okay.

7
8 MR. de WAAL: So that's -- we've confirmed with them this
9 afternoon.

10
11 THE COURT: Thank you, that's helpful.

12
13 MR. de WAAL: Thank you, My Lord.

14
15 THE COURT: Are there any parties that want to speak for Mr.
16 de Waal's perspective, in support? Thank you. Mr. McDonald.

17
18 MR. McDONALD: Thank you, My Lord.

19
20 THE COURT: Hearing now from those opposed, I guess.

21
22 **Submissions by Mr. McDonald**

23
24 MR. McDONALD: We are indeed opposed. And with respect,
25 there's a little more to it than -- than you've just heard and that -- what might meet the eye.
26 Have you had an opportunity to see the Statement of Claim, Statement of Defence and the
27 various applications that have been filed?

28
29 THE COURT: Well that's a very difficult question to answer
30 candidly because of course I've had the opportunity.

31
32 MR. McDONALD: Sorry. It was the wrong question.

33
34 THE COURT: Actually I did and I was -- it was a fairly limited
35 review last Friday night, a bit on the weekend, I haven't looked at them since, and -- you
36 know, I got to the line in Mr. de Waal's letter or someone from your office that said, it's
37 just going to be procedural on Thursday so, it went deeper into my basket.

38
39 MR. McDONALD: Oh, okay.

40

- 1 THE COURT: And then I received today, this lovely package
2 from yourself and from Mr. Leidl so --
3
- 4 MR. McDONALD: Okay, well --
5
- 6 THE COURT: That's why --
7
- 8 MR. McDONALD: -- you haven't had much of an opportunity then
9 and --
10
- 11 THE COURT: No. I'm -- I'm a neophyte in terms of the details
12 of this litigation.
13
- 14 MR. McDONALD: Okay.
15
- 16 THE COURT: That's --
17
- 18 MR. McDONALD: Well, let me give you a little more context if I
19 may.
20
- 21 THE COURT: Please.
22
- 23 MR. McDONALD: There are a couple of other dates that you should
24 be aware of. March 2nd was when Sequoia filed a notice of intention to make a proposal
25 in bankruptcy. And it was then -- my friend said some exchange of communication
26 between the trustee and Perpetual. There was a suggestion that I heard from my friend that
27 information was requested and a second tranche from Perpetual and none was provided
28 which led to the lawsuit. Perpetual was under the impression that it was having candid
29 discussions with the trustee and was very surprised to see the Statement of Claim.
30
- 31 The Statement of Claim was filed on August 2nd, so five months after the notice of
32 intention by Sequoia. And delivered to our office the next day, Friday, before the long
33 weekend in August. And in the cover e-mail, my friend stated that he was delivering
34 materials to counsel, sought to determine whether we had instructions to accept service. It
35 said, "You will see that the application has been scheduled for 4 PM on August 30th. We
36 only have a one half hour slot and expect that the matter will be adjourned on that date."
37 That too was our expectation that it would be adjourned and indeed, Mr. Leidl is in Ontario,
38 and I was in British Columbia. We requested an adjournment, it was not granted to us and
39 so I flew here today to make my submissions.
40

1 The Statement of Claim raises three separate causes of action. The first under the
2 *Bankruptcy and Insolvency Act*, claiming that a transaction that occurred in 2016, can be
3 reviewed and reversed. The second, an oppression claim. And the third, an allegation that
4 that transaction is void on the grounds of a public policy and statutory illegality.

5
6 With the Statement of Claim, was served a -- an application for judgment, for final
7 judgment, reversing the transaction or alternatively, for \$217 million in damages, jointly
8 and severally against the corporate defendants and Ms. Rose.

9
10 It's a complex case. We worked diligently and within 24 days, filed Statements of Defence
11 on Monday of this week, August 27th. At the same time, we, each defendant group, filed
12 applications, two applications. The first is an application to resolve three threshold or
13 gating issues. And to --

14
15 THE COURT: Sorry threshold or what?

16
17 MR. McDONALD: Gating. Initial preliminary --

18
19 THE COURT: Okay.

20
21 MR. McDONALD: -- dispositive issues.

22
23 THE COURT: Mm-hmm.

24
25 MR. McDONALD: In our view. Pursuant to Rule 7.1. And to stay
26 the plaintiff's claim which is part of the relief available. Sorry, the -- the plaintiff's
27 application, which is part of the relief available under that rule. We also filed summary
28 judgment applications identifying those three discreet issues. One in respect of each of the
29 three causes of action, which we say can be determined summarily, and will dispose of the
30 claim in its entirety. That led us to today, as I've said, that there was -- we weren't able to
31 get an adjournment as we contemplated, and my friend now proposes that you adopt a
32 schedule that sees a complex \$200 million lawsuit, dealt with in its entirety, to final
33 judgment in three months. With a one day hearing.

34
35 THE COURT: Do I misunderstand, Mr. McDonald, that the
36 middle column are dates your client proposes for dealing with this --

37
38 MR. McDONALD: Well --

39
40 THE COURT: -- multimillion dollar lawsuit?

41

1 MR. McDONALD: Yes and no. And --

2

3 THE COURT: Okay.

4

5 MR. McDONALD: -- and that's -- I think that's important that you
6 have that too because that's not entirely clear from my friend's schedule. And so let's have
7 a look at what the correspondence was. My friend sent us a schedule on August 14th and
8 said, "Would you please provide comments on our schedule?" We're working feverishly
9 on a Statement of Defence but he asked for comments and so we provided them. But I
10 want to take you to the third paragraph in my e-mail to Mr. de Waal last Friday, (as read):

11

12 I told you that I would respond to your proposed schedule and I will
13 do that in this e-mail. The proposed dates below do not take into
14 account our applications, but address the steps set out in your
15 schedule, to give you a sense of a time line that we think is realistic.
16 As you will see, our clients share your clients' desire to move quickly.

17

18 And then I set forward the schedule that I assume is accurately summarized on the -- the
19 table that Mr. de Waal handed up. And I go on to say, "Some of these dates are simply
20 driven by assessing a realistic time for each step. In some cases, conflicts in our calendars
21 make other dates impossible."

22

23 THE COURT: Okay.

24

25 MR. McDONALD: And so I -- I -- he asked for a response, I provided
26 a response but I told him, this is just to respond to the steps that you have set out, not
27 necessarily all the steps we see and it's -- doesn't take into account what we're still working
28 on which is our own applications which were filed a few days later. And I think it's
29 important to say, our clients do have one shared objective and that is, to move this case
30 quickly and efficiently.

31

32 THE COURT: M-hm.

33

34 MR. McDONALD: My friends say that there are a number of wells
35 that are in issue and they need to be abandoned and there are potential problems if there's
36 some delay. But they, or the Alberta Energy Regulator, have whatever obligations they
37 have with respect to those wells and presumably they're not banking on winning this
38 lawsuit, or winning it in three months and -- and avoiding some of those -- some of those
39 obligations.

40

1 For Perpetual and for Ms. Rose, it's also important that it moves quickly. This is a serious
2 overhang on a public company, as well as an individual. It's a large claim and we want to
3 move it quickly. But, the more we considered the complexity of it and the efforts to try to
4 streamline it, the more it became a concern to me that what this schedule my friend is
5 proposing, and even the -- the more what I say, reasonable dates that I -- I responded to on
6 -- on his schedule, is we need some procedural fairness. And yes, we would all like to
7 move it quickly but it has to be procedurally fair and we can't compromise the defendant's
8 entitlement to a full defence just so we can rush it through to judgment, one way or the
9 other, for \$200 million plus.

10
11 THE COURT: Do you and/or Mr. Leidl have a sense of when
12 your supporting affidavits would be filed, in respect of the dismissal applications?

13
14 MR. McDONALD: Well, there's a couple of answers to that. First --
15 our first application --

16
17 THE COURT: I thought the answers would be yes or no. And
18 then I'd follow up.

19
20 MR. McDONALD: No, we -- he and I have not discussed that --

21
22 THE COURT: Yes, I was -- okay.

23
24 MR. McDONALD: -- in any detail. But the first application we're
25 saying, can be decided on the pleadings as they exist.

26
27 THE COURT: Okay.

28
29 MR. McDONALD: So there's no need for any --

30
31 THE COURT: Okay, so it's --

32
33 MR. McDONALD: -- additional affidavit evidence.

34
35 THE COURT: All right.

36
37 MR. McDONALD: The second application which is the summary
38 judgment on the threshold issues, we contemplate an affidavit from Ms. Rose. That is
39 relatively simple in the sense that it only deals with the three discreet issues in the -- three
40 discreet threshold issues.

41

1 THE COURT: (INDISCERNIBLE) your claim.

2

3 MR. McDONALD: And we -- as I said, I've been out of town, my --
4 my colleague, Mr. Chiswell, I know, is working on that affidavit, I haven't seen it because
5 I just got back a couple of hours ago, but I would think one -- I don't want to go out on a
6 limb in case I'm wrong and I haven't even seen it but, one week or a little bit more should
7 be sufficient time for that.

8

9 An affidavit in response to the application is quite a different thing, in that, as I say, it's an
10 application for judgment for the full amount in the trial. And so the opposing evidence,
11 which my friend says according to his schedule, should be filed by next Friday, wouldn't
12 simply be an affidavit from Ms. Rose, she will of course have an affidavit. But there are
13 accounting issues, there may be accounting staff who would need to testify if this were a
14 trial, or would need to put in an affidavit if somehow this is going to be resolved short of a
15 trial. There are issues about abandonment and reclamation. How is that done? There are
16 questions about the efficiency of the operations of -- of Perpetual prior to the sale and the
17 acquisition of the no how and equipment by Sequoia. And how that can be done, at what
18 cost. There's some 2,500 wells in issue, what are the unique characteristics, not of every
19 well probably, but of -- of these wells that affect the costing of that? There are questions
20 about the negotiation of the -- the transaction, one of the issues which we say is a threshold
21 issue and can be dealt with, with relatively discreet evidence is whether the parties were
22 acting at arm's length in the transaction. And we say they were, my friend says they
23 weren't. If -- if they were at arm's length, then the claim is statute-barred under the
24 *Bankruptcy and Insolvency Act*.

25

26 There are also -- so we would need evidence from -- potentially from all those types of
27 witnesses and perhaps more. I haven't even met any witnesses other than Ms. Rose. And
28 I don't know who all they are.

29

30 There is another part of our evidence, that isn't even addressed on my friend's application
31 -- or on my friend's schedule, and that's expert evidence. The claim in a nutshell, is that
32 there was a transaction that involved assets of \$5 million and liabilities of \$220 million --
33 or \$225 million and so the delta (phonetic) is 220 and if we can't reverse the transaction,
34 then the judgment should be for 220.

35

36 Well, we'll need expert evidence on the value of the assets. We'll need expert evidence on
37 the value of the liabilities. We totally reject those numbers and the defence says that the
38 transaction was done at fair value. There are allegations that Sequoia was insolvent at the
39 time of the transaction or was rendered insolvent by the transaction. The defence is that it
40 was solvent at the time of the transaction, not rendered insolvent by the transaction and

1 indeed its insolvency and ultimate bankruptcy resulted from its own business decisions and
2 a dramatic fall in the price of gas.

3
4 So what happened to Sequoia in the year and a half following the transaction up to its
5 bankruptcy, and some sort of forensic analysis of that process, involves not only factual
6 evidence but expert evidence. There are damages questions, how do you calculate
7 damages? What mitigation -- where does mitigation play a role? There are accounting
8 issues of an expert nature relating to accounting expression called A-R-O and what that --
9 how that equates to the actual cost to abandon and reclaim wells. So, I don't have a good
10 sense of what the experts need to opine on. I just have a good sense when you look at the
11 pleadings, that there are a lot of expert issues to deal -- to be addressed.

12
13 My friend has put the entire case on damages, the quantification, by -- through Mr. Darby's
14 (phonetic) affidavit who says that there's a computer program that can generate
15 abandonment costs and he talked -- or the program's advised him that it's \$225 million.
16 Well, we need to respond to that. We'll respond to it at cross-examination in part of course,
17 but with our own evidence.

18
19 There's also - and this isn't our evidence, but - another matter that's not even addressed on
20 the schedule, and that's a question of applications under Rule 6.8 to examine witnesses in
21 advance of an -- of an application. I don't know if you're familiar with the rule but then
22 it's not just that we are entitled to cross-examine the affiant in support of the application.
23 If there are witnesses who have evidence available, then we can make -- bring an
24 application --

25
26 THE COURT: Application.

27
28 MR. McDONALD: -- for an order that they be examined. Well there
29 are two individuals who were the principles of Sequoia, Harold Wang (phonetic) and
30 Wentao Yang (phonetic) who had care and conduct of this business for a year and a half.
31 We say it was solvent when they got it and of course, it was bankrupt when they finished
32 with it. What happened? We'd like evidence from them and that would be evidence we
33 would have at a trial and we'd want it in a - or if we're not going to have a trial - in a Rule
34 6.8 application.

35
36 We also want to consider whether we make a similar application with respect to Jim Ellis
37 (phonetic), he's the president and CEO of the Alberta Energy Regulator. He has made
38 some comments in the press since this lawsuit was filed, about the inadequacies of their
39 regulatory regime and their legislation, when one of the causes of action is that we violated
40 the public policy reflected in that regulatory regime. So perhaps he might have some

1 interesting evidence on that question. Those are the only ones that I've thought of right
2 now but these are all critical questions that need to be addressed.

3
4 Let -- let me just raise another one that doesn't even appear on my friend's schedule.
5 Document production. My friend wants a three month accelerated process on affidavits,
6 to final judgment, in a complex commercial case for \$200 million, without any document
7 production. Well surely the defendants are entitled to the safeguard of some reasonable
8 document production, and equally have an obligation to produce relevant documents.
9 When is that going to occur? How is that going to occur? How does that affect the
10 schedule?

11
12 There's a short time period available for cross-examinations on the affidavits. Well now
13 that you've heard me and -- and you've -- you've heard my concerns as I get up-to-speed
14 on this case, we're going to need more than just a few days to cross-examine Mr. Darby
15 and Ms. Rose and call it a day.

16
17 Those are the sorts of things that, in my view, need to be addressed carefully and
18 thoughtfully on a schedule, and not jammed through on a court application that had been
19 intended for an adjournment, that's going to severely compromise the defendants' rights.
20 And I've said to my friend that, when we share the objective of moving this case quickly,
21 the best way to try to do that is cooperatively and sit down and see what we can work out.
22 Maybe we can't, because this might be a gloves off battle and there won't be any agreement
23 on anything, but maybe we can and if we can't, at least we'll have given it a shot and we
24 can be back before a -- you or whatever judge is hearing this, to -- to deal with it in a more
25 thoughtful and formal way.

26
27 So what --

28
29 THE COURT: So what would you have me do at the end of this
30 afternoon?

31
32 MR. McDONALD: I would have you do, at the end of this
33 application, if -- if you were prepared, My Lord, to assist us in obtaining a date for the
34 application which we have filed which is preliminary in my submission, to any other steps,
35 to resolve particular question and -- questions and to stay the plaintiff's application. Do
36 you have that application before you?

37
38 THE COURT: The ones that were filed by yourself and Mr.
39 Leidl --

40
41 MR. McDONALD: Yes.

- 1
2 THE COURT: -- earlier this week? I do.
3
4 MR. McDONALD: So I think they're pretty much the same, I -- ours,
5 My Lord, will say Burnet, Duckworth & Palmer on the cover and it's on behalf of the
6 Perpetual defendants.
7
8 THE COURT: (INDISCERNIBLE) proposed today at 4:00.
9
10 MR. McDONALD: Pardon me?
11
12 THE COURT: Your application is proposed today at 4:00, so --
13
14 MR. McDONALD: Yeah, it was returnable today --
15
16 THE COURT: Yeah.
17
18 MR. McDONALD: Yes. But --
19
20 THE COURT: Was there some other -- you said assist you in
21 getting a date?
22
23 MR. McDONALD: Well, yes, I mean we -- of course we don't agree
24 on anything so far and so the -- we had this date and a judge and so --
25
26 THE COURT: Yes.
27
28 MR. McDONALD: -- that's why we made this returnable but, that
29 application is to -- for an order that these three -- there's three threshold issues which we
30 say will dispose of the plaintiff's claim, can be heard and to permanently or temporarily
31 stay the plaintiff's application. As you'll see on the last page, the only material relied on is
32 the pleadings and proceedings. So, we would like the Court's assistance to get us an early
33 date to hear that application. And we're -- we can be ready whenever the Court's ready.
34
35 The second application --
36
37 THE COURT: How long will you require for that, if I --
38
39 MR. McDONALD: I would --
40
41 THE COURT: -- am inclined to your suggestion?

- 1
2 MR. McDONALD: I would think one to two hours.
3
4 THE COURT: For your part.
5
6 MR. McDONALD: Well no, I -- I was thinking for all of it.
7
8 THE COURT: Everybody?
9
10 MR. McDONALD: I mean to -- you know, if the Court is familiar
11 with the -- the pleadings, then the --
12
13 THE COURT: Okay.
14
15 MR. McDONALD: -- issues are pretty clear --
16
17 THE COURT: Okay.
18
19 MR. McDONALD: -- and -- and we've tried to set out distinctly at --
20 in -- in that application in paragraph 8, what the three issues are. So I would have thought
21 -- but -- but you know -- I certainly would not be more than an hour, so --
22
23 THE COURT: Okay.
24
25 MR. McDONALD: -- whatever my friend might be.
26
27 THE COURT: Okay. Your -- your friend says that there's no
28 reason why I can't carry on with what he's requested because the kind of application you're
29 referring to, you can bring it at any time.
30
31 MR. McDONALD: Well --
32
33 THE COURT: And what's the harm in setting out some further
34 deadlines? And if they all are found to be unnecessary because you succeed, then so be it.
35
36 MR. McDONALD: Quite so. You -- you could do that. That's a time
37 consuming and expensive process. The -- and I would think the first step would be
38 document production.
39
40 THE COURT: M-hm.
41

1 MR. McDONALD: And we can set dates for document production
2 and then parties would know that they have to work towards that. We can talk about
3 additional steps after that at this stage. I've suggested that a -- a better process rather than
4 negotiating it in court, with you today, is to negotiate it between ourselves and compact the
5 judge with our --

6
7 THE COURT: M-hm.

8
9 MR. McDONALD: -- differences after we've made a good faith
10 effort. But -- but we could -- I'm not -- I'm not opposed to --

11
12 THE COURT: And are there things you can envision the Court
13 saying today that might help that process, to be efficient?

14
15 MR. McDONALD: Well let me just say, there's one other thing I
16 wanted to ask you that what -- what --

17
18 THE COURT: Sure.

19
20 MR. McDONALD: -- we would leave with today. We would also
21 either at the same time or if it made more sense, after this -- the first application, to have a
22 date set for our summary dismissal application. I think they could be heard at the same
23 time and that would take more than --

24
25 THE COURT: When you say they, what are you talking about?

26
27 MR. McDONALD: They -- I'm sorry, the two applications, the --

28
29 THE COURT: Your -- okay.

30
31 MR. McDONALD: The initial application to -- for -- it's really to
32 resolve the questions and then to -- I suppose a Court could hear them at the same time and
33 if it dismissed our initial application, it might also implicitly be dismissing the second one.
34 But either at the same time or shortly thereafter, assist us in obtaining a date for the
35 summary dismissal application on the three threshold issues. And as I say, that --

36
37 THE COURT: And I apologize, because I think I
38 misunderstood, I thought that was the date you were first suggesting (INDISCERNIBLE)
39 and then you could argue in about an hour and -- okay, so how much time were you
40 contemplating --

41

- 1 MR. McDONALD: No.
- 2
- 3 THE COURT: -- for the actual dismissal application?
- 4
- 5 MR. McDONALD: If I confused you, I apologize, let me back up.
- 6
- 7 THE COURT: That's fine.
- 8
- 9 MR. McDONALD: We -- we have our -- our two applications.
10 Application to resolve questions and stay the plaintiff's application, number 1.
- 11
- 12 THE COURT: Yes.
- 13
- 14 MR. McDONALD: Application for summary dismissal on the
15 threshold issues, number 2.
- 16
- 17 THE COURT: Okay.
- 18
- 19 MR. McDONALD: I was speaking a moment ago, about number 1.
20 And I thought that could be determined, for my part, my submissions wouldn't take more
21 than an hour and no evidence is required.
- 22
- 23 Part 2, could even -- could be scheduled at the same time if the Court saw fit, and it requires
24 an affidavit from Ms. Rose which was the affidavit I was speaking about a few moments
25 ago. It's in the works, I haven't seen it, it's not that complex because the issues are discreet
26 so I think it could be put together fairly quickly. But that application is a more complicated
27 application. Could I ask you to turn to paragraph 4 of the application for summary
28 judgment?
- 29
- 30 THE COURT: Go ahead.
- 31
- 32 MR. McDONALD: We've set out the three threshold issues there.
33 The first one, were the parties dealing at arm's length with each other within the meaning
34 of the *Bankruptcy and Insolvency Act*? If they were, that claim fails. The plaintiff has to
35 prove -- prove a number of things to succeed on that, they were -- at -- they were not at
36 arm's length, they -- the transaction was not at fair value and the transaction -- the -- the
37 Sequoia was insolvent or rendered insolvent by it. But this is the one issue that we see not
38 requiring much evidence.
- 39
- 40 (b) is the plaintiff a complainant entitled to bring an oppression claim under Section 242
41 of the *ABCA*? Now let me just hand up that section and show you, potentially, how simple

1 this one is. 242 is the oppression remedy section. 239 is the definition section for Part 19
2 of the *Business Corporations Act* and it sets out in the definition of complainant, who can
3 bring an oppression claim. And item:

4
5 (iii), a creditor, (B) in respect of an application under section 242, if
6 the Court exercises its discretion under subclause (iv),
7

8 Well, PWC is not a creditor. But, it -- even if it decided it wanted to argue that it was, it
9 would need the Court's discretion, it doesn't have as of right, the ability to bring an
10 oppression claim. Or, and:

11
12 (iv) any other person who, in the discretion of the Court, is a proper
13 person to make an application under this Part.
14

15 So I would think PWC would claim to fall under item (iv) and be a proper person to seek
16 the Court's discretion. But it hasn't done that. Its proposal doesn't contemplate it. And it's
17 a fatal flaw.
18

19 The third claim is -- third threshold issue, which addresses the third cause of action, should
20 the claim made on the grounds of public policy, statutory illegality and equitable rescission
21 in paragraph 24 of the Statement of Claim be struck. Well, it's a novel cause of action to
22 say the least. In part, our argument will be that it is not a cause of action and any ability to
23 affect contracts on the basis of public policy and statutory illegality, may arise (sic) -- may
24 arise, excuse me, as a defence. It's a shield but not a sword and there's no ability for PWC
25 to, even if it had standing, to bring that sort of claim to use it as a sword.
26

27 So, I would like dates, or your assistance in obtaining dates for that application to be heard.
28 It's more complicated and I think a half a day would be unlikely to be enough and so, more
29 likely a full day would be required. And I'm not speaking for my own -- I was thinking
30 both --
31

32 THE COURT: Aggregate, yes.
33

34 MR. McDONALD: Aggregate.
35

36 THE COURT: (INDISCERNIBLE.)
37

38 MR. McDONALD: So that's what I would hope to -- or ask you for
39 your direction on or assistance on today. In terms of how can you help us either reach an
40 agreement on scheduling or if not, get back before the Court after we try, I'm not sure. I
41 mean we are senior counsel, we know what's required to talk this stuff through and we may

1 be able to make some progress and we may be just so diametrically opposed on what we
2 think a fair process is, that we'll be back here. But if -- if we have another date or two
3 dates, they'll be before a judge who will hopefully be up-to-speed on the case and be able
4 to better judge the respective positions that we put to that judge. Thank you, My Lord.

5
6 THE COURT: Thank you, Mr. McDonald. Do I call on Mr.
7 Leitl or Mr. Badawi?

8
9 MR. LEITL: Thank you, it's Mr. Leitl. Can you hear me, My
10 Lord?

11
12 THE COURT: Very well.

13
14 **Submissions by Mr. Leitl**

15
16 MR. LEITL: Thank you. I'll be -- I'll be very brief. I fully,
17 fully support Mr. McDonald's submissions. To be clear, we're counsels for Ms. Rose the
18 individual and all I propose to do in support of Mr. McDonald's request, that we have an
19 opportunity to argue our applications which will be dispositive. It's to give you -- add a
20 little colour here and to -- to emphasize that the claim against Ms. Rose is unprecedented
21 at multiple levels. We have a trustee in bankruptcy who did not bother to seek the Court's
22 authority to sue for oppression, suing an individual for almost a quarter of a billion dollars,
23 and saying in Mr. Darby's affidavit in one paragraph, that the theory of oppression, one and
24 a half years ago, was that Ms. Rose didn't give enough thought to the concerns of the ADR.
25 And that as I say, is unbelievably, multiplicatively (phonetic) unprecedented and we say we
26 will be able to get the whole thing disposed of at least as against Ms. Rose, quickly and not
27 have to be dragged through a matter that has the complexity that Mr. McDonald described.
28 So that's all I wanted to add, My Lord.

29
30 THE COURT: Mr. Leitl, is there any way that the most cogent
31 and simple response could be given to your friend's applications? Because if you're right,
32 it seems they're going to get nowhere very quickly on their schedule.

33
34 MR. LEITL: Well, I think the best way in our -- in our -- in
35 our judgment, is to bring the applications that Mr. McDonald has asked that we have the
36 opportunity to -- to bring. And the issue I raised is built into that.

37
38 THE COURT: Thank you. All right.

39
40 MR. LEITL: I'll go back on mute so you don't hear any noise
41 or unless somebody has any questions, My Lord.

1
2 THE COURT: I have no others.

3
4 MR. LEITL: Thank you.

5
6 THE COURT: Mr. de Waal, please, your reply.

7
8 **Submissions by Mr. de Waal**

9
10 MR. de WAAL: Thank you, My Lord. Very briefly, when my
11 friend says that they could not get an adjournment for today, I'm not sure that's correct. It
12 was always understood that the applications would be adjourned. In fact, they were only
13 served on Monday. And we never anticipated for one second, that they would not be
14 adjourned. The issue with respect, is whether our application may be adjourned to a
15 specific date before their applications had been heard. Just adjourned, not heard. Whether
16 our application should be adjourned to a hearing date until their applications had been
17 heard.

18
19 And we say, My Lord, that there's no reason why our application should not be adjourned
20 and that these steps should not be scheduled. In fact, you'll see paragraph 3 of my form of
21 order says that the deadlines for any of the steps may be amended by the parties in writing
22 or by further court order. So if it is --

23
24 THE COURT: Just give me one second. Sorry, I've got yours
25 mixed up with others I think.

26
27 MR. de WAAL: (INDISCERNIBLE.) I have another copy, My
28 Lord.

29
30 THE COURT: I have your one page schedule, what did I do with
31 your -- thank you. Sorry. Okay, carry on.

32
33 MR. de WAAL: So, paragraph 3 allows for the respondents to
34 say, we haven't had enough time to cross-examine, we need more than a day, you know,
35 we cannot do it by Friday, can we come to court if we're not being reasonable and to extend
36 those days? And that includes the hearing date. But until then, there's no reason why this
37 order should not be granted simply because they chose to file applications without
38 evidence, and argue that those applications will be successful. And if they are in fact
39 scheduled and heard, it presumably will be before November, and if they are successful,
40 that will be the end of our application, end of the problem.

41

1 The other point that is significant, My Lord, is that these circle of threshold issues, go to
2 the heart of our application. So whether this was an (INDISCERNIBLE) deal for example,
3 is exactly what we need to show in our application. And if we fail, if -- if my friends are
4 correct, we simply lose our application. You don't need to extract of, let's say the ten issues
5 we have in our application, extract three of those, and say well let's deal with these three
6 before we go back and deal with the other seven. And what I don't understand, frankly,
7 practically, is, how you can have those issues determined with no problem, sometimes even
8 with no evidence, when you make such a fuss about all the steps and the discovery and the
9 disclosure and everything else you need to establish those same issues for the hearing of
10 our application. We do not need to analyze the transactions, we do not need to show what
11 the financial consequences were, whether there was a transfer undervalue. Why is that
12 suddenly not a problem when you want to schedule the respondents' application? So we
13 say, schedule our application. If my friends are correct, and they schedule their application
14 and it's heard and they're correct, they win and our application does not proceed.

15
16 There are 2,500 wells, more than 2,500 wells at issue, there's (INDISCERNIBLE) there
17 are regulatory issues, there's -- this -- this costs money, it costs the trustee money to keep
18 operating. This -- this has to be dealt with. It cannot be held in limbo because the
19 respondents, after a month -- a month after they've been served with these documents, still
20 cannot even anticipate what steps might have to be taken. There may have to be document
21 production, we may have to subpoena other witnesses, we may have to get evidence from
22 people we don't even know yet. Now if -- if that's the way this is going to go, our
23 application will never be heard.

24
25 THE COURT: Isn't the logical extension of what you're saying
26 that I should just sort of restrict or deny some response rights? So it can be heard quickly?

27
28 MR. de WAAL: No, My Lord, we -- we think that -- that the
29 schedule allows for the affidavit, that -- that has now been outstanding for a month and will
30 take another week to prepare, but will -- will allow for the response rights and --

31
32 THE COURT: Which affidavit are you talking about in their --

33
34 MR. de WAAL: The affidavit of the -- of the --

35
36 THE COURT: That you're saying the deadline would be
37 September 7th?

38
39 MR. de WAAL: Yes.

40

- 1 THE COURT: Because I think Mr. McLeod (sic) is saying that
2 that affidavit, that -- the time frame for that remains indeterminate because there's a range
3 of possible things and they have to get a new file and understand all this stuff. Separate
4 affidavit from Ms. Riddell -- sorry, Ms. Rose, would be one to two weeks maybe from
5 now.
- 6
- 7 MR. de WAAL: Well, but, you --
- 8
- 9 THE COURT: But it's a different one, I think you have here as
10 responding to your application.
- 11
- 12 MR. de WAAL: Well, anything that they need to file has to be
13 filed by a certain deadline. They -- they don't give us a deadline, they just tell us everything
14 they need to do before that deadline but we don't have a deadline and there's no end to that
15 process. So what we're saying is --
- 16
- 17 THE COURT: Well we've -- we've just started. You know,
18 there --
- 19
- 20 MR. de WAAL: Yes. Yes.
- 21
- 22 THE COURT: Okay.
- 23
- 24 MR. de WAAL: But -- but -- but schedule this and if they need
25 another week, then ask us for a week and if we won't agree, then come to court and get
26 another week, or get two weeks. But don't just say -- because after all this -- all these
27 details about what might have to happen before this can be heard, in the end, the conclusion
28 is, just don't schedule this application until ours have been heard. And that, with respect,
29 My Lord, these -- these applications are not related. If they're successful independently, if
30 they -- they could have filed this application tomorrow and if they were successful, our
31 application would not proceed in November. So, they're not linked, they're not tied
32 together.
- 33
- 34 THE COURT: But --
- 35
- 36 MR. de WAAL: And --
- 37
- 38 THE COURT: -- it sounds like they're very linked, if the success
39 of his means yours is over.
- 40
- 41 MR. de WAAL: Well they're linked in that sense, that the --

1
2 THE COURT: Yes.
3
4 MR. de WAAL: -- consequence of the one, if the one is
5 successful, then the other one would proceed.
6
7 THE COURT: But there's no factual overlap in your mind,
8 between these two.
9
10 MR. de WAAL: Well the factual -- there is fact -- some factual
11 overlap but that -- that's -- just reinforces my point. Why is the one not a problem but when
12 you have the same factual issues in the other application --
13
14 THE COURT: Yes.
15
16 MR. de WAAL: -- it's a huge problem. By the way, My Lord, the
17 -- the request on May 28th, and this is in the Darby affidavit at exhibit 'A'.
18
19 THE COURT: Okay.
20
21 MR. de WAAL: Was to provide all the records relating to the fair
22 market value of any assets, etcetera, etcetera. It went into the -- the detail of what was
23 required and there was a response from Perpetual to that request. So, we would assume
24 that the Perpetual records were collected and by June 6th when they were provided to the
25 trustee, those records were all in one box. And to now say, well you have to go and look
26 at experts and determine what the values were, suggests, My Lord, that the response to this
27 request was not adequate. Which again is, is inconsistent with -- with what we've been
28 dealing with.
29
30 This whole application, the trustee does not -- is not a witness to these events. The trustee
31 is relying on the records obtained from Sequoia which at the time, was a fully owned
32 subsidiary of Perpetual. It's not a strange company where they have to go and make these
33 investigations. **This was Perpetual doing this transaction through a subsidiary.** The records
34 are available, it's all there, everyone knows exactly what happened, and the question is,
35 what do we have to look for? File an affidavit, have cross-examinations, schedule the
36 application and if you want to bring a summary judgment application to have another
37 application (INDISCERNIBLE) another trial, a summary judgment application in another
38 application which is a strange creature to me anyway, then schedule that. If you're
39 successful, then you win. But that's -- that's how to deal with this.
40

1 It's -- it's the Perpetual financials that the application relies on. It's a Perpetual subsidiary.
2 It's the Perpetual records. And it's the Perpetual numbers that say - maybe not the 200
3 million but - that these ARO obligations were 131 or \$133 million. And that the value on
4 the -- on the plus side, was \$5 million. That's not a number that the trustee made up. We
5 got that from -- and it's all set out in the affidavit. It's not as complicated as my friend
6 wants it to seem.

7
8 THE COURT: It just feels like I'm being asked to pre-decide
9 that, without them having the opportunity to resist it.

10
11 MR. de WAAL: My Lord, you're not compelling anyone to go to
12 a hearing on November 30th. You're scheduling the steps that would require -- that we
13 would require to take to get to a hearing. If anything -- if there's any reason not to have
14 that, then my friends will be before this Court again. But, the alternative is -- is an
15 indeterminate process. This is not a trial, this is an application, it's an application under
16 Section 96 which allows this to be done by application, and if -- as I say, if there's any
17 complaint about not enough time to speak to a witness who is not available, then let's deal
18 with that at that time. But for these purposes, Your Lordship was not asked to direct that
19 there shall be a hearing on that date. We just --

20
21 THE COURT: It felt like that by row number 9 on your
22 schedule.

23
24 MR. de WAAL: Nine? Eight, My Lord?

25
26 THE COURT: Number 9 on your proposed schedule, it felt like
27 I was being asked to set a hearing date.

28
29 MR. de WAAL: Oh, this is -- this is eight in the order, I'm sorry,
30 My Lord.

31
32 THE COURT: Oh, I'm sorry. Yes, number 8.

33
34 MR. de WAAL: Yeah, eight in the order, yeah. That's why I
35 couldn't find nine.

36
37 THE COURT: The last -- I should have just said the last one.

38
39 MR. de WAAL: Yeah. So, schedule a hearing, but -- but that
40 doesn't mean -- things are scheduled and -- and adjourned and -- and removed all the time.
41 So -- but -- but we have this -- unfortunately in --

- 1
2 THE COURT: Regrettably.
3
4 MR. de WAAL: -- in a -- in a -- on a commercial list, we have to
5 have -- we have to pre-book the hearing.
6
7 THE COURT: Yes, yes.
8
9 MR. de WAAL: But allow us to pre-book that and if -- if, through
10 discussions or -- or any other way we can resolve this than fine, or if it's decided by a Court
11 that our application is ill-founded, then that's the end of it too.
12
13 THE COURT: Did you happen to canvas with the commercial
14 trial coordinator, dates other than November 30?
15
16 MR. de WAAL: No, the schedule --
17
18 THE COURT: For example, the ones your friend proposed in
19 January?
20
21 MR. de WAAL: No, those schedules -- the schedule is not
22 available yet, that -- which is the problem. So as soon as we go beyond December 31st,
23 then we're somewhere in space.
24
25 THE COURT: Okay. So it's not just us, okay. Mr. de Waal,
26 before you're seated, do you have any opposition to me entertaining your friend's request,
27 whether it's in addition to your request --
28
29 MR. de WAAL: No, My Lord.
30
31 THE COURT: -- or in lieu of your request, to fix a date --
32
33 MR. de WAAL: None whatsoever.
34
35 THE COURT: -- for adjourning --
36
37 MR. de WAAL: None whatsoever, My Lord, and that's -- we've
38 never suggested otherwise.
39
40 THE COURT: Okay.
41

1 MR. de WAAL: I'm not available next week and I indicated that
2 but -- I'm not here next week.

3
4 THE COURT: That would be a little aggressive.

5
6 MR. de WAAL: But otherwise, I'm available.

7
8 THE COURT: Okay.

9
10 MR. McDONALD: Might -- might I just say one --

11
12 THE COURT: I'd actually like that and I'll --

13
14 MR. McDONALD: -- the --

15
16 THE COURT: -- give the final word to Mr. de Waal after but,
17 there's a number of things said that I would like to hear a response to.

18
19 MR. McDONALD: I -- I hesitate to bounce up and down.

20
21 THE COURT: It's just procedural.

22
23 **Submissions by Mr. McDonald**

24
25 MR. McDONALD: There was one thing that I think, just wasn't
26 correct. My friend said well, Sequoia was a subsidiary of Perpetual and so essentially all
27 the records are in Perpetual's hands. Well, the transaction was in October 2016, almost
28 two years ago. At that time, this business was sold to an arm's length third party. Perpetual
29 hasn't had anything to do with it for a year and a half. It went from an operating business
30 to bankruptcy in the hands of total strangers. So if -- if my friend left you with the
31 impression that somehow we have all the records because it's just our business, Perpetual
32 did own the business up until two years ago, and has had nothing to do with it since.

33
34 THE COURT: Right.

35
36 MR. McDONALD: My friend says, well Section 96 of the *BIA*
37 provides for a resolution of cases on -- by way of application. Well, you're well aware that
38 there's a lot more to this case than a Section 96 application. There's an oppression claim
39 which in itself, is a significant lawsuit. There's this claim about voiding contracts on the
40 basis of public policy. And whether or not it may be appropriate in some circumstances,

1 to review a transaction by way of a summary application, for all the reasons I've tried to
2 explain earlier, it's not appropriate in this case.

3
4 I -- I thought I had made my point clear about why these three threshold issues in our view,
5 can be determined immediately and if we're successful, dispose of the entire case. They
6 are issues that are not factually complex. Unlike what I was saying about valuation
7 insolvency damages, these are not that sort of issue. 1) is, was the transaction negotiated
8 at arm's length? 2) is the plaintiff -- does -- qualify as a complainant to bring an oppression
9 action? 3) is there a cause of action known to law about -- to try to void a contract on the
10 basis of violating public policy or being statutorily illegal. Those are much more simple,
11 discreet, dispositive issues, and that's why they can be determined in advance, and that's
12 why in my submission, they should be.

13
14 And the final point, my friend keeps speaking of this benign concept of just adjourning his
15 case, and if he wants to adjourn it to November 30th, I'm fine with that but what you pointed
16 out on the schedule is that's not what he really wants, he wants it set for hearing on
17 November 30th. For one day. To take this complex \$200 million case (INDISCERNIBLE)
18 pretrial in three months and decide it all in one day. And it's all okay because I can always
19 come back to court and say the things to another judge a month from now that I'm saying
20 to you now. It's not fair.

21
22 THE COURT: Thank you. Mr. de Waal? Your final word.

23
24 **Submissions by Mr. de Waal**

25
26 MR. de WAAL: No, just briefly, two things. 1) is this is not a
27 derivative action, it's not something where somebody has to come to court and seek leave
28 to commence a derivative action. This is an oppression action and in -- in my experience
29 and according to the cases, we don't need to come separately and say, can we please file
30 this claim? So, this is the merits of my friend's application, but that's the kind of thing
31 that's now being put up as requiring our application to be adjourned into the future so that
32 that kind of thing can be -- can be discussed. We'll deal with the merits when those
33 applications are set down so it doesn't need to affect the adjournment but that's the kind of
34 argument that -- that -- that these applications raise.

35
36 Then secondly, with respect to whether my friends are in fact aware of what happened with
37 Perpetual - not Perpetual operating - with Sequoia since the sale, that's irrelevant with
38 respect, because the Section 96 provision requires -- the inquiry is whether the transfer was
39 a transfer at undervalue --

40
41 THE COURT: M-hm.

- 1
- 2 MR. de WAAL: -- at the time, not today looking back --
- 3
- 4 THE COURT: What was the time at issue? According to the
- 5 trustee --
- 6
- 7 MR. de WAAL: October -- October 2016 when --
- 8
- 9 THE COURT: Okay.
- 10
- 11 MR. de WAAL: -- when -- when this happened.
- 12
- 13 THE COURT: Okay.
- 14
- 15 MR. de WAAL: And then whether the debtor was insolvent at the
- 16 time of the transfer or was rendered insolvent by it. So the issues of fact relate to that time
- 17 period. That's -- and if we show what the facts were on that date, we say we get that
- 18 evidence and the basis for our submissions, from the Perpetual records. The records that
- 19 they will now have to scour to try and find out what happened. But we say --
- 20
- 21 THE COURT: But does it not take somebody with a -- a nature
- 22 of expertise to review those records and form their estimative value?
- 23
- 24 MR. de WAAL: Well --
- 25
- 26 THE COURT: And therefore, if so, then the defence may have
- 27 experts with different views.
- 28
- 29 MR. de WAAL: Well those records include financial statements.
- 30
- 31 THE COURT: Sure.
- 32
- 33 MR. de WAAL: They include the -- the ARO calculations, we --
- 34 they include the LLR ratings, they include all those -- those --
- 35
- 36 THE COURT: And the values of wells and drilling spacing units
- 37 and stuff --
- 38
- 39 MR. de WAAL: That is -- that is --
- 40
- 41 THE COURT: -- stuff that is a function of estimates --

- 1
- 2 MR. de WAAL: But the --
- 3
- 4 THE COURT: -- of market value of product and --
- 5
- 6 MR. de WAAL: The --
- 7
- 8 THE COURT: -- quantity under the ground and all of that.
- 9
- 10 MR. de WAAL: The values are there, My Lord. What I -- what I
11 understand my friend to say, and perhaps this is just speculation on my part, is that they
12 want to see whether those values that were in fact in their records are -- can be -- can now
13 be substantiated or not. But -- but the values that you find in the application on which the
14 trustee, by the way, stands or falls, if it's not good enough, then we lose the application.
15 But those values we all got from the Perpetual records. And they go back to October 2016.
- 16
- 17 THE COURT: And -- and help me with what Mrs. -- or Ms.
18 Rose's role was with that organization?
- 19
- 20 MR. de WAAL: She was the -- she was a director of Perpetual
21 Energy Inc., the parent company.
- 22
- 23 THE COURT: Yes.
- 24
- 25 MR. de WAAL: And she was a sole director of now Sequoia, at
26 the time Perpetual Energy operating company.
- 27
- 28 THE COURT: What was her role in October 2016?
- 29
- 30 MR. de WAAL: The same, she -- she --
- 31
- 32 THE COURT: Okay.
- 33
- 34 MR. de WAAL: -- resigned on that day -- that's one issue by the
35 way, that Mr. Leidl's application raises that -- that the Perpetual application does not raise,
36 she resigned as a director and also got an indemnity at that time, which is referred to in the
37 pleadings but that's a fourth issue that -- that the -- that Mr. Rose's application raises. But
38 she was the sole director, she signed the deal on both sides as trustee for the seller, and as
39 -- as the sole director for the purchaser, now Sequoia, and -- and then resigned and walked
40 away and then changed the name and -- and they set the -- set the -- the -- these assets
41 afloat.

- 1
2 MR. LEITL: My Lord, this is Mr. Leitl, two things. Mr. de
3 Waal is breaking up and he is leading you well down a path of argument that will be hotly
4 disputed in terms of the evidence and the facts.
5
- 6 THE COURT: Okay, thank you. I -- I opened the area of
7 conversation.
8
- 9 MR. de WAAL: I think that --
10
- 11 THE COURT: So, Mr. --
12
- 13 MR. de WAAL: I think I've said anything, My Lord. I -- we have
14 no objection again, just to summarize, to -- to an adjournment and an early hearing and
15 whatever my friends want with their application.
16
- 17 THE COURT: Well I want follow-up on that with you and
18 propose dates that I understand you're available which would be November 30th.
19
- 20 MR. de WAAL: My Lord -- well, I --
21
- 22 THE COURT: It's for -- for your friend's threshold application.
23 If it's successful, I would think the trustee and the creditors would be well served to have a
24 quick and lower cost end to the matter, but if not, then --
25
- 26 MR. de WAAL: My Lord --
27
- 28 THE COURT: -- I'm not sure how I set dates on yours. I want
29 to but --
30
- 31 MR. de WAAL: My Lord, what -- what I propose -- my initial
32 proposal yesterday --
33
- 34 THE COURT: Right.
35
- 36 MR. de WAAL: -- and I've now changed that order, with the
37 initial proposal and what I've suggested when -- when we got this first on Monday, is that
38 this should all be heard together. And the -- the judge hearing the matters on November
39 30th should say which application is heard first. And it's easy if -- if whoever reads the
40 papers say, well we should -- we can simply determine this issue and that's the end of it,
41 that's the way to resolve this. But in the meantime, to get there and to deal with the same

1 issues, is this an arm's length transaction for example, you have to analyze the same facts,
2 same evidence and it's the same path to get there, same steps. So my initial proposal was,
3 have this all heard at the same time. My friend said no, ours have to be heard before yours
4 is even scheduled. It's on that basis that I say, well then, let's do it separately. We want
5 our hearing and I'm available then and you can schedule yours whenever you want. So I
6 would still -- I would go with that, My Lord, as my first option is to say, adjourn this all to
7 November 30th. We have a full day, we have a day available for the judge to -- to read or
8 -- or everything has been filed. But that's ideally how this should be scheduled. And if --
9

10 THE COURT: You guys think we're so much smarter than -- no,
11 you -- you probably don't, you probably know we're not. That's a really tall order to put
12 onto one of my colleagues, that's an -- it's -- anecdotal aside. I find you saying that the
13 factual underpinnings are the same for all these issues, they should be heard together, it's a
14 matter of judicial efficiency, whatever. Your friend says, not. They're very distinct issues,
15 the three they raise, I guess four with respect to Mr. -- and Ms. Rose. But -- so --
16

17 MR. de WAAL: My Lord, could I make one more --
18

19 THE COURT: -- I need help from both of you knowing because
20 this Court's pattern before ever dealing with the trial of an issue in advance -- if there's
21 going to be overlap, we don't do it.
22

23 MR. de WAAL: My Lord --
24

25 THE COURT: So --
26

27 MR. de WAAL: -- let me make one -- one other submission.
28

29 THE COURT: Yes.
30

31 MR. de WAAL: Along the same lines. Let's say my friend's
32 application is heard and it's dismissed on the basis that the judge hearing that application
33 says, I find that this was in fact a non-arm's length transaction.
34

35 THE COURT: M-hm.
36

37 MR. de WAAL: So you lose on that point. And then we go to my
38 application, the same issue arises, and the judge says, well no on the same evidence, or
39 different evidence, I find that this was an arm's length transaction. Then we have the classic
40 example of why there should not be two decisions --
41

- 1 THE COURT: Why would the first decision not be an issue
2 estoppel and --
3
- 4 MR. de WAAL: Not be -- not be binding?
5
- 6 THE COURT: -- forget the next?
7
- 8 MR. de WAAL: Because, My Lord, finding that this is an arm's
9 length transaction requires more than just -- it's not a discreet issue, it's an issue that
10 permeates the whole application. How is this (INDISCERNIBLE) put together, what was
11 the consideration, what was the structure, who negotiated what, who represented whom at
12 this?
13
- 14 THE COURT: So if I set this for November 30th for that issue,
15 just one of the three in your friend's application, you will say, in order for us to put our best
16 foot forward, we need a whole bunch more time, a whole bunch more evidence?
17
- 18 MR. de WAAL: We -- we would say that, My Lord?
19
- 20 THE COURT: Yes.
21
- 22 MR. de WAAL: No.
23
- 24 THE COURT: Wouldn't you?
25
- 26 MR. de WAAL: No. No, My Lord. We will argue essentially --
27
- 28 THE COURT: No.
29
- 30 MR. de WAAL: -- our own application. That's what I'm saying.
31 It's the same application. We don't need more time, we've got the evidence on the arm's
32 length deal in -- in the affidavit, it's there.
33
- 34 THE COURT: But your application entails more issues, does it
35 not?
36
- 37 MR. de WAAL: It does get into financials for example, it's not --
38 that's not the only -- the Section 96 is not the only basis.
39
- 40 THE COURT: Right.
41

- 1 MR. de WAAL: It gets into the role of director of -- of a
2 corporation and the fiduciary obligations and other obligations --
3
- 4 THE COURT: Yes.
- 5
- 6 MR. de WAAL: -- that she had.
- 7
- 8 THE COURT: Oppression seems rather fact intensive, to
9 prosecute.
10
- 11 MR. de WAAL: No, My Lord. If -- if this was in fact a -- a non-
12 arm's length deal --
13
- 14 THE COURT: Right.
- 15
- 16 MR. de WAAL: -- that simply, as we say, set up Sequoia to fail -
17 -
18
- 19 THE COURT: I see. She'd say that --
20
- 21 MR. de WAAL: -- then that's --
22
- 23 THE COURT: -- in and of itself constitutes --
24
- 25 MR. de WAAL: -- that's it.
26
- 27 THE COURT: -- oppression.
28
- 29 MR. de WAAL: Yes, My Lord. It's not more complicated than
30 that.
31
- 32 THE COURT: Do you have any other basis for which you are
33 alleging oppression?
34
- 35 MR. de WAAL: It's essentially that, My Lord. You can't -- you
36 can't serve --
37
- 38 THE COURT: It's essentially that.
39
- 40 MR. de WAAL: -- you can't serve the other corporation -- the
41 parent corporation and discard your obligations or disregard your obligations --

- 1
2 THE COURT: Right.
3
4 MR. de WAAL: -- to -- to Sequoia, which is what we say
5 happened here.
6
7 THE COURT: Okay.
8
9 MR. LEITL: My Lord, it's Mr. Leidl, I'd just like an
10 opportunity to speak but I'll ask you to tell me when is the right time.
11
12 THE COURT: I will do that, thank you.
13
14 MR. de WAAL: Yes, My Lord. One of the things, for example, -
15 - that that Mr. Rasmussen (phonetic) points out is that the adequacy of the consideration,
16 again, is -- is -- the whole financial background to the deal will inform whether this is - not
17 inform - will be part of the -- of the consideration of whether this is arm's length or not.
18 How this whole deal and the fiduciary obligations, how this deal came together and what
19 it meant for Sequoia. Those are my submissions.
20
21 THE COURT: Thank you. Go ahead please, Mr. Leidl.
22
23 **Submissions by Mr. Leidl**
24
25 MR. LEITL: Oh, just briefly, I'm -- I'm very surprised, with of
26 the greatest of respect, to hear my friend say that a -- an oppression claim against an
27 individual in respect of a transaction that was entered a year and a half ago, seeking a
28 quarter of a billion dollars damages against her personally, will not be factually
29 complicated. It will, among other things, require an examination of everything that
30 happened with Sequoia after that transaction, up until the date of its bankruptcy which was
31 the first date on which the trustee had authority to do anything, and I'll just leave it there.
32
33 THE COURT: As I said earlier, Mr. de Waal, this is your client's
34 application, you're entitled to the final -- final word. Anything in response?
35
36 MR. de WAAL: Nothing, My Lord.
37
38 THE COURT: Okay, thank you. I recognize the hour but I
39 would like to reflect for a few minutes before I come back and decide what I'm going to
40 do.
41

1 MR. McDONALD: Thank you, My Lord.

2

3 (ADJOURNMENT)

4

5 THE COURT: Thank you, please be seated. I took so long you
6 probably could have negotiated the entire lawsuit. Mr. Leidl, are you still there, can you
7 hear me?

8

9 MR. LEIDL: I am, thank you, My Lord. I'll go back on mute.

10

11 **Decision**

12

13 THE COURT: Thank you. Well after I tell you that neither of
14 you are getting all that you want, you might be relieved to know that I'm going to endeavor
15 to interfere as little as possible. It felt to me like some of these -- the carts came before the
16 horse. Let me tell you briefly, a couple of specific conclusions and then come to practically
17 how I would like you to proceed.

18

19 I am of the view that the defendants should go first with the particular questions application.
20 And the judge that hears that application of course, will then be largely determining by
21 virtue of his or her decision, the nature of the remaining litigation path. It's my view,
22 perhaps you share it, that you really need a specific member of this Court, from the
23 commercial list, that would hear all of these.

24

25 It seems to me that the particular questions application can be heard perhaps not quite as
26 quickly as Mr. McDonald would imply, but I -- one of the things I did, apart from reading
27 the pleadings afresh, having now had the benefit of your submissions, I also looked at the
28 Court's commercial list schedule. Not to try and pigeonhole you with any particular judge
29 on any particular date, I leave that to you, but I did notice that there is some availability
30 first in the first week of October, more availability in the second week of October and so
31 that question could be heard in the normal scheduling by one of those judges in that
32 timeframe. And then you would have greater ability to work collaboratively, probably,
33 maybe with some disagreements here and there, on a litigation plan. For whichever track
34 you're then on.

35

36 But it doesn't work to just sign up for one of those particular slots because -- for many
37 reasons but -- I mean I appreciate that you may want to have some input into who you
38 would want to have -- sit on all of the applications if -- if you are able to persuade the
39 powers that be. But if you went in one of those slots in the first half of October, there's no
40 way to know, as you've pointed out, if they're even going to be available in the first quarter
41 of 2019, or later.

1
2 And so, I know you're both very experienced and I suspect you've both done this before a
3 number of times. I would like you to consult with either or both of Madam Justice Horner
4 as the Calgary head of the commercial list or the ACJ, Justice Rooke. And frankly, I don't
5 know which, you know, for protocol you're supposed to go to first. But ask them for, call
6 it an early assignment of a member of the commercial list for 2019.
7

8 I'm of the view, unless I've really misunderstood things, that you can have, you the trustee,
9 can have this matter heard at the latest, in the first quarter of 2019, because even though
10 there is nothing in the proposed list that refers to document discovery, all the other dates
11 for Mr. McDonald end in January 31st of next year. I am -- that view is reinforced for me
12 in recognizing the amount of analysis and hard work that goes into generating Statements
13 of Defence like that. So there's a lot of thought that's gone into that already, some strategy
14 and how we want to approach this. And so, whoever is early assigned to this may be
15 persuaded otherwise, but it strikes me that despite the dollars involved, and because of the
16 capability of the counsel involved, you can get this done fully, protecting all the rights,
17 procedurally, that all parties enjoy, by having it all done in the first quarter next year.
18

19 I don't want to set a specific date other than saying first quarter next year. Because I think
20 when you can gather together with either or both of those two judges, your specific timing
21 may be a function of the availability of the judge or two that you really prefer. And I -- I
22 saw who's sitting on the week of the 29th, 30th and I think it's a good choice. That may
23 have been part of Mr. de Waal, your process, it may not have been, it may have been
24 coincidence but ---
25

26 What I am ordering then, is that the particular questions application proceed first. It
27 proceed before a judge. That either Justice Rooke as the ACJ or Justice Horner as the head
28 of the commercial list, will choose. And so their availability in the short-term, is the real
29 wrinkle in what I am proposing that you do. I'm requiring you to do. I'm not wanting to
30 usurp their discretion in saying, I don't agree with Justice Jeffrey, I -- I think this isn't
31 suitable for all being done by the same commercial list judge. Or that nothing should be
32 locked in until that first preliminary application is heard and decided.
33

34 Beyond that, I would welcome further dialogue or initial reactions, is that feasible? In view
35 of what you guys know. And you just give me the tip of the iceberg. Mr. McDonald,
36 you're rising first.
37

38 MR. McDONALD: I don't have much to say other than, I had
39 contemplated that Justice Horner as a supervising judge, might be the person we should be
40 talking to about something along the lines of --
41

- 1 THE COURT: She probably is, but --
- 2
- 3 MR. McDONALD: And --
- 4
- 5 THE COURT: -- she just doesn't have the ability that the ACJ
6 has to fix people's schedules next year, but she probably is the place to start.
- 7
- 8 MR. McDONALD: I did --
- 9
- 10 THE COURT: Yes.
- 11
- 12 MR. McDONALD: -- speak with Brent (phonetic) about that --
- 13
- 14 THE COURT: Okay.
- 15
- 16 MR. McDONALD: -- and he's -- and I have, in the past, through
17 Justice Horner, had cases scheduled or managed on the commercial list, so it strikes me
18 that that's an appropriate first step and I'm --
- 19
- 20 THE COURT: Okay.
- 21
- 22 MR. McDONALD: -- certain I understand your direction.
- 23
- 24 THE COURT: I guess one of the reasons that I'm reminded that
25 I had, that as you spoke, came back to mind, is I do think it's -- it's best for the trustee also
26 in respect of the single judge hearing them all including this first application. Because
27 maybe incorrectly, but my observation so far is that when one of us gets the kind of
28 application about dealing with something in parts, not the whole, is there is a strong
29 tendency to say, I would not want to tie the hands of my colleague at the ultimate hearing
30 and -- and so I'm just going to beg off on this first question. That's not the best way to put
31 it. But if -- if you have a person assigned to hear all of it, I think they will, more times than
32 not, take a more rigorous approach to each of those questions. Mr. de Waal?
- 33
- 34 MR. de WAAL: My Lord, as -- as for scheduling of the steps to
35 get us to that hearing --
- 36
- 37 THE COURT: Yes.
- 38
- 39 MR. de WAAL: -- does that mean -- and I agree with my friend
40 that Justice Horner is -- is the person I think we should go to first at least.
- 41

- 1 THE COURT: Yes, okay.
- 2
- 3 MR. de WAAL: Unless she defers to somebody else but, as for
4 scheduling of the steps to get us to that first hearing --
- 5
- 6 THE COURT: Yes.
- 7
- 8 MR. de WAAL: -- would she then be in a position to tell us, here's
9 what you do to get that to that hearing, or is that something that you are going to deal with
10 or is this just a journey to a date?
- 11
- 12 THE COURT: When you say to that hearing, are you talking
13 about the particular questions hearing that I --
- 14
- 15 MR. de WAAL: Yes, My Lord. If she says, this is to be heard in
16 the first week of October, when do we get the applicant's affidavit for example?
- 17
- 18 THE COURT: Yes. It's actually for the person that -- she,
19 probably in consultation with the person or one from a list of two or three that you might
20 submit, that person would decide that. What I can offer to you is if you run aground before
21 you get an answer, in as timely a fashion as you require because you've given me all this
22 stuff, if I can help in a step here or there, I'm happy to do that, set a 1:00, 9:00 any day I'm
23 not otherwise busy, it will take Justice Horner a bit of time but probably not too much.
24 Once you get to the point of, you're ready to go, have that meeting. My experience is, she's
25 very quick and --
- 26
- 27 MR. de WAAL: Thank you.
- 28
- 29 THE COURT: -- and she'll get that for you soon.
- 30
- 31 MR. de WAAL: Thank you.
- 32
- 33 THE COURT: Yes.
- 34
- 35 MR. McDONALD: And I'm sure I understood you but I -- just so
36 there was no disagreement --
- 37
- 38 THE COURT: (INDISCERNIBLE) yes.
- 39
- 40 MR. McDONALD: -- after this, by the particular issues question, you
41 mean what I refer to as, motion number 1, not -- not --

1
2 THE COURT: Well I think it's what you call motion number 1 -
3 -
4
5 MR. McDONALD: Yeah. Not --
6
7 THE COURT: -- particular questions application --
8
9 MR. McDONALD: We're not including motion number 2, we're
10 doing --
11
12 THE COURT: No.
13
14 MR. McDONALD: -- motion number 1 on its own. It's -- okay. I've
15 --
16
17 THE COURT: That's right.
18
19 MR. McDONALD: I just wanted to make sure we were all on the
20 same page.
21
22 THE COURT: Part of it, I felt in the course of the submissions,
23 that I was actually being asked to predetermine that question. I didn't want to do that. But
24 it is the application entitled - the one that's filed for the Perpetual Energy defendants -
25 application to resolve particular questions and to stay the plaintiff's application. The
26 remedies sought, parts 1 through 4, (a) through (d) of number 1. That's what I'm referring
27 to.
28
29 MR. de WAAL: I think -- I think that answers my question, My
30 Lord, because I don't believe my friends are going to provide an affidavit in support of
31 that.
32
33 MR. McDONALD: Yeah. We don't -- we think that could be decided
34 on the face.
35
36 THE COURT: Okay. Okay. I know whoever's hearing it will
37 certainly appreciate some written submissions so --
38
39 MR. de WAAL: And -- and just to be --
40
41 THE COURT: -- perhaps --

1
2 MR. de WAAL: -- just to be clear, My Lord, that applies for the
3 application of the -- of -- on behalf of Ms. Rose as well, the same application for both sides.
4

5 THE COURT: It does. Mr. Leidl, are they identical on that
6 application? Differing only on the subsequent application?
7

8 MR. LEIDL: Substantially identical.
9

10 THE COURT: Okay. Then yes. Anything else, counsel? Okay.
11

12 MR. McDONALD: Thank you very much for your -- your time, for
13 staying late, My Lord. I appreciate it.
14

15 THE COURT: And that's my comment to you, madam clerk,
16 thank you.
17

18
19 PROCEEDINGS ADJOURNED SINE DIE

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1 **Certificate of Record**

2

3 I, Karina Salguero, certify that this recording is a record made of the evidence in the
4 proceedings in Court of Queen's Bench, held in courtroom 1702, at Calgary, Alberta, on the
5 30th day of August, 2018, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.

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1 **Certificate of Transcript**

2

3 I, Shari Lynch, certify that

4

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

8

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

11

12

13

14 AL-JO-1001-3848

15 September 3, 2018

16 *Shari Lynch*

17

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Action No.: 1801-10960
E-File Name: CVQ20PRICEWATERHOUSECOOPERS
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
February 14, 2020

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2

3 February 14, 2020

Morning Session

4

5 The Honourable
6 Mr. Justice Nixon

Court of Queen's Bench
of Alberta

7

8 R. de Waal
9 L. Rasmussen
10 P. G. Chiswell

For PricewaterhouseCoopers Inc., LIT
For PricewaterhouseCoopers Inc., LIT
For Perpetual Energy Inc., Perpetual Operating
Trust, and Perpetual Operating Corp.

11

12 S. H. Leidl
13 G. Benediktsson
14 K. O'Brien

For S. Riddell Rose
For S. Riddell Rose
Court Clerk

15

16

17 THE COURT CLERK:

Order in court. All rise.

18

19 THE COURT:

Good morning.

20

21 MR. LEIDL:

Good morning.

22

23 THE COURT:

Please be seated.

24

25 Counsel, at your convenience, I will just simply note that I received four documents, and
26 I've read all documents a couple of times actually, the documents being a brief dated
27 February 4th from Norton Rose; a letter dated February 5th, from Burnet, Duckworth &
28 Palmer; a brief dated September 7th from De Waal Law; and a final brief in the form of a
29 reply dated February 10th from Norton Rose.

30

31 MR. LEIDL:
32 that.

And that's everything. Thank you for confirming

33

34 THE COURT:

Thank you. I will turn it over to you, sir.

35

36 MR. LEIDL:

Thank you, My Lord. For the record, my name is
37 Leidl, initial 'S.' I am here with my colleague, Mr. Benediktsson. Mr. Chiswell is here for
38 the Perpetual defendants, and Mr. de Waal and Mr. Rasmussen for the trustee.

39

40 **Submissions by Mr. Leidl**

41

1 MR. LEITL: We are here simply to speak to the form of order
2 that flows from Your Lordship's reasons. I do not intend to repeat the submissions in our
3 brief or reply, although I will highlight some points and obviously try to answer any
4 questions.

5
6 The form of order that we are proposing, it's at tab 2 of our submissions. And the form of
7 order that Mr. de Waal advocates is attached to his submission.

8
9 At the end of the day, the one substantive difference is whether the release barred all claims
10 against Ms. Rose. And you will hear from Mr. de Waal, I take it, that he says it did not,
11 that your reasons did not find that.

12
13 Now, the reasons are at tab 1. You're obviously intimately familiar with those. If I could
14 just begin by reminding everybody about the conclusions of the Court in respect of the
15 release. And I'm beginning at paragraph 327, Sir. And this is quoted in our submissions as
16 well.

17
18 But after the Court's analysis of the allegations and the evidence, the Court concluded: (as
19 read)

20

21 Given the above facts and analysis, I find that the release provides
22 a complete defence to Ms. Rose --

23

24 So let's stop there. A "complete defence." No qualification: (as read)

25

26 -- in respect of all of the trustee's claims against her.

27

28 No qualification: (as read)

29

30 Significantly, the trustee does not seek to set aside the release. If
31 the release is not set aside, I find that there can be no damages
32 against Ms. Rose and she is shielded from financial exposure.

33

34 The alternative *BIA* claim, as we have defined it in our submission, the section 96 claim
35 against Ms. Rose, seeks a monetary judgment as you know -- or sought. So nothing was
36 accepted. And the reasons say it is a complete defence in respect of all claims, and yet we
37 are here because the trustee says that that's not what it says.

38

39 The only communication before we filed our submissions from counsel for the trustee was
40 when my friend wrote: (as read)

41

1 We do not see anything in the reasons to indicate that Justice
2 Nixon considered or decided that the release also applied to the
3 section 96 claim.
4

5 That -- notwithstanding that the Court said a "complete defence" to all claims.
6

7 And as you have seen in our submissions, I was doubly startled by that submission given
8 that we had, I think, three, if not four, appearances before you with rounds of briefs. And
9 you will recall the answers to the written questions, many of those dealt with the release
10 and oral submissions. And not once did you hear my friends orally and not once did you
11 see them write any suggestion that the alternative *BIA* claim was not released. And to this
12 date, they have not articulated a theory under which it would not have been released.
13

14 By filing the submissions that I've filed before you, Sir, I put it on a 'T' for my friend for
15 him to explain the legal basis on which that claim would survive. And if he read his reply
16 front to back, it's not there.
17

18 So while I'm on that point, Sir, I would like to point out the submissions that we made that
19 are not answered in my friend's reply.
20

21 Now, the first is the one that I will be hammering on. The plain words of the reasons say
22 that it is a complete bar to all claims. You would think that my friend would have to reply
23 to that and explain why it's not. He doesn't.
24

25 We pointed out that from the get-go in this proceeding, Ms. Rose's statement of defence
26 has an entire section saying the release is a complete bar to all claims. Nothing in my
27 friend's reply. In fact, they didn't file a reply to that.
28

29 We pointed out in our submission that throughout the entirety of the proceeding to date
30 that the trustee has never argued that the alternative *BIA* claim was not subject to the
31 release. And he didn't reply to that. Why had they never argued it? And if they've never
32 argued it, why are we here?
33

34 We pointed out, Sir, that by design, the way they crafted the alternative *BIA* claim, the
35 release was not challenged. And they don't say anything about that. They don't dispute that.
36

37 Another point -- and this is just for reference -- in paragraphs 15 through 17 of our
38 submissions is we point out -- and Your Lordship made the same observation in different
39 words -- is that the entire focus of the trustee's theories, claim theories, as against Ms. Rose
40 was on the basis of her role as a director of PEOC. Nothing in my friend's reply about that.
41

1 And one reason that's important, Sir, as you will recall, is that the only mention of the
2 release in the statement of claim and the only mention of the release in my friend's
3 submission, including in the answers to questions, was the allegation, as you recall,
4 that -- in the context of the director claim, they alleged that Ms. Rose caused PEI, the public
5 company, to require 198 to enter the release. And they didn't seek to set the release aside.
6 They wanted that as a ground of damages under the rubric of the director claim. That was
7 all struck.

8
9 And as the reasons note, the trustee proceeded with its claimed theory, proceeded to
10 respond to the motion to strike and motion for summary judgment on the basis that the
11 release was enforceable.

12
13 Now, in my friend's reply, there's a long section dealing with what I call the primary *BIA*
14 claim, the primary *BIA* claim being as against PEOC and POT, to set aside the asset
15 purchase agreement.

16
17 Ms. Rose is not a party to that claim, and that's why I don't spend much time on it. The fact
18 that that claim barely survived the Perpetual defendant's application for summary judgment
19 has no bearing on whether the release bars the alternative *BIA* claim.

20
21 Now, if you see in our submissions at paragraph 24, you can see the entirety of the
22 alternative *BIA* claim, and that's 24(d). Almost a throw-away. The allegation was that PEI,
23 POC, and Rose benefitted from and were privy to the asset transaction.

24
25 So let me briefly unpack that, Sir. That was the claim that was before you on the motion to
26 dismiss and motion for summary judgment. That claim does not seek to set aside the
27 release. It does not seek to set aside the share purchase agreement under which the release
28 was provided.

29
30 And why not? Because as you found in the reasons, Sir, the share purchase agreement and
31 the release were negotiated at arm's length. It would have been impossible to seek to set
32 them aside under section 96, and that's why the trustee didn't do that. As I've mentioned,
33 that aspect of the section 96 claim only seeks money. It doesn't seek any setting aside or
34 anything like that.

35
36 And we've already taken you back to the reasons where you found, among other things,
37 that Ms. Rose can have no financial exposure. Period.

38
39 You will see here an allegation that Ms. Rose benefitted from the asset purchase
40 transaction. Remember, this only looks at the asset purchase transaction in isolation. And
41 you've seen in our submissions where we reminded you about the evidence that was before

1 the Court about, first of all, Mr. Darby's affidavit did not say that Ms. Rose benefitted from
2 the asset purchase transaction. He said: I think she benefitted from the Goodyear
3 restructuring. And the definition of the Goodyear restructuring was the company's internal
4 deliberations before any documents were even executed. And this is all before the Court
5 when we argued the motion for summary judgment.

6
7 When we cross-examined Mr. Darby on the idea of benefit, he said: Well, I think -- I'm
8 assuming that she must have benefitted as a shareholder of PEI. Again, the allegation is
9 benefitting from the asset purchase agreement only. And we took Mr. Darby, in cross-
10 examination, through the share-trading price of PEI and showed him how it had not gone
11 up, and he still didn't accept that fact.

12
13 Ms. Rose, in her affidavit, explained why she had not benefitted from any of this; and she
14 wasn't cross-examined on it. In my friend's reply, if you have that handy, Sir --

15
16 THE COURT: Yup. I do, sir.

17
18 MR. LEITL: -- at paragraph 22 --

19
20 THE COURT: I'm there.

21
22 MR. LEITL: -- it begins with "conspicuously absent."

23
24 THE COURT: M-hm. Yes.

25
26 MR. LEITL: Let me paraphrase the argument, as I understand
27 it. It is, they're saying, uh-huh. Mr. Leidl didn't address the fact that Ms. Rose benefitted
28 from the asset transaction as a shareholder of Perpetual Energy. Mr. Darby didn't say that
29 she had benefitted from the asset transaction. On cross, his evidence was, in a word,
30 destroyed.

31
32 And let's think about, Sir, the legal consequences of the argument here. They're not even
33 offering it. They've just throwing it out as a possible argument. They offer you no authority.
34 Nothing.

35
36 But imagine under section 96, if a shareholder of a public company could be liable for
37 \$217,000,000 simply because one of the public company's subsidiaries had entered into the
38 asset transaction. That is the theory that my friend is gently advocating here, and it is
39 preposterous.

40
41 And if they are advocating that theory, why didn't they sue all the shareholders at PEI? If

1 the trustee has the duty to maximize the estate, why are they laser-focused on Ms. Rose?

2

3 And just for reference, Sir -- I'm not going to read it -- but the summary of all of the
4 evidence about the allegations of the benefit begins at paragraphs 36 and goes through to
5 paragraph 42 of our submission.

6

7 THE COURT: I'm there.

8

9 MR. LEITL: I won't read it.

10

11 The other point, of course, is that on this -- this idea of privity, you will recall that Ms.
12 Rose explained and you found that she was not in control of PEI.

13

14 So if I can just -- while we have it, if you still have my friend's reply open, Sir -- just to
15 walk through a couple of other points that he has made. I'm sorry. I was going to take you
16 to my reply and just paraphrase some points.

17

18 In my friends' response, they argue -- they rely in quite detail on your oral reasons that we
19 got in August, and they say that those are determinative equally with the written. And we
20 simply point out the paragraph in your reasons that say that the written reasons supersede
21 the oral reasons. So that's at paragraph 1 of your reasons.

22

23 In my friends' response, they have an entirely new argument about the release that was
24 never made before the Court, and in any event, falls on its face. They say, in their response,
25 that "claim" was not defined in the shareholder agreement. But it was, and you noted that
26 in your reasons, and we argued that when we were here before you.

27

28 If you recall, there was a carve-out in the release and the definition of claim. And I'm
29 paraphrasing. It basically is saying that it doesn't release anything based on deceit or fraud
30 or criminal conduct. And we said: And, look. And they're not alleging that. And we didn't
31 dispute that. That was all on the table before the Court at the time.

32

33 I've dealt with the ideal of -- the idea of a PEI shareholder benefitting under section 96,
34 which I suggest is a non-starter.

35

36 And, finally, a submission by my friend that I found very surprising, with respect, he
37 essentially asserts that because Ms. Rose filed an appeal in August -- or it might have been
38 in September -- and because we had a conference with the case management office of the
39 Court of Appeal about that, I made a misrepresentation to the Court. That's the argument
40 in my friend's submission.

41

1 When I have told my friend -- I don't remember how many times -- that the only reason
2 that we have -- that Ms. Rose filed a notice of appeal following your oral reasons was that
3 we were being very cautious, noting that the written reasons would likely supersede the
4 oral reasons and we just wanted to keep our powder dry until we got them.
5

6 Now, if the Court accepts that the form of order that we propose is appropriate, there will
7 be no need for an appeal by Ms. Rose. That's the only reason it was done, and it wasn't an
8 admission of anything. We hadn't seen your written reasons when we filed the notice of
9 appeal, and we want to withdraw the appeal if and will do so if you agree with the form of
10 order we are proposing.

11
12 So, in summary, Sir, we've got written reasons that say a complete defence to all claims
13 without a qualification. Our order says the release is a complete defence to all claims. And
14 I look very much forward to hearing my friends explaining why "all" does not mean "all."
15

16 Unless you have any questions ...
17

18 THE COURT: I may have some questions. I would like to hear
19 from your friend first.
20

21 MR. LEITL: Thank you.
22

23 THE COURT: Thank you.
24

25 Counsel, at your convenience.
26

27 MR. DE WAAL: Thank you, My Lord.
28

29 **Submissions by Mr. de Waal**
30

31 MR. DE WAAL: My Lord, we find ourselves in a -- in a strange
32 position where we have to tell you what we think you said when you're obviously in the
33 best possible position to determine what you found because the question today is simply
34 what you have in fact found, not to re-argue the case or refer to analyze the pleadings or
35 anything. Just to see what the result is of your findings in your oral and then subsequently
36 the written decision.
37

38 And the question is whether you found that the release has anything to do with the section
39 96 claim. And if we read -- we say, if we read your oral decision, as well as the written
40 decision, there was no reference to the section 96 claim in the context of the release.
41

1 And my friends keep saying that we never said that it didn't apply. The question is whether
2 they ever argued that the release applied also to the section 96 claim, and the answer to that
3 is no.
4

5 So, My Lord, I'm not going to repeat the arguments. And I've -- and I've -- we've made our
6 written submissions. But if I could just highlight some of the things we say, My Lord, in
7 paragraph 6, as part of the *BIA* claim -- and there is no suggestion of a main *BIA* claim and
8 an alternative or subsidiary claim; there is a *BIA* claim -- as part of that claim, the trustee
9 claims the difference between the value of the consideration received and the value of the
10 consideration given by Sequoia Resources on the basis that Ms. Rose is a privy within the
11 meaning of section 96 because she benefitted from the asset transaction, directly or
12 indirectly, as a beneficial shareholder of PEI. That's the claim.
13

14 And then in your oral reasons, My Lord, you made the point in paragraph 7. I quote that.
15 You made the point that with respect to the *BIA* claim, you focussed only on whether -- on
16 the arm's length issue. Nothing else.
17

18 And then you found, at the top of page 2 of my -- or our submissions, My Lord, just before
19 paragraph 8, I'm just going to refer to the last paragraph there: (as read)
20

21 Finally, I must determine whether I am sufficiently confident in
22 the state of the record to exercise my discretion to summarily
23 dismiss some or all of the trustee's claims in respect of the *BIA*
24 matter.
25

26 And then you conclude in paragraph 9: (as read)
27

28 Given that the sole focus of the *BIA* claim is on the arm's length
29 issue, I cannot find that there is no reasonable claim. That being
30 the case, I will not strike the *BIA* claim.
31

32 If the release -- if you had found -- and, again, I'm telling you what I think you said -- but
33 if you had found that the release applied, the *BIA* claim, in that respect at least, would not
34 have succeeded -- would not have proceeded. But you did not find that.
35

36 THE COURT:

Sorry. Give me that again, sir?

37
38 MR. DE WAAL:

39 If you had found that the release applied also to
40 the section 96 claim, the *BIA* claim, as you did with respect to some of the other claims,
41 then presumably the result would have been the same as it was with respect to the other
claims where you said the release applies and I'm striking -- we're dismissing the director's

1 claim, for example, where the release applied.

2

3 So if you had found -- if we read the reasons, if you had found that the release applied to
4 the section 96 claim, the same result would have followed. However, you said: I didn't
5 consider that.

6

7 THE COURT: The same result? Are you saying that if I had
8 found the release applied to section 96 that I would have dismissed section 96, full stop?

9

10 MR. DE WAAL: Yes, you may. Yes, My Lord.

11

12 THE COURT: Well, I can categorically say to you now that that
13 is not the correct interpretation of what I found. But continue on.

14

15 MR. DE WAAL: Well, I think that answers the question, My Lord.
16 So I'm not ...

17

18 Yeah. And just to be -- to be clear, My Lord, Mr. Rasmussen reminds me I'm talking about
19 the *BIA* claim with respect to Ms. Rose, that aspect of the *BIA* claim, not the *BIA* claim
20 against Perpetual.

21

22 THE COURT: So you are shifting your answer, and that's not a
23 criticism. But I just want to make sure that you're now focused just on section 96 in Ms.
24 Rose when you make that argument.

25

26 MR. DE WAAL: Yes, My Lord. In fact, that was the context in
27 which I made the submission. I said the *BIA* claim against Ms. Rose is pleaded in a
28 particular way. You said you did not consider that. What you considered only was the arm's
29 length argument. And I'm saying that that is confirmed by the fact that when you applied
30 the release or found that the release applied to the other claims, you dismissed those claims.
31 So if you had found that the release also applied to the section 96 claim insofar as it relates
32 to Ms. Rose, if the release applied, you would have dismissed that claim too, that part of
33 the claim. That's the submission.

34

35 THE COURT: If I stated that the release is a complete
36 defence -- and I'll focus also on the word "all" -- does that not address the issue?

37

38 MR. DE WAAL: My Lord, that's for Your Lordship to determine.
39 But on our reading of your reasons, when you said "all claims," you were discussing the
40 director's claims.

41

1 You separated out the different issues. When you dealt with section 96, you dealt with that
2 separately. No reference in my friend's arguments or in your finding to a release.

3
4 When you get to the release issue, you describe -- and I'll get to that in my submissions,
5 My Lord -- but you describe those as relating to her position as a director. Not as a
6 shareholder. Not as a privy.

7
8 And when you say "all claims," it's in the context of discussing all claims arising from her
9 position as a director. That's how we read your reasons, My Lord.

10
11 THE COURT: Continue.

12
13 MR. DE WAAL: My Lord, I'm not -- I'm not going to repeat
14 everything, but paragraph 12, I say -- I quoted: (as read)

15
16 ... not qualifies dismissal of the applications to strike or dismiss
17 the *BIA* claim in any way.

18
19 The Court never referred to the *BIA* claim against Ms. Rose as privy to the transfer in any
20 way. And as I've just said, My Lord, my friends also never argued that. And it's somewhat
21 opportunistic of them to say, but we never said it didn't apply as if there was something to
22 respond to in their submissions.

23
24 Paragraph 15, My Lord, this is now the release issue. In your oral reasons, paragraph 15,
25 you said: (as read)

26
27 The trustee's claims against Ms. Rose are solely in relation to her
28 having acted as a director of POC.

29
30 So that's -- that's the context: (as read)

31
32 I find this to be directly contrary to the expressed terms of the
33 release.

34
35 So when you say "all claims," it's in the context of finding that the trustee's claims against
36 Ms. Rose are solely in relation to her having acted as the director.

37
38 THE COURT: Yeah, well, let's just read that sentence again: (as
39 read)

40
41 The trustee's claims against Ms. Rose are solely in relation to her

1 having acted as a director of POC.

2

3 MR. DE WAAL: Yes, My Lord.

4

5 THE COURT: So the next sentence goes on to state that that's
6 directly contrary to the release. I'm just focused on your claim against her in that context.

7

8 MR. DE WAAL: Yes, but the trustee's claim are not limited to her
9 claim -- to her acting -- to her having acted as director. The section 96 claim has nothing
10 to do with that. So when you say all claims are covered by the release, it's in this context
11 where you find that the claims that you're talking about are the claims relating to her
12 position as director.

13

14 THE COURT: Yeah. Move on to your next argument, please.

15

16 MR. DE WAAL: My Lord, my -- my friend seems to
17 misunderstand my argument about the definition of claims, which is in paragraph 18. The
18 release says -- and that's quoted in paragraph 18: (as read)

19

20 ... all claims as defined in the purchase and sale agreement.

21

22 And the point we make is that there is no definition of claims in the purchase and sale
23 agreement. That definition we find in the share purchase agreement, not in the purchase
24 and sale agreement.

25

26 Paragraph 19, just a quote, My Lord: (as read)

27

28 The trustee's claims against Ms. Rose are solely in relation to her
29 having acted as the director of POC. I find this to be directly
30 contrary ...

31

32 Again, repeated in the written -- in your written reasons, My Lord. The point -- again, I
33 think my friend misunderstood the argument -- I am saying that if it was as clear as Mr.
34 Leidl proposes, that you had dismissed all claims against Ms. Rose, there would have been
35 no need for him to file a notice of appeal in the first place.

36

37 THE COURT: But isn't that prudent simply to file a notice of
38 appeal, awaiting the written reasons?

39

40 MR. DE WAAL: My Lord, and then when the written reasons are
41 issued, he doesn't withdraw the notice of appeal.

1
2 THE COURT: Well, that's a timing issue. Do you not agree that
3 that's a prudent move?
4

5 MR. DE WAAL: My Lord, what I am saying, and that's all I'm
6 saying, is that that is inconsistent -- he's not misrepresenting anything to the Court of
7 Appeal. Their right of e-mail, to send an e-mail to -- to the case management office of the
8 Court of Appeal, and they say it's not completely clear from the transcript whether Justice
9 Nixon dismissed all of these claims ...
10

11 And when he writes to me a day or two later, or when he makes these submissions to Your
12 Lordship, he's absolutely certain that that's what the reasons say. And all we make of
13 that -- we don't say there's a misrepresentation to the Court of Appeal -- we say that that is
14 consistent with our understanding, that it is not clear from your reasons, written or oral,
15 that you had in fact dismissed the section 96 claim against Ms. Rose. That's -- that's the
16 submission.
17

18 My Lord, I've -- I've made the submissions in our written submissions. So unless you have
19 other questions ...
20

21 As I've said, this is essentially for Your Lordship to determine what Your Lordship found.
22 So it's not really for me to say what you should have found or for my friend to say what
23 you should have found or what -- what was argued. It's simply an analysis of what Your
24 Lordship had already found and that you should sign one order or the other.
25

26 Thank you, My Lord.
27

28 THE COURT: Thank you, sir.
29

30 Reply?
31

32 MR. LEITL: Briefly, My Lord.
33

34 **Submissions by Mr. Leidl (Reply)**
35

36 MR. LEITL: My friend focuses on your correct comments in
37 your reasons about the claims, all claims of the trustee, being based on Ms. Rose having
38 been the director of POC because, of course, the alternative *BIA* claim was also based on
39 Ms. Rose having been a director of POC, and they couldn't get at her otherwise except we
40 heard today for the first time now that they say, ah, well, maybe she could also be liable as
41 a shareholder of a public company, something that was never alleged in relation to the

1 alternative *BIA* claim.

2

3 So, of course, every claim before the Court against Ms. Rose was premised on the fact that
4 she had been a director of POC. So there is no gotcha moment there.

5

6 And when my friend says that they didn't say anything because we didn't argue it, we
7 argued vehemently, Sir, that the release affected all claims over and over again. And the
8 only response you heard from my friend was no, no, we're just suing in the director claim
9 for her having entered the release. We want damages. So that -- that's where we engaged.

10

11 And if there was a legal theory under which the release did not affect the section 96 claim,
12 you would have heard it from my friend, and you didn't. So unless you have any questions,
13 those are my submissions, Sir.

14

15 THE COURT: Thank you.

16

17 MR. DE WAAL: My Lord, could I correct -- correct a statement.

18

19 THE COURT: I think Mr. Chiswell wants to speak. Perhaps let
20 him speak first, and then Mr. Leidl will have the last word, just to be clear.

21

22 MR. CHISWELL: Thank you, Sir.

23

24 THE COURT: It's his application. Thank you.

25

26 MR. CHISWELL: I just want to state for the record that the
27 Perpetual defendants agree with the submissions of Ms. Rose's counsel. It seems to us that
28 they defend it on the basis that the release barred all claims, and that's in paragraph 29 of
29 their statement of defence.

30

31 The application to summarily dismiss by Ms. Rose, they filed the amended amended
32 application at paragraph 3(b). It says the exact same wording that they have in the statement
33 of defence, that it applies to all claims. And we interpreted your decision the same way,
34 that it applied to all claims. Thank you.

35

36 THE COURT: Thank you.

37

38 Mr. de Waal?

39

40 **Submissions by Mr. de Waal (Reply)**

41

1 MR. DE WAAL: My Lord, Mr. Leitzl says to you that the claims
2 against Ms. Rose are limited to her position as a director. In fact, the statement of
3 claim -- and this is in our arguments -- the statement of claim, paragraph 16.3 and 16.3.4,
4 expressly say that Ms. Rose caused POC to enter into an asset transaction with POT in
5 circumstances from which she would benefit personally from the asset transaction,
6 including as a beneficial shareholder in PEI.

7

8 In fact, I think Mr. Leitzl referred to that in his initial comments. So for him to now say that
9 it has nothing to do with shareholders, the fact that she was a shareholder, it's related only
10 to her position as a director, is not correct, My Lord.

11

12 MR. LEITL: Sir, what my friend has quoted you was the
13 director claim which was struck.

14

15 THE COURT: I certainly understand where you're coming
16 from, Mr. de Waal, but how do you reconcile your submissions with both paragraph 326
17 and 330? And 330 is just a one-sentence position: (as read)

18

19 Given the above facts announced, I find the release is a complete
20 bar to the claims against Ms. Rose.

21

22 MR. DE WAAL: Well, as I've said, when you say "the claims
23 against Ms. Rose," you had earlier explained what you were referring to. And those claims
24 relate only to her position as a director. You made that clear when you started that section
25 of your decision.

26

27 You did not say that these claims include anything else. You understood those claims, that
28 you referred to as "all claims," to relate only to her position as a director. And I've got
29 the -- had the reference in my -- in our submissions, My Lord. It's in the oral reasons. It's
30 paragraph 15 of my -- our written submissions, My Lord. And then, again -- I think there
31 should be a reference to the written ...

32

33 But -- but that, as you said, you said that these are solely in relation -- paragraph 328: (as
34 read)

35

36 The trustee's claims against Ms. Rose are solely in relation to her
37 having acted as a director of POC. I find this to be directly contrary

38 ...

39

40 So when you're talking about "all claims," read fairly, that's what you referred to.

41

1 THE COURT: Is there anything else any from party?

2

3 MR. LEITL: No, My Lord.

4

5 THE COURT: I'm just pausing for a minute to review the
6 submissions.

7

8 **Decision**

9

10 THE COURT: Thank you for your submissions, and thank you
11 for your written arguments.

12

13 This concerns the oral judgment of myself, Justice Blair Nixon. Insofar as it's an oral
14 judgment, I retain the right to review the transcript. I always reserve the right to issue a
15 written decision, although it's highly unlikely in this case.

16

17 In oral judgments, it is not my practice to cite in any detail legislation, juris prudence, or
18 the *Rules of Court*, notwithstanding that I have considered them.

19

20 This hearing this morning is to address the wording that is to be used in the order that arises
21 from the decision of this court in this case. The decision to which I refer is cited as
22 *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2020 ABQB 6.

23

24 As mentioned earlier, I have had the benefit of reviewing four documents concerning the
25 proposed orders. Those documents are as follows: first, the brief dated February 4th, 2020,
26 from Norton Rose Fulbright; second, a letter dated February 5th, 2020, from Burnet,
27 Duckworth & Palmer. That letter simply stated that Perpetual Energy defendants agree
28 with the submissions of Ms. Rose in the brief dated February 4th, 2020. Third, a brief dated
29 February 7th, 2020, from De Waal Law; and fourth, a reply brief dated February 10th,
30 2020, from Norton Rose Fulbright.

31

32 Based on my review of those four documents and the submissions that I have heard this
33 morning, I find that the order as proposed by Norton Rose Fulbright to be in keeping with
34 the decision that I issued in this case.

35

36 In support of this finding, I note for the record that the reasoning in the brief dated February
37 4th, 2020, from Norton Rose Fulbright and the reply brief dated February 10th, 2020, from
38 Norton Rose Fulbright reflects my view of the case. I adopt the submissions in those two
39 documents for the purposes of this hearing.

40

41 That concludes my judgment. However, if the parties cannot agree on costs concerning this

1 hearing today, I will hear submissions on the matter at a time that is mutually convenient
2 for all of the parties.

3

4 I also note that in the submissions of Norton Rose Fulbright, there was a request for the
5 Court to schedule a hearing to determine costs. I assume that is a reference to the hearings
6 leading up to the January 2020 decision. I will certainly make myself available. I only note
7 that in a couple weeks, I am starting another long trial which will, I believe, consume March
8 and into April. And I just give you that as a frame of reference.

9

10 Does counsel have a clean copy of the order they wish me to sign?

11

12 MR. LEITL: When we sent the brief to you, we slipped in a
13 loose copy. I don't have another copy.

14

15 THE COURT: I have that here. Then my only --

16

17 MR. LEITL: That's it, if you're prepared to sign that.

18

19 THE COURT: I am. My only hesitation is I have checkmarks. I
20 was going through the two orders --

21

22 MR. LEITL: Oh, (INDISCERNIBLE).

23

24 THE COURT: Mr. de Waal has a clean copy.

25

26 MR. LEITL: Thank you, Sir.

27

28 THE COURT: Thank you, sir.

29

30 Based on the decision that I just gave and my earlier review of this document, I am
31 executing it as signed.

32

33 Is there any other business that we need to attend to today?

34

35 MR. LEITL: Yes. Mr. Chiswell. Before him -- if I may.

36

37 THE COURT: Certainly.

38

39 MR. LEITL: We will be seeking costs of today, in addition to
40 costs of the hearings below. We put my friends on notice that all of the defendants will be
41 seeking the highest possible level of costs against PwC personally, and so we will have to

1 file some materials in that regard and it might take ...

2

3 Can we speak to your assistant of any possible dates?

4

5 THE COURT: Certainly. I was going to mention that. Reach out
6 to Verna Aimery (phonetic) -- I think you've got her contact numbers --

7

8 MR. LEITL: Yes.

9

10 THE COURT: -- and email -- at your convenience and pick a
11 time that suits us all.

12

13 MR. LEITL: Thank you, My Lord.

14

15 And there is one other matter that Mr. Chiswell wanted --

16

17 THE COURT: Okay.

18

19 MR. LEITL: -- to address briefly, I think.

20

21 THE COURT: Thank you.

22

23 MR. CHISWELL: Thank you, Sir.

24

25 The Perpetual defendants want to bring two more applications in this matter, and I provided
26 draft copies to my friends yesterday. I told them that I would just be seeking scheduling
27 today.

28

29 So one of them is going to be a security for costs application, and we submit it could
30 probably be heard at the same time as the general costs application for efficiency sake,
31 perhaps at the end of your trial.

32

33 As well, Sir, we have a second application to strike and for summary dismissal of two other
34 elements of the *BIA* claim as a result of your decision. And -- and -- and I note that you're
35 available on the commercial list in June 23rd to 26th, and I submit that that might be a good
36 time to schedule it.

37

38 THE COURT: Yes. Reach out to my assistant as early as
39 possible because I know I've already got some hearings for that week.

40

41 MR. CHISWELL: Okay.

1
2 THE COURT: But certainly we will accommodate that.
3
4 MR. CHISWELL: I will do that today.
5
6 THE COURT: Okay. Subject to the availability of your friends.
7
8 And I'm assuming, just to be formal, you referred to your friends, Mr. de Waal, having a
9 copy. I'm assuming Mr. Leidl also has a copy.
10
11 MR. CHISWELL: Everybody has a draft copy. When I get dates --
12
13 THE COURT: Right.
14
15 MR. CHISWELL: -- we'll file it.
16
17 THE COURT: Thank you. I just want to make sure that I didn't
18 misunderstand you on that.
19
20 MR. CHISWELL: Not at all, Sir.
21
22 THE COURT: Thank you, sir.
23
24 MR. CHISWELL: Thank you.
25
26 MR. LEITL: I think that's it, My Lord. Thank you.
27
28 THE COURT: Anything else?
29
30 MR. LEITL: No.
31
32 THE COURT: Sir?
33
34 MR. DE WAAL: No.
35
36 THE COURT: Okay.
37
38 Madam clerk, if we could adjourn. Thank you.
39
40 MR. LEITL: Thank you, My Lord.
41

1 THE COURT CLERK:

Order in court.

2

3

4 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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3 I, Katherine O'Brien, certify that this recording is a record made of the evidence in the
4 proceedings in the Court of Queen's Bench court held in courtroom 1601 at Calgary,
5 Alberta, on the 14th day of February, 2020, and that I was the court official in charge of
6 the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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3 I, Bonny Bowes, certify that

4

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

8

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

11

12 Bonny Bowes, Transcriber

13 Order Number: AL-J0-1004-9916

14 Dated: March 3, 2020

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CLERK OF THE COURT
FILED

FEB 04 2020

JUDICIAL CENTRE
OF CALGARYCOURT FILE
NUMBER

1801-10960

COURT

COURT OF QUEEN'S BENCH
OF ALBERTAJUDICIAL
CENTRE

CALGARY

PLAINTIFFS

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

DEFENDANTS

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

DOCUMENT

**SUBMISSIONS OF
SUSAN RIDDELL ROSE*****Settling Form of Order***ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION
OF PARTY
FILING THIS
DOCUMENTNorton Rose Fulbright Canada LLP
3700, 400 Third Ave SW
Calgary, Alberta T2P 4H2Phone: 403.267.8140
Fax: 403.264.5973**Steven H. Leitt**
Gunnar Benediktsson

Counsel for Susan Riddell Rose

File No. 1001040549

PART 1 - INTRODUCTION

1. The Defendant Susan Riddell Rose (**Rose**) respectfully tenders these submissions as to an appropriate form of Order arising from the Reasons for Judgment of the Court filed January 13, 2020 (the **Reasons**).¹
2. The form of Order proposed by Rose, and supported by the other Defendants, is attached at **Tab 2**.
3. This form of Order follows communications with counsel for the Trustee. The Defendants have done their best to accommodate the Trustee's drafting points; however, one substantive issue remains unresolved. It concerns the scope of the Court's ruling regarding the Resignation and Mutual Release Agreement executed on October 1, 2016 (the **Release**).
4. Rose's position is that the Court found the Release to be a complete bar to the claims made by the Trustee; thus, all claims against her were dismissed on that basis. The Trustee evidently disagrees, and takes the position that (in this case at least), "all" does not mean "all." To explain this anomalous position, counsel for the Trustee offers only this: "We do not see anything in the Reasons to indicate that Justice Nixon considered or decided that the release also applied to the s. 96 claim."
5. To the extent the Trustee comes up with additional arguments, Rose will address them by way of reply. These submissions address Rose's position that the Court's findings regarding the Release resulted in the dismissal of all claims against her, including the alternative BIA claim made against her.
6. In short:
 - (a) the Reasons state:

Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee's claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be no damages against Ms. Rose and she is shielded from financial exposure.²

¹ A copy of the Reasons is attached at **Tab 1**. Rule 9.3 states: If there is a dispute about the contents of a judgment or order, the disputants may apply to the Court to resolve the dispute.

² Reasons, para. 327 (emphasis added).

- (b) Rose expressly defended on the basis that the Release was a complete bar to all claims against her;
- (c) the Trustee did not plead and never argued that its carefully constructed alternative s. 96 claim against Rose was not barred by the Release; and
- (d) instead, and by design, the Trustee advanced a narrow challenge to the Release based on unfounded allegations of fact and an untenable interpretation of the ABCA, all of which the Court expressly rejected in the Reasons.

PART 2 - REASONS ARE CLEAR THAT THE RELEASE IS A BAR TO ALL CLAIMS AGAINST ROSE

7. The Court framed the issues into five categories. The fourth issue, defined as the **Release Issue**, was expressly defined as follows:

Is the release a complete bar to the claims against Ms. Rose ...?³

8. The Court did not “carve out” the Alternative BIA Claim (defined below) because the Trustee did not plead a claim amenable to being carved out, and never submitted that it should be carved out.
9. In relation to arguments actually made by the Trustee, the Court expressly found that: “The decision in *Redwater* nullifies the Trustee’s assertions concerning the Release.”⁴
The Court found that:

[287] The Share Purchase Agreement was negotiated between sophisticated parties. Each of those parties was represented by experience[d] legal counsel.

[288] The Trustee does not challenge or seek to set aside the Share Purchase Agreement. Given that context, I find the terms and conditions in the Share Purchase Agreement continue to stand.

[289] The Share Purchase Agreement stipulated the closing deliverables for Perpetual Energy, in its capacity as the vendor, including the following for the benefit of PEOC:

8.1(a)(xviii) resignations of all directors and officers of [PEOC] and a release from such directors and officers pursuant to which they release all Claims against [PEOC]; ...

³ Reasons, para. 5.

⁴ Reasons, para. 285.

[290] The Share Purchase Agreement also stipulated the closing deliverables of 198Co, in its capacity as the purchaser. These deliverables included the following reciprocal release in favour of Ms. Rose:

8.2(a)(xiii) releases signed by the new signing authorities of [PEOC] as appointed by the Purchaser releasing the directors and officers of [PEOC] from any Claims related to such directors and officers acting as a director or officer of [PEOC]; ...

[291] The term "Claim" is defined broadly in the Share Purchase Agreement as "any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing."

[292] As provided for in the Share Purchase Agreement, the new directors of PEOC signed the Release on behalf of PEOC. Those new PEOC directors did so under the new ownership of 198Co.

[293] PEOC and Perpetual Energy released Ms. Rose from any claims relating to her having acted as a director and officer of PEOC. The Release provides as follows:

Corporate Release

3. PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement), which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.

[294] As is evident from the above text in clause 3 of the Release, it includes an exclusion that provides that the Release does not apply if the Claim is based on the fraud, criminal conduct or deceit. None of the claims or particulars in the Trustee SOC allege fraud, criminal conduct or deceitful conduct in respect of Ms. Rose.

[295] The Release further provides:

Understanding & General

4. The parties acknowledge and declare that they have been provided with sufficient time and opportunity to consider all factors related to the execution of this Mutual Release and acknowledge a full awareness of its consequences and its voluntary execution. The parties acknowledge having received independent legal advice regarding the execution of this Mutual Release, or have voluntarily chosen not to receive such advice.

...

6. This Mutual Release shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.

10. The Court noted that the Release was an agreement entered into by the predecessor of Sequoia.⁵ No-one disputes that it was Sequoia's shoes that the Trustee stepped into upon its appointment.
11. The Court expressly rejected the Trustee's pleading that Rose had caused PEOC to require 198Co to agree to the Release.⁶
12. The Court expressly rejected the Trustee's pleading that the Release violated s. 122(3) of the ABCA.⁷
13. The Court expressly found that the Release provides a complete defence to Rose in respect of all of the Trustee's claims against her:

[327] Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee's claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be no damages against Ms. Rose and she is shielded from financial exposure. [Emphasis added.]

14. Further:

[330] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose. [Emphasis added.]⁸

PART 3 - NATURE OF TRUSTEE CLAIMS

A. Primary claims against Rose founded on ABCA

15. The Trustee is an officer of the Court charged with taking reasonable steps to protect the interests of the estate of Sequoia Resources Corp. (**Sequoia**). When asked to explain, in this context, the Trustee's decision to advance a claim against Rose, Mr. Darby said this:
 - Q. So what facts were magical in terms of finding a lawsuit against Ms. Rose?
 - A. Specifically her execution of her fiduciary duties with regard to stakeholders of PEOC.⁹ [Emphasis added.]

⁵ Reasons, para. 287.

⁶ Reasons, paras. 309-315.

⁷ Reasons, paras. 316-326.

⁸ The Court repeated this conclusion at para. 378.

⁹ Darby cross-examination, p. 69, l. 22-25.

16. The Trustee's primary claims against Rose are thus founded on alleged breaches of director duties provided for under the Alberta *Business Corporations Act* (**ABCA**). The Director Claim, Oppression Claim and Public Policy Claim, as against Rose, were all premised on her duties as a director of Perpetual Energy Operation Corp. (**PEOC**), the wholly-owned subsidiary of the public company Perpetual Energy Inc. (**PEI**).
17. Notably, the Trustee's only challenge to the Release was in connection with the Director Claim, which sought damages for breach of director duties on the premise that the Release was enforceable.

B. BIA Claims

18. The Trustee's primary claim under the BIA (the **Primary BIA Claim**) was against PEOC and Perpetual Operating Trust (**POT**): to set aside the Purchase and Sale Agreement dated October 1, 2016 (the **Asset Purchase Agreement**). Rose was not a party to, and could not have been, a party to the Primary BIA Claim as she was not a party to the Asset Purchase Agreement.
19. The Trustee's challenge of the Asset Purchase Agreement under the Primary BIA Claim was carefully conceived. In order to succeed under s. 96, the Trustee had to prove that the impugned transaction was not entered at arm's length. The Trustee thus elected not to seek to challenge the Share Purchase Agreement or the Aggregate Transaction (as defined in the Reasons) as part of the Primary BIA Claim. The Trustee could not challenge the Release pursuant to s. 96 of the BIA because the Release was a product of the Share Purchase Agreement.
20. In the alternative to the Primary BIA Claim, the Trustee claimed damages from PEI, POT and Rose pursuant to the "privity clause" of s. 96 of the BIA (the **Alternative BIA Claim**). Because the Alternative BIA Claim was predicated on the same thesis underlying the Primary BIA Claim, the Trustee could not challenge the Release as part of the Alternative BIA Claim.

C. Trustee's Statement of Claim

21. The specific claims advanced by the Trustee are those it expressly pleaded. The Trustee never sought to amend its claim, even after the Defendants moved to strike.
22. The Trustee's claims against Rose comprised the following:

- (a) The Alternative BIA Claim;
 - (b) the Oppression Claim¹⁰;
 - (c) the Public Policy Claim¹¹; and
 - (d) the Director Claim.¹²
23. The Trustee concedes that the Reasons struck and/or dismissed the Oppression Claim, the Public Policy Claim and the Director Claim. Again, the only pleaded challenge of the Release was made in the context of the Director Claim.
24. The BIA claims were pleaded at paragraphs 21-23 of the Statement of Claim, which alleged that:
- (a) the Asset Purchase Agreement constituted a transfer at undervalue within the meaning of s. 96 of the BIA¹³;
 - (b) the Asset Purchase Agreement was entered into while PEOC was insolvent or, alternatively, the Asset Purchase Agreement “rendered” PEOC insolvent¹⁴;
 - (c) PEOC, PEI, POC, POT and Rose were “not dealing at arm’s length with each other within the meaning of the BIA”;¹⁵and
 - (d) PEI, POC and Rose “benefitted from and were privy to the Asset Transaction within the meaning of s. 96 of the BIA.”¹⁶
25. The underscored language comprised the entirety of the pleading of the Alternative BIA Claim against Rose.
26. Subsection 96 of the BIA provides:

Transfer at undervalue

96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to

¹⁰ As defined at para. 5 of the Reasons.

¹¹ As defined at para. 5 of the Reasons.

¹² As defined at para. 5 of the Reasons.

¹³ Statement of Claim, para. 21.

¹⁴ Statement of Claim, para. 22.

¹⁵ Statement of Claim, para 22.2.4.

¹⁶ Statement of Claim, para 22.2.5.

the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

[...]

(b) the party was not dealing at arm's length with the debtor and

[...]

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it ...

[...]

Meaning of person who is privy

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person. [Emphasis added.]

27. In the context of the Alternative BIA Claim, the Trustee did not allege that Rose had received a benefit by reason of the Asset Purchase Agreement or that she had caused a benefit to be received by another person.¹⁷ In contrast, in the context of the Director Claim made under the ABCA, the Trustee alleged that Rose benefited from the Asset Purchase Agreement "including as a beneficial shareholder in PEI".¹⁸ Evidence was led in respect of that allegation which amply demonstrated that Rose received no benefit of any kind.
28. The only challenge to the Release was made in the context of the Director Claim. The Statement of Claim alleged that Rose breached her ABCA duties to PEOC by:
- 16.5 causing PEI to require 198 to agree that, as a condition of closing of the [Share Purchase Agreement], 198 would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to s. 122(3) of the ABCA.
29. On that basis, the Trustee sought damages against Rose.¹⁹ Put another way, the Trustee said: "I agree that the Release exists; I agree that it says what it says; but I want damages under the ABCA for Rose having agreed to it."

¹⁷ Statement of Claim, para. 22.2.5.

¹⁸ Statement of Claim, para. 16.3.4.

¹⁹ Statement of Claim, p. 8, para. 3 (under "Remedy sought").

D. Rose Statement of Defence

30. Rose's position regarding the Release was made very clear in her Statement of Defence. Rose's Statement of Defence pleaded that the Release was a complete bar to all claims against her:

Resignation and Mutual Release Agreement is a *complete bar* to the claims against Rose

24. As required by the Share Purchase Agreement, Rose resigned as an officer and director of PEOC effective October 1, 2016.
25. Rose's resignation was documented in a written Resignation and Mutual Release Agreement [the Release] executed on October 1, 2016 by Rose and PEOC (as then owned and controlled by 198).
26. The [Release] was negotiated at arm's length and did not involve the transfer of any PEOC assets. *PwC has no standing to ask the Court to review the [Release] pursuant to s. 96 of the BIA.*
27. Clause 3 of the [Release] provides:
- PEI and PEOC do hereby release and forever discharge Susan Riddell Rose from all Claims (as defined in the [Share Purchase Agreement]) which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.
28. "Claim" is defined broadly in the Share Purchase Agreement. *The claim against Rose is a Claim.*
29. By virtue of the [Release], *PwC is barred and estopped from making the claims against Rose in this proceeding.* The claim should be dismissed on this ground.
- [Underscoring in original; italics added for emphasis.]

31. The Trustee elected not to file a Reply.

E. The Evidence

32. The position of the Trustee was that it had tendered all relevant evidence in support of its claims; that there were no issues raised by its Statement of Claim that warranted a trial.²⁰ The Trustee had put its best foot forward both in terms of its allegations and its evidence.
33. Mr. Darby's affidavit acknowledged the Release:

28. Rose resigned as a director of PEOC on October 1, 2016. I attach a copy of a "Resignation & Mutual Release", as Exhibit H. It confirms, in the preamble, that Rose acted as a director and

²⁰ Reasons, paras. 355, 371.

officer of PEOC “at the request” of PEI, that the Share PSA required her to resign and that PEI requested her to resign. It also provides that PEI and PEOC agree to release Rose with respect to “having acted, at the request of PEI, as a director and officer of PEOC.” Rose was replaced as director of PEOC by Wentao Yang and Hao Wang. [Emphasis added.]

34. Mr. Darby did not suggest that the Release had any limitations in scope.²¹
35. In order to prove the Alternative BIA Claim, the Trustee had to prove that Rose was “privy” to the Asset Transaction: specifically, that by reason of the Asset Transfer Agreement, Rose benefitted or caused another person to benefit.
36. Dealing with the latter first, the only evidence adduced by the Trustee which remotely touched upon causation was the bare argument in Mr. Darby’s affidavit that Rose was “controlling mind” of PEOC.²² In contrast, the unchallenged evidence of Rose was that the Asset Purchase Agreement was an embedded component of the Aggregate Transaction; and, further:

I was not the “directing mind” of PEOC

80. PEOC was a special purpose wholly owned subsidiary of Perpetual. I took my responsibilities as a director and officer of PEOC seriously, considered its best interests and the interests of its stakeholders, and exercised my business judgment to the best of my ability, but the ultimate decision to enter the [Aggregate Transaction] was that of Perpetual and its board of directors.
81. Immediately upon the closing of the [Aggregate Transaction], PEOC (quickly to become Sequoia) was controlled exclusively by 198 and the owners of 198.
37. The Court ultimately found as follows:
- [313] ... PEOC was a special purpose entity corporation that was a wholly owned subsidiary of [PEI]. That being the case, legal control flowed from the parent corporation, which was [PEI], to the subsidiary, which was PEOC.
38. Nor did the Trustee tender any evidence that Rose had received a “benefit” “by reason of” the Asset Purchase Agreement in the context of the Alternative BIA Claim. The only “evidence” tendered by the Trustee regarding a benefit to Rose was the entirely bare statement in Mr. Darby’s affidavit that: “Rose personally benefitted from the Goodyear

²¹ See, for instance, paragraph 51 of the Darby Affidavit.

²² Affidavit of Paul Darby sworn August 2, 2018, para. 8.

Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of PEOC.”²³

39. Two things are noteworthy in this regard. First, the affidavit of Mr. Darby defined “Goodyear Restructuring” as the August 2016 proposal of PEI which, after PEI’s sales process and negotiations with 198Co, ultimately led to the Aggregate Transaction. Mr. Darby did not even suggest that Rose had received a benefit by reason of the Asset Purchase Agreement.
40. Second, on cross-examination, it was established that Mr. Darby had simply assumed that Rose had benefitted from the Goodyear Restructuring. He had not asked Rose whether she benefitted; he had never considered the matter at all.²⁴
41. In contrast, Rose’s evidence was as follows:

I received no “personal benefit” from the Transaction

77. Mr. Darby speculates that I received a “personal benefit” from the Transaction. He does not say what kind of benefit or how much it might be worth. He never asked me about any such benefit in the course of our discussions and correspondence.
78. I did not receive a personal benefit from the Transaction. As an officer and director of PEOC, I received no salary and no other form of compensation. I received no compensation from Perpetual or any other party other than my normal salary for my work on the Transaction. All of the shares of PEOC were owned by Perpetual. My work on behalf of PEOC was in my capacity as the director and officer nominated by Perpetual.
79. I am a shareholder of Perpetual, a publicly traded company. There was no material impact on the Perpetual share price following the Transaction as described in Exhibit EE. I have not sold any shares of Perpetual that I owned at the time of closing.
42. Counsel for the Trustee elected not to challenge Rose’s evidence on cross-examination.

F. Submissions of Rose regarding the Release

43. The Brief filed by Rose on November 1, 2018 set out extensive submissions in support of the position that the Release was a complete bar to all claims made against her.²⁵
44. It was noted that the Trustee’s only, albeit very indirect, challenge of the Release was the unfounded allegation that Rose breached her fiduciary duty to PEOC in “causing PEI

²³ Darby Affidavit, para. 49.

²⁴ Darby cross-exam. p. 68, l. 13 – p. 75, l.5; p. 70, l. 9- p. 72, l. 27; p. 95, l. 16 – p. 98, l. 2

²⁵ Rose Brief filed November 1, 2018, pp. 10-19.

to require 198 to agree" to the Release in breach of s. 122(3) of the ABCA.²⁶ There was no other challenge to the Release to which Rose could respond.

G. Submissions of the Trustee regarding the Release

45. The Trustee's Brief acknowledged that one of the issues raised by the Defendants' applications was whether the Trustee's claims against Rose should be dismissed, including on the basis that they were 'barred and estopped' from making claims against Rose by virtue of the Release.²⁷
46. At pages 43 through 46 of its Brief, the Trustee made extensive submissions in support of the argument that "the Release has no effect on the Trustee's claims against Rose." The arguments had two premises:
 - (a) the Trustee had pleaded that Rose had breached her fiduciary duty in "causing PEI" to "obtain from 198" the execution of the Release; and
 - (b) s. 122(3) of the ABCA precluded an agreement to provide such a Release.
47. Notably, the Trustee did not make any argument that the Alternative BIA Claim against Rose could or should survive Rose's application to dismiss on the basis of the Release.

H. Hearing of November 8, 2018

48. At the hearing of November 8, 2018, counsel for Rose made extensive submissions in support of the position that the Release was a bar to all claims against her. Counsel for Rose addressed the arguments expressly made in the Trustee's Brief.²⁸
49. Regarding the Release, counsel for the Trustee made two oral submissions:
 - (a) responding to the complaint that the Trustee had never raised any concerns about the Release when it interviewed Rose;²⁹ and
 - (b) submitting that the Court should consider s. 122(3) of the ABCA and related Ontario jurisprudence on director duties.³⁰

²⁶ Rose Brief, para. 53; Statement of Claim, paras. 15 and 16.

²⁷ Trustee Brief, para. 19 (emphasis added).

²⁸ November 8, 2018 hearing transcript, pp. 38-45.

²⁹ November 8, 2019 hearing transcript, p. 76, l. 18-22.

50. Counsel for the Trustee made no additional submissions regarding the Release. Counsel for the Trustee did not submit that the Alternative BIA Claim against Rose could or should survive the Release.

I. Questions of the Court

51. On December 11, 2018, the Court issued a series of questions to counsel.
52. Notably, counsel for the Trustee consistently framed the Trustee's position in relation to the Release as was pleaded in the Statement of Claim, namely that the Trustee's only challenge to the Release was in relation to the Director Claim.

J. Hearing of December 17, 2018

53. On December 17, 2018, counsel appeared before the Court to tender their written submissions and to make oral submissions in response to the Court's questions.
54. Once again, the Trustee's counsel made it clear that the Trustee's claim against Rose – including the basis for its claim for damages in relation to the Release – was premised entirely on the ABCA (the "Act" as quoted below):

As for the release itself, My Lord, we do not take issue with the fact that releases can be granted. However, the wording of the Act is clear. If you grant a release with respect to a breach of the director's duties under the Act, that has no effect, and so you can release the director from all kinds of things, including negligence, but you cannot release the director from liability under the Act, from her duties or from – subsequently from liability. Presumably in terms of settlement, thinking practically, the parties can agree that there was no breach. I imagine that could be – I'm not a solicitor, but I imagine that that could be something that you could agree to. But insofar as there's a release that's pursuant – or that's contrary to the direct language of the Act, that has no effect.

So we do not take the position, as I think Mr. Leith suggested, that no releases can ever work and the whole world should know that. That's not what we say. We're effectively just saying look at the Act, and as long as you stay within the boundaries of that exclusion or outside the boundaries of that exclusion, releases work. [Emphasis added.]³¹

K. Decision of the Court of Appeal re Security for Costs

55. Pending release of the Reasons, the parties filed Notices of Appeal. Rose filed a Notice of Appeal simply to protect her rights pending confirmation that the Reasons completely

³⁰ November 9, 2018 hearing transcript, p. 1, l. 31 – p. 3, l. 9.

³¹ December 17, 2018 hearing transcript, p. 85, l. 2-15.

barred all of the Trustee's claims against her. That confirmation is now made clear in the Reasons.

56. The Defendants filed applications for security for costs of the Trustee's appeals. On January 29, 2020, the Honourable Madam Justice B.L. Veldhuis released the Court's decision.³²
57. In reaching Her Ladyship's decision, she reviewed the Reasons. She observed that:

[7] In the [Reasons], the chambers judge struck the respondent's oppression claim on two grounds. First, the respondent was not a "proper person" that would accord it standing as a "complainant" entitled to make this claim under the ABCA. Second, given the impact of [Redwater] the respondent has no cause of action in respect of oppression because the Supreme Court has nullified the claim. The chambers judge also struck and summarily dismissed the allegations that Ms. Rose breached her fiduciary duty and duty of care. In any event, the chambers judge found that Ms. Rose's release would act as a complete bar to the claims against her. The respondent appeals the chamber judge's decisions on these claims. The applicants seek security for costs for this appeal. [Emphasis added.]

PART 4 - CONCLUSION

58. The Trustee intentionally pleaded the Alternative BIA Claim so as not face the unanswerable defences arising from a challenge to the Share Purchase Agreement, of which the Release was a product. As a result, there was no challenge to the Release under the BIA.
59. Rather, the Trustee consciously elected to frame its challenge of the Release under a factual theory regarding Rose's relationship with PEI and pursuant to s. 122 of the ABCA.
60. It was in the context of those claims, as carefully devised the Trustee, and in the context of the evidence adduced by the parties, that the Court ruled, without qualification or exception, that the Release was a bar to all of the Trustee's claims against Rose.
61. Accordingly, Rose respectfully submits that the draft form of Order attached at **Tab 2** should be approved by the Court.

³² Tab 3.

PART 5 - PROCEDURE FOR SETTLING FORM OF ORDER

62. On January 29, 2020, counsel for Rose wrote to counsel for the Trustee to propose a timeline for the parties to exchange submissions regarding the form of Order. Counsel for the Trustee did not respond regarding the timeline. Thereafter, counsel for Rose advised that these submissions would be filed on February 4, 2020 and that we would ask the Court to implement the following remaining timeline:
- (a) Trustee responding submissions to be delivered by Friday, February 7, 2020; and
 - (b) Rose reply submissions, if any, to be delivered by Tuesday, February 11, 2020.
63. Given the extraordinary claims made against Rose and the fact of the pending appeals, it is submitted that the form of Order should be resolved urgently.
64. In the circumstances, Rose submits that if the Trustee does not provide responding submissions by February 7, 2020, the Court should proceed to approve the form of Order proposed by Rose.

PART 6 - COSTS

65. The Defendants have informed the Trustee that they intend to seek costs on a full indemnity basis as against PricewaterhouseCoopers Inc. personally.
66. The Defendants request that the Court schedule a hearing to determine costs. Their materials and submissions will be filed thereafter in due course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF FEBRUARY 2020.



Norton Rose Fulbright Canada LLP

Steven Leitl
Gunnar Benediktsson
Counsel for Susan Riddell Rose

1



Court of Queen’s Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABQB 6

Date:
Docket: 1801 10960
Registry: 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

**Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon**

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I. Introduction

[1] A summary of my decision in this case was given orally on Thursday, August 15, 2019 from the bench. I advised the parties that I would be issuing written reasons. The detailed reasons and conclusions are provided below. If there are any discrepancies between the brief oral reasons provided and this written decision, this written decision takes precedence.

[2] The Applicant, PriceWaterhouseCoopers Inc, is the trustee in bankruptcy (the “Trustee” or “PWC”) of the Estate of Sequoia Resources Corp (“Sequoia Resources”). Sequoia Resources was formerly known as Perpetual Energy Operating Corp (“PEOC”).

[3] The Trustee commenced an action by way of a Statement of Claim (the “Trustee SOC”). The Trustee seeks an order declaring a particular sale of assets (the “Asset Transaction”) void as against the Trustee. Alternatively, the Trustee seeks judgment for an amount not less than \$217,570,800 based on the application of section 96(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[4] The Defendants to the Trustee SOC are Perpetual Energy Inc (“Perpetual Energy”), Perpetual Operating Trust (“POT”) and Perpetual Operating Corp (“POC”) (collectively, the “Perpetual Energy Defendants”) and Ms. Susan Riddell Rose (“Ms. Rose”).

II. Issues

[5] I have framed the issues as follows.

- A. Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA* (the "**BIA Claim**")?
- B. Is the Trustee a "complainant" that is entitled to bring an oppression claim under section 242 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 [*ABCA*] (the "**Oppression Claim**")?
- C. Should the claim by the Trustee for relief on the grounds of public policy, statutory illegality, and equitable rescission be struck (the "**Public Policy Claim**")?
- D. Is the release a complete bar to the claims against Ms. Rose (the "**Release Issue**")?
- E. Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction ("**Director Claim**")?

III. Facts

[6] Perpetual Energy is a public company. It holds all of the shares in PEOC, and is the sole beneficiary of the POT.

[7] Ms. Rose was a director and shareholder of Perpetual Energy. Prior to October 1, 2016, she was also the sole director of PEOC.

[8] PEOC was the trustee of POT until October 1, 2016. Prior to that date, PEOC had no assets or operations, and existed solely to act as the trustee for POT.

[9] POT held a beneficial interest in various oil and gas properties and related assets (the "**Trust Assets**"). A subset of the Trust Assets included a large number of gas wells as well as certain other properties in Alberta identified for disposition (collectively, the "**Goodyear Assets**").

[10] In its capacity as trustee for POT, PEOC held the legal interests and licenses for the Goodyear Assets.

[11] During the first six months of 2016, Perpetual Energy decided to sell the Goodyear Assets. It solicited over ten potential third party buyers in respect of the Goodyear Assets.

[12] Confidentiality agreements were entered into with four parties concerning the Goodyear Assets. Those confidentiality agreements permitted the third parties to conduct due diligence, and review the information in the data room established by Perpetual Energy.

[13] Perpetual Energy provided multiple presentations to prospective purchasers. These presentations included: (i) the analysis of recently implemented operating models; (ii) a system of abandonment and reclamation activities and results; and (iii) workover, recompletion and drilling opportunities with respect to the Goodyear Assets.

[14] Perpetual Energy and Kailas Capital Corp (“**Kailas Capital**”) entered into a letter of intent dated July 7, 2016 (the “**Kailas LOI**”). The Kailas LOI was non-binding, and was issued by Kailas Capital to Perpetual Energy. Kailas Capital incorporated 1986114 Alberta Inc (“**198Co**”) to effect its business strategy.

[15] The Kailas LOI informed Perpetual Energy that Kailas Capital had participated in numerous successful transactions in Canada over the past 12 months, and that it managed producing energy assets in Canada.

[16] The Kailas LOI also stated that Kailas Capital desired to minimize commodity price risk. Consistent with that expressed desire, the Kailas LOI stipulated that concurrent with the signing of the “**Definitive Agreement**”, Perpetual Energy would enter into commodity price risk management contract to secure price protection (the “**Gas Marketing Contract**”).

[17] The sale of the Goodyear Assets from Perpetual Energy to Kailas Capital was effected through the following steps (collectively, the “**Aggregate Transaction**”):

- (a) POT sold its beneficial interest in the Goodyear Assets to PEOC in the Asset Transaction. This step was effected through an asset purchase agreement dated October 1, 2016 (the “**Asset Purchase Agreement**”). The Asset Purchase Agreement caused the legal and beneficial interest in the Goodyear Assets to be combined in PEOC.
- (b) Except for a 1% interest in the legal title to four East Edson wells (the “**Retained Assets**”), PEOC transferred legal title to all the remaining POT assets to POC. This transaction was effected because POC was the new trustee for POT.
- (c) Perpetual Energy sold all of the shares in PEOC to 198Co (the “**Share Transaction**”). The Share Transaction was effected through a share purchase and sale agreement dated September 26, 2016 (the “**Share Purchase Agreement**”).
- (d) Rose resigned as the sole director of PEOC.
- (e) PEOC changed its name to “**Sequoia Resources Corp**” (“**Sequoia Resources**”).
- (f) POC requested the transfer of the Retained Assets.

[18] The Aggregate Transaction was completed on October 1, 2016. In the course of the Aggregate Transaction, the “**Resignation & Mutual Release**” was negotiated and signed by the parties (the “**Release**”).

[19] During the 17 months following the Aggregate Transaction, Sequoia Resources (formerly PEOC) operated the Goodyear Assets. In a public letter to its stakeholders issued in March 2018, Sequoia Resources reported that during the first 11 months of operations after October 1, 2016, the corporation steadily increase its production and reduced its overall environmental liabilities. In that same letter, Sequoia Resources also reported that it ranked fifth in the Province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017.

[20] On March 23, 2018, PWC was appointed the Trustee in Bankruptcy of PEOC, being the date on which the corporation assigned itself into bankruptcy.

IV. The Pleadings

[21] The Trustee filed the Trustee SOC on August 2, 2018. On that same date, the Trustee filed an application for relief (the “**Trustee Application**”) and the affidavit of Mr. Paul J. Darby (the “**Darby Affidavit**”). The relief sought in the Trustee Application paralleled the relief sought in the Trustee SOC.

[22] The claims in the Trustee SOC are grounded on four approaches: (i) An alleged transfer at undervalue, which the Trustee asserts violated section 96 of the *BIA*. This is the *BIA* Claim. (ii) The alleged application of the oppression provisions of the *ABCA*. This is the Oppression Claim. (iii) An alleged violation of public policy, statutory illegality and equitable grounds. This is the Public Policy Claim. (iv) An alleged breach by Ms. Rose of her duties as the sole director of PEOC at the time of the Asset Transaction. This is a combination of the Release Issue and the Director Claim described above (collectively, the “**Breach Claim**”).

[23] The Defendants filed two separate Statements of Defence. One Statement of Defence was filed by the Perpetual Energy Defendants. The other Statement of Defence was filed by Ms. Rose.

[24] The Defendants also filed four applications (collectively, the “**Defendants’ Applications**”), two of which were “**Stay Applications**”. The other two were “**Summary Dismissal and Strike Applications**” (collectively, the “**Summary Dismissal Applications**”).

V. Remedies Sought by the Defendants

[25] The parties agreed that the Summary Dismissal Applications filed by the Defendants would be heard before the Trustee Application. Concerning the Stay Applications filed by the Defendants, they were to be addressed only if any of the Trustee’s claims survived the Summary Dismissal Applications.

[26] The Defendants seek remedies under two different provisions of the *Alberta Rules of Court*, AR 124/2010 (the “**Rule**” or “**Rules**”). In numerical sequence, those provisions are as follows.

- a. Pursuant to Rule 3.68, the Defendants seek to strike various claims made by the Trustee.
- b. Pursuant to Rule 7.3, the Defendants seek to summarily dismiss various claims made by the Trustee.

[27] I first review the law concerning the striking of pleadings, including the limits of Rule 3.68(3), followed by a review of the current state of the law concerning summary dismissals. This is necessary because of the recent judicial developments emanating from *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 [*Weir-Jones*].

A. Striking Pleadings

1. Background

[28] Striking claims that disclose no reasonable prospect of success is a valuable housekeeping measure. Striking claims in appropriate circumstances is essential to effective and fair litigation. It unclutters proceedings and weeds out hopeless claims. It also provides claims that have some chance of success a better opportunity to go on to trial on a timely basis: *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 19 and 20 [*Knight*].

[29] Striking claims is also consistent with the underlying philosophy of the Rules. That philosophy is to identify the real issues, and to facilitate the quickest means of resolving a claim at the least expense: *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 7 [*Grenon*].

[30] In summary, striking claims promotes litigation efficiency, reduces time and cost, and contributes to justice by permitting all stakeholders to focus on the serious claims: *Knight* at para 20. Notwithstanding the attractiveness of Rule 3.68, it is applied sparingly. It is often misused to strike out claims that are only probably bad, but not certainly bad: William A Stevenson & Jean E Côté, *Alberta Civil Procedure Handbook*, 2019 ed by Jean E Côté, F F Slatter & Vivian Stevenson (Edmonton: Juriliber, 2019) vol 1 [*Stevenson & Côté 2019*] at 3-123.

2. The Law

[31] The Rules provide that a claim or part of a claim may be struck if it discloses no reasonable claim: r 3.68. The relevant provisions of the Rules read as follows:

Court Options to Deal With Significant Deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;
- (b) that a commencement document or pleading be amended or set aside;
- (c) that judgment or an order be entered;
- (d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following: ...

- (b) a commencement document or pleading discloses no reasonable claim or defence to a claim; ...

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

[32] When considering an application under Rule 3.68(2)(b), “the Court must accept the allegations of fact as true except to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof”: *Grenon* at para 6. In other words, the decision must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application; and

(ii) the applicable statutory and common law: *HOOPP Realty Inc v Guarantee Co of North America*, 2015 ABCA 336 [*HOOPP Realty*] at para 25, Wakeling JA, concurring.

[33] In the course of assessing the application of Rule 3.68(3), the following judicial guidelines should be considered:

- a. A Chambers Judge may consider “the content of any document referred to in a statement of claim because it is part of the statement of claim”: *HOOPP Realty* at footnote 5, Wakeling JA, concurring.
- b. A Chambers Judge “must ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff’s prospects of success are extremely low”: *HOOPP Realty* at footnote 8, Wakeling JA, concurring.
- c. A Chambers Judge may consider “the underlying litigation context of a claim, even one which does not give rise to a novel cause of action”: *HOOPP Realty* at para 19. On this particular point, the majority in *HOOPP Realty* suggest that the Court may go “outside the contents of the Amended Statement of Claim”, albeit short of evidence. The debate in *HOOPP Realty* was whether it was open to the chambers judge to consider the fact that the principal debtor in another case had been released from its obligations to HOOPP, as had been confirmed in 2014 ABCA 20. At footnote 4, Wakeling JA is more categorical, and states that “[n]o other facts may be introduced by way of affidavits or judicial notice”.
- d. A Chambers Judge may consider a range of factors when considering the test for striking pleadings: *O’Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140 at para 16. The factors that can be considered include the clarity of the factual pleadings and the case law.

[34] The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action is not absolute. Judicial comments in this regard are as follows:

- a. The Supreme Court of Canada has stated that the rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true: *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 27. The Supreme Court in that case went on to state that “[t]he very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven”: *Operation Dismantle* at para 27.
- b. The Court of Queen’s Bench of Alberta has stated that types of “[a]llegations that are not assumed to be true include those based purely on assumptions and speculation and those that are incapable of proof”: *PR Construction Ltd v Colony Management Inc*, 2017 ABQB 600 at para 29.

- c. In the context of considering Rule 9-5(1) of the B.C. Supreme Court Civil Rules (which parallels Rule 3.68), the Supreme Court in that province stated that when determining "... whether it is plain and obvious the statement of claim does not disclose a reasonable cause of action ... , facts are considered true; assumptions and speculations are not": *McGregor v Holyrood Manor*, 2014 BCSC 679 at para 10; see also *Honborg v Private Career Training Institutions Agency*, 2015 BCSC 695 at para 32; *Dempsey v Envision Credit Union*, 2006 BCSC 750 at para 7; and *McDaniel v McDaniel*, 2009 BCCA 53 at para 22.
- d. Courts have expressed the need for caution on this point. For example, the B.C. Court of Appeal has stated that great caution must be taken in relying on *Operation Dismantle* as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind: *Young v Borzoni*, 2007 BCCA 16 at para 30. Notwithstanding that caution, the B.C. Court of Appeal went on to state that its consideration of the authorities led it "... to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases": *Borzoni* at para 30. It drew this inference "...from the statement of Estey J in *Operation Dismantle* that the 'rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven'": *Borzoni* at para 30.
- e. This entitlement to look behind the allegations was also endorsed in a 1985 BC Supreme Court decision, where the following comment was made – "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure": *Rogers v Bank of Montreal* (1985), 64 BCLR 63 (SC) at 192.
- f. The Court of Queen's Bench of Alberta has also stated that an exception exists where the facts pleaded are absurd, highly implausible or are considered bald allegations: *Arabi v Alberta*, 2014 ABQB 295 at paras 72-75.

[35] Another instructive comment is from Master Schlosser. In his view, *HOOPP Realty* confirms that there is no simple bright line for the material that can be used in support of an application to strike under Rule 3.68(2)(b): *McDonald & Bychkowski Ltd v Loughheed*, 2015 ABQB 792 at para 15. Materials are to be considered on a case-by-case basis. After considering the matter, Master Schlosser determined that the pleadings from another action (the *Bhasin* pleadings) fall into the category of acceptable materials permitted by *HOOPP Realty* because the subject pleadings were not in the nature of evidence: *McDonald* at para 15.

[36] In summary, the judicial guidelines indicate that it is appropriate to consider the circumstances, litigation history and allegations in a particular case, and to subject assumptions and speculations to skeptical analysis: *Borzoni* at para 31. In contrast to facts, assumptions and speculations are not considered true. That said, seldom will a party seek to strike a pleading based on a fatal flaw in the pleading pursuant to Rule 3.68; rather, an application for summary judgment may proceed instead. However, if there is an abuse of process or no cause of action, Rule 3.68 may apply and is often used.

B. Summary Judgment

1. Background

[37] Summary judgment applications are a valid means to adjudicate and resolve legal disputes: *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] at para 36. The Supreme Court of Canada has directed that summary judgment motions be used more robustly by the courts because they are a less expensive, more expeditious way to determine actions: *Hryniak* at paras 4 and 67.

[38] The Alberta Court of Appeal has further directed that Courts in this province may summarily dismiss a case where there is no genuine issue requiring a trial. In particular, no trial is required where a judge is able to reach a fair and just determination on the merits of a motion for summary dismissal: *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 at para 13. This will be the case when the process:

- a. allows the judge to make the necessary findings of fact;
- b. allows the judge to apply the law to the facts; and
- c. is a proportionate, more expeditious and less expensive means to achieve a just result.

(see *Hryniak* at para 49)

2. The Law

[39] Summary dismissal applications are permitted under Rule 7.3. That Rule reads as follows:

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- a) there is no defence to a claim or part of it;
- b) there is no merit to a claim or part of it;
- c) the only real issue is the amount to be awarded.

[40] For purposes of this case, the relevant provision is Rule 7.3(1)(b). For the Defendants to be successful under that Rule, they need to establish that there is no merit to the particular claim or part of it.

[41] While the persuasive burden is initially on the applicant, once that burden is satisfied the persuasive burden shifts to the respondent: *Wood Buffalo Housing & Development Corp v Flett*, 2014 ABQB 537 at para 33.

[42] As a matter of process, parties to a summary dismissal application are expected to put their “best foot forward”. That being the case, gaps in the record will not necessarily prevent summary disposition: *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at para 12.

[43] In recent years, the Alberta Court of Appeal had applied two different tests concerning the level of proof necessary to succeed on a summary dismissal application. That Court recently addressed this rift and clearly set out the applicable test in *Weir-Jones v Purolator Courier*,

2019 ABCA 49 [*Weir-Jones*]. The Alberta Court of Appeal also outlined how Rule 7.3(1)(b) was to be applied to determine whether there is no merit to a claim or part of it.

[44] In addressing the application of Rule 7.3(1)(b), the Court of Appeal emphasized that a determination under Rule 7.3(1)(b) is not a result of a summary trial. It is a matter of summary judgment. In that regard, a summary judgment process is not to be construed as being on the summary trial process continuum: *Weir-Jones* at para 19. To underscore the point, the Alberta Court of Appeal stated that summary judgment “is a way of resolving disputes *without* a trial; a summary trial *is* a trial”: *Weir-Jones* at para 18 (emphasis in original). Witnesses may give oral evidence at a summary trial; an application proceeds on affidavit evidence and transcripts of any cross examinations. In the course of its commentary, the Court of Appeal at para 21 reiterated that the three-part test in *Hryniak* set out above is the correct analytical approach for when summary judgment may be appropriate: see *Hryniak* at para 49.

[45] With respect to assessing the facts when applying the *Hryniak* test, the Alberta Court of Appeal directed that a judge can make findings of fact if the record permits that to be done, when viewed from an overall perspective: *Weir-Jones* at para 38. Further, that Court indicated that a judge may draw inferences as necessary, and need not restrict themselves only to cases where the facts are not in dispute.

[46] In connection with that judicial guideline, a plaintiff cannot resist summary dismissal merely by raising a “doubt”: *Stefanyk* at para 16. That said, the Alberta Court of Appeal provided caution on a couple of fronts. First, it stated that for a matter to be appropriate for summary judgment, there ought not to be a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. Second, the presiding judge must consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily: *Weir-Jones* at para 34.

[47] Summary judgment also may be granted where, “even if the facts asserted by the resisting party were true, they would not support that party’s claim”: *Weir-Jones* at para 38.

[48] In terms of the standard of proof, the moving party must begin by proving the factual basis of the application on the balance of probabilities: *Weir-Jones* at paras 30 and 33. Once that has occurred, the presiding judge must be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial: *Weir-Jones* at para 30. In short:

[t]he moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden...: *Weir-Jones* at para 35.

[49] In this regard, it is important to note that summary judgment cannot be resisted merely by speculating as to what may arise at trial: *Weir-Jones* at paras 37 and 39.

[50] Summary judgment also may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: *Weir-Jones* at para 21. In general, the

sufficiency of the record will depend on the nature of the issues, the source and continuity of the evidence, and other relevant considerations: *Weir-Jones* at para 36.

[51] In any event, the presiding judge retains the discretion to send a matter to trial if that is necessary to achieve a just result. However, doing so should not be used as a pretext to avoid resolving the dispute when possible: *Weir-Jones* at para 21.

[52] Notwithstanding the above comments, a trial may be necessary in the following circumstances.

- a. Where there is a dispute on material facts, or one depending on issues of credibility: *Weir-Jones* at para 35.
- b. Where there is a realistic prospect that a trial will create a better record: *Weir-Jones* at para 39.
- c. Where the factual issues are sufficiently complicated that a trial is appropriate: *Weir-Jones* at para 45.

[53] The question is whether a trial is required as a matter of fairness. In addressing that question, the judge must recognize that there is “no right to take an unmeritorious claim to trial”: *Weir-Jones* at paras 42 and 46. Where the defendant can show that a claim does not have merit, it should not have to suffer a trial: *Weir-Jones* at para 43.

[54] In *Weir-Jones*, the Court of Appeal summarized the application of the principles as follows at paragraph 47:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level, the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

VI. Analysis

A. *BIA* Claim – Was the Asset Transaction an arm’s length transfer for purposes of section 96(1) of the *BIA*?

1. Incremental Facts and Context

[55] Kailas Capital was incorporated in Alberta. The voting shares of that corporation are owned 50% by Mr. Hao Wang and 50% by Mr. Wentao Yang. Those two individuals are the only directors of the corporation. I infer from the evidence before me that each of Mr. Wang and Mr. Yang are at arm’s length with all members of the Perpetual Energy group of entities and Ms. Rose.

[56] Kailas Capital initiated an offer to purchase shares of PEOC. That offer was made in the Kailas LOI. That letter stipulated that PEOC was to hold the legal and beneficial interest in the Goodyear Assets.

[57] Separate teams and their respective counsel represented each of the Perpetual Energy group and the Kailas Capital group in the negotiations concerning the Aggregate Transaction (as a whole) and the Asset Purchase Agreement (on its own). (I will refer to these negotiation teams as, the “Vendor Team” and the “Purchaser Team”, respectively.)

[58] The Aggregate Transaction involved multiple steps, all of which were structured in sequence. That sequence occurred on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[59] Concerning the negotiation of the Asset Transaction, the Trustee agreed that Kailas Capital, 198Co, Mr. Wang and Mr. Yang (collectively, the “Kailas Group”) had an “interest” in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised “influence” in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

[60] Perpetual Energy Defendants framed their response to the *BIA* Claim as only involving the question of whether the parties were dealing at arm’s length¹. In particular, the Perpetual Energy Defendants were careful to assert that they were not challenging the “value” issue in respect of their opposition to the *BIA* Claim, apparently on the basis that it was irrelevant to the arm’s length issue.

2. The Law

a. Statutory Framework - The *BIA*

[61] The two relevant statutory provisions in respect of the *BIA* Claim are section 4 and 96 of the *BIA*. The relevant portions of those sections are outlined below.

¹See paragraph 4(a) of the Application for Summary Dismissal and to Strike filed by Perpetual Energy, POT and POC on October 19, 2018. See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which is categoric in the use of the term “only”.

[62] Section 4 of the *BIA* defines “related persons”, and addresses whether such persons are dealing at arm’s length. It reads, in part, as follows.

4 (1) In this section, ...

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are “related persons” if they are ...

(c) two entities

(i) both controlled by the same person or group of persons, ...

Relationships

(3) 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;

...

Question of fact

(4) 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.

Presumptions

(5) 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 the absence of evidence to the contrary*, deemed not to deal with each other at arm’s length.

[Emphasis added.]

[63] Section 96 of the *BIA* addresses “Transfer at undervalue”. It reads, in part, as follows.

96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, ... the trustee—or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor—if

(a) *the party was dealing at arm’s length with the debtor and*

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

...

(b) *the party was not dealing at arm’s length with the debtor and*

- ...
- (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
 - (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it...

[Emphasis added.]

[64] The “arm’s length” issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Section 96 of the *BIA* is concerned with transfers that are effected at undervalue.

[65] If a transfer was between arm’s length parties and was effected within one year of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(a) of the *BIA*. If a transfer was between non-arm’s length parties and was effected within five years of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(b) of the *BIA*.

[66] Concerning this arm’s length issue, section 4 of the *BIA* outlines the rules as to who is a related party. Generally, persons who are related to each other are deemed not to deal with each other at arm’s length.

[67] Section 4(5) of the *BIA* regarding presumptions was amended a few years ago to make it a rebuttable presumption. Because of its recency, this presumption has not been extensively considered in the context of the *BIA*.

[68] A review of the amendments to section 4(5) of the *BIA* is relevant to the analysis that will be required to address the arm’s length question in this case. Section 4(5) of the *BIA* was amended to make it clear that the rules in the statute that otherwise deem persons to not be dealing with each other at arm’s length can be rebutted in limited circumstances. Section 4(5) of the *BIA* now provides that for the purposes of establishing whether persons are dealing at arm’s length in a transfer at undervalue, persons who are related to each other are, *in the absence of evidence to the contrary*, deemed not to deal with each other at arm’s length.

[69] As a result of the inclusion of the phrase “in the absence of evidence to the contrary” in section 4(5) of the *BIA*, the general presumption that related persons are not dealing with each other at arm’s length may be rebutted. This rebuttable presumption applies to two particular scenarios. One of those scenarios concerns an alleged transfer at undervalue pursuant to section 96(1)(b) of the *BIA*. That legislative change was introduced into section 4(5) of the *BIA* to better ensure that legitimate agreements were not inadvertently captured by the avoidance transaction provisions of the *BIA*. The second scenario, which does not apply here, relates to section 95(1)(b) regarding a payment or obligation allegedly made in favour of a creditor who is not dealing at arm’s length with the insolvent person.

[70] The example used in the legislative commentary that introduced the amended section 4(5) of the *BIA* was an agreement in the family law context. The commentary states that the

rebuttable presumption was added to section 4(5) of the *BIA* to ensure that legitimate family law agreements were not inadvertently captured by the avoidance transaction provisions in the *BIA*.

[71] I infer that the example of the agreement in the family law context was used in the legislative commentary because in divorce proceedings the parties bargain keenly, notwithstanding that the *BIA* might otherwise deem those individuals to be related. While the legislative commentary to Bill C-12 used “legitimate family law agreements” as an example, the wording in the amended provisions is not restricted to family circumstances. It is of general application.

b. The Jurisprudence

[72] The Alberta Court of Appeal considered the meaning of the phrase “arm’s length” in the *BIA: Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd*, 2013 ABCA 293 [*Piikani Energy*] at paras 20-23, 26 and 29; see also *Juhasz (Trustee of) v Codeiro*, 2015 ONSC 1781 at paras 38-44. In connection with a review of section 4 of the *BIA*, the Alberta Court of Appeal observed that the phrase “arm’s length” is not defined in the *BIA: Piikani Energy* at para 20.

[73] In circumstances such as this, the jurisprudence under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (“*ITA*”) provides appropriate principles for determining whether two parties deal at arm’s length: *Piikani Energy* at para 21. As a starting point, the definitions of “related persons” and “arm’s length” are either identical or similar as between the *ITA* and the *BIA: Piikani Energy* at para 21. That said, it should be noted that the *ITA* does not contain a provision that parallels the rebuttable presumption provision inherent in section 4(5) of the *BIA*. Notwithstanding that difference, the jurisprudence that has considered the *ITA* provides instructive guidance for purposes of the *BIA*.

[74] The Alberta Court of Appeal has endorsed judicial comments that in choosing to incorporate the term “control” into the *BIA*, Parliament must have intended to adopt the meaning it had in the *ITA* insofar it used almost identical terminology in the *BIA*: see *Duro Lam Ltd v Last*, 1971 2 OR 202, (SCJ) at 385. Our Court of Appeal has applied similar logic to the phrase “arm’s length”: *Piikani Energy* at para 23.

[75] In the course of its analysis, the Court of Appeal in *Piikani Energy* at paras 28-29 considered *Canada v McLarty*, 2008 SCC 26 [*McLarty*]. In *McLarty*, the Supreme Court of Canada discussed the phrase “not dealing at arm’s length” within the meaning of the *ITA*.

[76] The Court of Appeal in *Piiknai* held that the factors the Supreme Court considered in interpreting arm’s length under the *ITA* “provide helpful guidance and apply in the *BIA* context to determine whether, as a question of fact, two parties deal with each other at arm’s length...”: *Piikani* at paras 29-30. I turn to outline those factors, to the extent they may be relevant in this case.

[77] In *McLarty*, Rothstein J commented as follows, at para 43:

43 It has long been established that when parties are not dealing at arm’s length, there is no assurance that the transaction “will reflect ordinary commercial

dealing between parties acting in their separate interests” (*Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at p. 1152). ...

[78] Later in the same decision, Rothstein, J continued, at paras 61-62:

61 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.

62 The Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 “Meaning of Arm’s Length” (June 8, 2004) sets out an approach to determine whether the parties are dealing at arm’s length. Each case will depend on its own facts. However, there are some useful criteria that have been developed and accepted by the courts: see for example *Peter Cundill & Associates Ltd. v. R.*, [1991] 1 C.T.C. 197 (Fed. T.D.), aff’d [1991] 2 C.T.C. 221 (Fed. C.A.). The Bulletin provides:

22. ... By providing general criteria to determine whether there is an arm’s length relationship between unrelated persons for a given transaction, it must be recognized that all-encompassing guidelines to cover every situation cannot be supplied. Each particular transaction or series of transactions must be examined on its own merits. The following paragraphs set forth the CRA’s general guidelines with some specific comments about certain relationships.

23. The following criteria have generally been used by the courts in determining whether parties to a transaction are not dealing at “arm’s length”:

- was there a common mind which directs the bargaining for both parties to a transaction;
- were the parties to a transaction acting in concert without separate interests; and
- was there “de facto” control.

[79] While the Supreme Court of Canada acknowledged that the parties in *McLarty* were not related, the analysis of that Court is still instructive because of the consideration that the Supreme Court gave to the arm’s length issue in that case. The Supreme Court stated that because the parties were not related, the issue as to whether they were dealing at arm’s length was a question of fact: *McLarty* at para 45. That judicial comment is instructive for purposes of the Asset Transaction because of the need to consider the possible application of the rebuttable presumption in section 4(5) of the *BIA*.

[80] In subsequent cases dealing with either the *BIA* or *ITA*, the above analysis concerning what constitutes “arm’s length” was been adopted: see *Juhasz; National Telecommunications v Stalt*, 2018 ONSC 1101; and *Montor Business Corp v Goldfinger*, 2016 ONCA 406.

3. Application of the Law to the Facts

[81] Concerning the *BIA* Claim, the primary objective of the Defendants is to seek summary dismissal. In considering the application of summary dismissal to that claim, I am required to assess whether the Defendants have established that the record makes it possible to resolve the respective disputes on a summary basis.

[82] I must also assess whether the Defendants have demonstrated on the balance of probabilities that, on the facts as proven, there is no merit to the *BIA* Claim. If the Defendants discharge this burden, I must assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the *BIA* Claim. This latter assessment will be based on the nature of the issues, and their merits. Lastly, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the *BIA* Claim: *Geophysical Service Incorporated v Falkland Oil and Gas Limited*, 2019 ABQB 162 at para 40.

[83] The first step in respect of the application of the law to the facts is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. If so, I will address that step in detail. If not, the second step is to determine whether the *BIA* Claim should be struck. If not, then the *BIA* Claim needs to proceed to a regular trial.

[84] Before I address the first step in the analysis, I acknowledge that the non-arm's length issue in respect of the *BIA* Claim arises because Kailas Capital wanted the Goodyear Assets bundled into PEOC. As such, the Asset Transaction was implemented to address the request of the Kailas Group, in its capacity as purchaser. That request was stated in the Kailas LOI.

[85] The Trustee asserts that the Asset Transaction should be viewed in isolation from the other components of the Transaction, and that the parties were not dealing at arm's length. The Trustee does not assert that the Share Transaction was not at arm's length.

[86] The Asset Transaction is an issue in this case because the Trustee SOC alleges that the underlying disposition of property involved circumstances where the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC. The PWC commencement document goes on to assert that the Asset Transaction was entered into between PEOC and POT in circumstances where PEOC, Perpetual Energy, POC, POT and Ms. Rose were not dealing at arm's length with each other within the meaning of the *BIA*.

a. Can the *BIA* Claim be determined on a summary judgment basis?

[87] Given the above context, I turn to consider the first step, which is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. In considering this claim, my sole focus is on the arm's length issue, and not on value.

[88] The reason that I am not considering value is because my focus is dictated by the pleadings, and the relevant provision is clause 4(a) of the Summary Dismissal Application filed by Perpetual Energy. That pleading focuses the challenge of the *BIA* Claim on the arm's length

issue.² Indeed, it would be an error of law for me to consider the value issue since that would be outside the scope of this Application: *Online Constructors Ltd v Speers Constructions Inc*, 2020 ABCA 132 at para 15; see also *Stevenson & Côté 2019* at page 13-23.

[89] This focus on the “arm’s length issue” (and not on “value”) was also emphasized by the Perpetual Energy Defendants during the hearings. This focus away from the value issue was evident in the submissions of Counsel for Perpetual Energy when he asserted:

- a. that *PriceWaterhouseCoopers v Legge*, 2011 NBQB 255 was not good authority. The *Legge* decision states that because the disputed transaction in that case was not at fair market value, it was not at arm’s length;
- b. that focusing on the “consideration” underlying the transaction to answer the “arm’s length” question was wrong;
- c. that the current “evidence” before me concerning value was “highly unreliable”; and
- d. that the “arm’s length” issue could be determined without regard to the consideration (value) exchanged on the deal.

[90] This narrow focus on the “arm’s length” issue made sense at the time that the Perpetual Energy Defendants drafted the Summary Dismissal Application in respect of the *BIA* Claim because they wanted to terminate the *BIA* Claim without getting into the valuation issue. The Perpetual Energy Defendants could have a number of reasons for wanting to avoid the valuation issue, including the fact that if valuation needed to be addressed, *viva voce* evidence likely would be required. If *viva voce* evidence was required, that would preclude a summary dismissal of the *BIA* Claim.

[91] The critical issue at this stage is to determine the nature of the relationship between the key players involved in the Aggregate Transaction. During the negotiation leading up to that transaction, the Vendor Team and the Purchaser Team represented the Perpetual Energy group and the Kailas Group, respectively, in the Aggregate Transaction.

[92] The Aggregate Transaction involved multiple components, all of which were structured in sequence. Although the Asset Purchase Agreement was signed on September 26, 2016, the closing sequence was effected on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[93] Concerning the negotiation of the Asset Transaction, the Trustee agreed that the Kailas Group had an “interest” in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised “influence” in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

² See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which states that “[t]he first threshold issue addresses only the question of whether the parties were dealing at arm’s length” (underlining added). The first threshold issue is referenced in that Brief as the *BIA* claim.

[94] The threshold issue in respect of the *BIA* Claim in the context of the Summary Dismissal Application concerns the involvement of the Purchaser Team in respect of the Asset Transaction, in general, and the degree of influence that the Purchaser Team had over PEOC, in particular.

[95] As noted above, the involvement of the Purchaser Team in respect of the Asset Transaction, generally, and the degree of influence that the Purchaser Team had over PEOC, in particular, must be determined. If the Perpetual Energy Defendants provide sufficient evidence to allow the Court to make the necessary findings on the balance of probabilities, then the rebuttable presumption in section 4(5) of the *BIA* must be considered by the Court in the context of the evidence before it.

[96] In considering the evidence before me, I acknowledge the particulars about the transaction that the Perpetual Energy Defendants emphasized. Those particulars include the emails between the Purchaser Team and the Vendor Team during the course of negotiations.

[97] While that evidence certainly provides a factual basis to support the assertion that the Purchaser Team exercised *de facto* control over PEOC in respect of its purchase of the Goodyear Assets, I am not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily: *Weir-Jones* at para 34. In particular, while I may be able to draw certain inferences, those inferences are not robust enough to permit me to determine on the balance of probabilities that the Purchaser Team established the necessary control over the subject transactions.

[98] Given the importance of that factual issue, I find that the determination of the “arm’s length issue” will turn on the credibility of witnesses who were directly involved in the negotiation of the Asset Transaction, including their alleged control of PEOC. Given the importance of the issue, I have scrutinized the evidence before me with considerable care. I find that the cogency of the evidence does not allow me to conclude that it is more probable than not that the Purchaser Team had the degree of “influence” that would be necessary for me conclude that they exercised the prerequisite control.

[99] Concerning an issue such as this, the totality of the surrounding circumstances should be assessed and weighed as a prerequisite to determining whether the Perpetual Energy Defendants, in their capacity as the moving party, have satisfied the burden of proof. In short, the critical factual evidence pivots on this credibility point, and the inferences that I can draw from the current record are too weak to allow me to draw the necessary conclusions on the balance of probabilities.

[100] While I concede that there is some supporting evidence from the Perpetual Energy Defendants, I find that it should be tested in a *viva voce* context. Further, the “interest” and “influence” of the Kailas Group should be tested in open court so that both (i) the “credibility” of those participants can be assessed, and (ii) the “location” of the alleged arm’s length activities can be determined. I refer to “location” because it is important to consider how, what and when critical steps on the negotiation continuum occurred as between the Vendor Team and the Purchaser Team. In my view, that evidence is necessary before an informed finding can be made on the arm’s length issue.

[101] Given the above facts and analysis, I find that the Perpetual Energy Defendants have not demonstrated on a balance of probabilities that there is no merit to the *BIA* Claim. I make this finding because they rely on witnesses whose credibility must be assessed. Evidence of the witnesses from both the Vendor Team and Purchaser Team needs to be tested in order to establish, on the balance of probabilities, the necessary evidentiary foundation. This assessment occurs as part of the adversarial process, and is necessary in that system. Accordingly, the first step fails with the result that the *BIA* Claim cannot be dismissed on a summary basis.

[102] Again, I emphasize that the above finding is only made on the basis of the arm's length issue, and not on value.

b. Can the *BIA* Claim be struck?

[103] Given the above finding, I now turn to consider whether the record makes it possible to strike the *BIA* Claim under Rule 3.68 on the basis that it discloses no reasonable claim. In considering this question, my sole focus continues to be on the arm's length issue, and not on value.

[104] My narrow focus is based on my understanding of the pleadings concerning the *BIA* Claim and the above noted emphasis by the Perpetual Energy Defendants that the "arm's length" issue should be determined without regard to the consideration (value) exchanged on the deal. As I noted above, the Perpetual Energy Defendants framed the *BIA* Claim so that the underlying issue addressed "...only the question of whether the parties were dealing at arm's length".

[105] As framed, the *BIA* Claim raises an interesting arm's length issue, which involves a mixture of facts, deeming rules and rebuttable presumptions. In the context of the arm's length issue that the Perpetual Energy Defendants are challenging, there is neither a fatal flaw nor an abuse of process. Technically, the arm's length question raises an issue that is worthy of consideration by a Court.

[106] Subject to a comment that I will make below in respect of the Oppression Claim, I find that the Perpetual Energy Defendants have not provided me with the necessary foundation to strike the *BIA* Claim. Accordingly, the *BIA* Claim will not be struck.

4. Conclusion

[107] Concerning the following determinations, I emphasize that they are made on the premise that the sole focus of the *BIA* Claim is on the arm's length issue. To underscore the point, the "arm's length" issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Since the moving parties (the Perpetual Energy Defendants) framed the *BIA* Claim to focus on the arm's length issue, I have not touched on value. I am constrained by the manner in which the issue was framed in the Summary Dismissal Application, as reinforced by the Brief provided by the Perpetual Energy Defendants. That being the case, my only focus under the *BIA* Claim component of the decision is on whether section 96(1)(b) of the *BIA* is displaced because of the arm's length argument advanced by the Perpetual Energy Defendants.

[108] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[109] Given the above facts and analysis, I will not strike the *BIA* Claim.

[110] In making these findings, I am bound to decide the *BIA* claim within the confines of the underlying application: *MNP (Next Friend of) v Bablitz*, 2006 ABCA 245 at para 9 leave to appeal to SCC refused, 31686 (12 April 2001) citing *Rodaro v Royal Bank* (2002), 59 OR (3d) 74 (ONCA) at para 60. I cannot make a decision on an issue that is not pleaded or argued: *Humphries v Lufkin Industries Canada Ltd*, 2011 ABCA 366 at para 49. To do so is an error of law: *Online Constructors* at para 15; see also *Stevenson & Côté 2019*, at page 13-23. While there were good practical reasons for the Perpetual Energy Defendants to confine the *BIA* Claim to the arm's length issue, I note for the record, without deciding the point, that my findings below in respect of the Oppression Claim may have caused me to arrive at a different conclusion in respect of the *BIA* claim if I had not been restricted to addressing the arm's length issue.

[111] As a final comment, the Trustee argues that the presumption that related parties do not deal at arm's length for the purposes of section 96 of the *BIA* can only be rebutted by proof that the transaction was at fair market value. While I agree that the arm's length issue can be rebutted by proof that the transaction was at fair market value, I do not agree that is the only way it can be rebutted for the purposes of section 96 of the *BIA*. While nothing turns on the point in this decision, I concur with the arguments advanced by the Perpetual Energy Defendants to the effect that section 4(5) of the *BIA* provides a foundation by which to rebut the application of section 96 of the *BIA* independent of proof of fair market value.

B. Oppression Claim – Is the Trustee a “complainant” that is entitled to bring an oppression claim under section 242 of the *ABCA*?

1. Incremental Facts and Context

[112] The handling of environmental regulatory obligations in receivership, bankruptcy and CCAA proceedings has long been challenging. This case exemplifies some of the challenges, including the status of a trustee and creditor to seek corporate remedies.

[113] The principals behind 198Co and Sequoia Resources (formerly named PEOC) took steps between October 1, 2016 and March 23, 2018 (being the date that Sequoia Resources assigned itself into bankruptcy) to pursue a business in respect of the Goodyear Assets. The evidence is that the operational activities of Sequoia Resources during that period of slightly over 17 months included steps to abandon some wells. In contrast, there is no evidence that the Trustee has taken any steps to abandon any PEOC wells.

[114] Amongst other facts, the Trustee SOC includes the following.

- a. The Goodyear Assets had significant associated abandonment and reclamation obligations (“ARO”) when PEOC acquired that property in the context of the Asset Transaction: para 5 of the Trustee SOC.
- b. The amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified: para 6.1 of the Trustee SOC.
- c. The Goodyear Assets had significant net liability at the time of the Asset Transaction: para 13 of the Trustee SOC.
- d. The liabilities assumed by PEOC when it acquired the Goodyear Assets were at least \$223,241,000: para 13.1 of the Trustee SOC.

- e. The value of the Goodyear Assets acquired in the Asset Transaction were at most \$5,670,200: para 13.2 of the Trustee SOC.
- f. The Goodyear Assets were high liability assets: para 16.3.1 of the Trustee SOC.
- g. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.
- h. PEOC will suffer costs incurred: (i) until the Goodyear assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.
- i. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242: para 18 of the Trustee SOC.
- j. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[115] The Oppression Claim is plead in three components, contained in paragraphs 18, 19 and 20 of the Trustee SOC. Those three paragraphs are under the heading "Oppression".

[116] Paragraph 18 of the Trustee SOC states that the Trustee is a "proper complainant" within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute.

[117] The Trustee SOC pleads the Oppression Claim as follows:

19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

19.1 Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors (emphasis added).

[118] The Trustee SOC addresses the "interests of the creditors of PEOC", and is focused on the ARO and unidentified municipalities. The text reads as follows.

20. As a result of the [Aggregate Transaction] generally, and the Asset Transaction in particular:

20.1 if PEOC was not insolvent, it was rendered insolvent;

20.2 PEOC was liable for, but unable to pay the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*; and

20.3 PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of PEI, POC and [Ms.] Rose personally.

[119] In cross examination on the Darby Affidavit filed by the Trustee, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction.

2. The Policy and The Law

a. The Policy

[120] The issue of who is liable for well abandonment, reclamation, release of substances and contaminated sites, or ARO, is an on-going challenge for the oil and gas industry. It has broad implications, and has been a matter for discussion for many years.

[121] For example, the Energy Resources Conservation Board (“ERCB”) published *Recommendations to Limit the Public Risk from Corporate Insolvencies Involving Inactive Wells* in December 1989. It recommended the primary beneficiaries, or well licensees, should bear responsibility, rather than the working interest owners of the well: N Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (Calgary: University of Calgary, 2000) at 49. The ERCB set out a proposed order as to who would bear the obligation for abandoned wells. Its recommendations were not adopted: Vlavianos at 50.

[122] In response to the ERCB report, representatives of three petroleum industry associations formed a task force that presented its report to the government in December 1990: Vlavianos at 51. The industry task force rejected the ERCB’s proposed order of responsibility. Under the ERCB’s proposal, the original well licensee could potentially be liable for the well indefinitely: Vlavianos at 51. Instead, the industry task force recommended the licensee of record should be liable for abandoned wells, and recommended an abandonment fund be available to cover these costs: Vlavianos at 52. These recommendations were largely adopted in legislative changes in 1994: Vlavianos at 53.

[123] This history illustrates the policy discussions that have been ongoing surrounding liability for abandoned oil and gas wells. The position now advanced by the Trustee is what was advanced by the ERCB, and rejected by the legislature, that the prior licensee should be liable for abandoned wells.

[124] I acknowledge the importance of environmental protection, as well as the need to address who pays to remediate abandoned wells and contaminated sites. That said, the actions of the Trustee pose an interesting question. Should the Trustee be permitted to engage the oppression remedy to challenge the Asset Transaction or ought environmental protection and reclamation be pursued under a position advanced by an appropriate regulatory framework that is developed in conjunction with the stakeholders?

[125] It is not the function of the Court to fix legislative or regulatory regimes. That is the domain of the legislature or Parliament. Until laws are past, policy is not enforceable. In this case, the Trustee asks the Court to frame a legal regime that has been rejected by the legislature.

b. The Law

i. Statutory Framework – The ABCA

[126] “Complainant” is defined in section 239(b) of the ABCA as follows:

- (b) “complainant” means
- (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
 - (ii) a director or an officer or a former director or officer of a corporation or any of its affiliates,
 - (iii) a creditor
 - (A) in respect of an application under section 240 [derivative action], or
 - (B) in respect of an application under section 242 [oppression], if the Court exercises its discretion under subclause (iv),
- or
- (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

[Emphasis added.]

ii. The Jurisprudence

(A) Creditor as a Complainant

[127] Creditors have been permitted to use the oppression remedy for some years. The authority of creditors to do so was confirmed in 2004 by the Supreme Court of Canada: *Peoples Department Store Inc (Trustee of) v Wise*, 2004 SCC 68 [*Peoples*].

[128] The entitlement of creditors to use the oppression remedy, however, was constrained by the Supreme Court of Canada. In particular, that appellate Court stated that creditors could use the oppression remedy to protect their interests from the harmful conduct of directors if they qualify as a “proper person”: *Peoples* at para 48 to 50; see also section 239(b)(iv) of the ABCA.

[129] In making these statements in 2004, the Supreme Court of Canada did not provide guidance on what constituted a “proper person”. It left that task to the determination and discretion and of the lower courts. The trial courts and provincial appeal courts have taken on that task, and have effectively put a fence around the oppression remedy in respect of creditors. Creditors are only granted access to the oppression remedy if they meet certain criteria.

[130] The law in this area has evolved over the years. An early case that is still authoritative on this point is *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)), [1993] OJ No 1560 [*Hordo*].

[131] The Court in *Hordo* commented that debt actions should not normally be turned into oppression actions. That Court also stated that “complainant” status should be refused to creditors, unless the creditor was “in a position analogous to a minority shareholder” with some “particular legitimate interest in the manner in which the affairs of the company are managed”: *Hordo* at para 14. This has been interpreted to mean having “a direct financial interest in how the company is being managed” but having “no legal right to influence or change what they see to be abuses of management or conduct contrary to the company’s interests”: *PRW Excavating Contractors Ltd v Louras*, 2016 ONSC 5652 at paras 17-19 [*PRW*].

[132] The Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: *Hordo* at para 15, citing *Re Daon Development Corporation* (1984) 54 BCLR 235 at 13, 10 DLR (4th) 2016.

[133] The status of a person as a “complainant” under the oppression remedy is a prerequisite to the application of the two-step framework that is outlined in the BCE case: *Re BCE Inc*, 2008 SCC 69. If a person does not qualify as a complainant in the first instance or, where section 239(b)(iii)(B) or section 239(b)(iv) of the *ABCA* apply, a person has not been granted standing as a “complainant”, the quest for an oppression remedy in respect of that person ends, full stop.

(B) Trustee as a Complainant

[134] Trustees in bankruptcy are not always recognized as being “proper persons.” Accordingly, they are not automatically “complainants” that are entitled to bring oppression proceedings. It depends on the circumstances.

[135] There are circumstances where the Alberta Court of Appeal determined that a trustee did not have status to bring an oppression claim pursuant to section 234 of the *ABCA*: *Carter Oil and Gas Ltd (Trustee of) v 400133 BC Ltd*, 1998 ABCA 372 at para 27. In another case, the Ontario Superior Court of Justice stated that while the standing of a trustee in an oppression action was not fully settled in the jurisprudence, it also was not obvious that the trustee in bankruptcy does not have such capacity: *Dulex Ltd (Trustee of) v Anderson* (2003), 63 OR (3d) 659 (SCJ) at para 18.

[136] In effect, these cases confirm that the status of a trustee in bankruptcy does not automatically determine that a trustee is a “proper person” to be accorded standing as a “complainant”.

[137] Generally, a trustee in bankruptcy must pursue the common interests of all of the creditors at the time of bankruptcy. The Alberta Court of Appeal has provided the following instructive comments on this point: see *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.

Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. Of particular importance are sections 30 and 72:

30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

...

The case law establishes that a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors.

[Emphasis added.]

(C) Redwater Factor

[138] The recent decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*] is relevant to the Oppression Claim, and other matters touched on below. At paragraph 37 of *Redwater*, the three-part test in *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 [*Abitibi*] is set out for determining when an environmental obligation imposed by a regulator will be a provable claim in the insolvency context. In *Abitibi*, the Supreme Court of Canada said, at para 26:

First, there must be a debt, a liability or an obligation to a *creditor*.
Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation (emphasis in original).

(I) Redwater – AER Creditor Status

[139] The *Abitibi* test and the status of the AER as a creditor was addressed in *Redwater*. Insofar as that status may impact the “facts” that have been included in the Trustee SOC, that case needs to be considered carefully.

[140] In *Redwater*, the Supreme Court stated its position concerning the creditor status of the AER as follows, at paras 121 and 122:

[121] In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the “creditor” step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599 (CanLII), 368 D.L.R. (4th) 122 (“*Nortel CA*”), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the “monetary value” step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the “sufficient certainty” step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater’s regulatory obligations were “intrinsicly financial”. Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

[122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers

against a debtor. On a proper understanding of the “creditor” step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

[141] The Supreme Court made it clear in *Redwater* that whether the AER has a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test, which presupposes that the AER is a creditor: *Redwater* at para 130. That is, the “creditor” test cannot be bypassed on the basis of a contingency.

[142] A contingent claim must be capable of valuation in order to be a provable claim. It cannot be too remote or speculative: *Redwater* at para 138. As a matter of law, it must be established that enforcement by the regulator results in the regulator attaining the status of creditor: *Redwater* at para 146. Absent any such establishment, the AER is not a creditor. As I read the *Abitibi* test, it is binary. There is no middle ground. The regulator either is a creditor or is not.

[143] *Redwater* holds that the AER is not a creditor. As stated by the Supreme Court, “[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes”: *Redwater* at para 158.

[144] This holding by the Supreme Court in *Redwater* is consistent with the findings by the Alberta Court of Appeal in *Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, leave to appeal to SCC refused 22655 (16 January 1992) [*Northern Badger*]. In *Northern Badger*, the Alberta Court of Appeal acknowledged that the legislative framework embedded in the *Oil and Gas Conservation Act*, RSA 2000, c O-6 gave it the right to incur costs in respect of abandoned boreholes, and become a creditor for the amounts incurred. While the regulator had the right to incur costs in respect of abandoned boreholes, it did not do so in respect of the Northern Badger wells. Instead, the steps taken by the regulator were “...simply in the course of enforcing observance of a part of the general law of Alberta”: *Northern Badger* at para 34.

[145] The Alberta Court of Appeal further stated that the statutory abandonment obligations were part of the general law of Alberta: *Northern Badger* at para 33. It commented that such obligations bind every citizen in a manner that parallels many other laws, including, for example, health and safety laws.

[146] The Alberta Court of Appeal went on to state that such public duties are owed to all citizens of the community, rather than being owed to the public authority enforcing them: *Northern Badger* at para 33. That appellate Court further stated that the regulator was not a

creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: *Northern Badger* at para 33 and 34.

[147] While the Alberta Court of Appeal commented that Northern Badger had a liability, it described that liability as being “inchoate”: *Northern Badger* at para 32. Given the use of the term “inchoate”, that appellate Court was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: *Northern Badger* at para 32.

(II) *Abitibi* – Insufficient Certainty

[148] *Abitibi* confirmed that a remediation order could be a contingent obligation, which is commonly understood to be an obligation that only becomes a debt upon the occurrence of a future event that may or may not occur. If the future event is too remote or speculative, the claim will not be included in the insolvency process. Given this background, if the AER has not triggered the enforcement mechanism, will not be performing the remediation work, or will not be asserting a monetary claim to have its costs reimbursed, then the future event is too remote or speculative for the AOR associated with the Goodyear Assets to be included in the insolvency process: *Redwater* at paras 36, 140 and 152.

[149] As noted above, in *Redwater*, the Supreme Court of Canada revisited the test in *Abitibi*. In the course of considering the *Abitibi* test, the Supreme Court found that it was not “...sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process”: *Redwater* at para 142. That Court reinforced this determination by commenting as follows, at para 145:

The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator’s affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy.

[150] Accordingly, under the *Abitibi* test, the AER did not have a claim provable in bankruptcy.

[151] In summary, the Supreme Court of Canada in *Redwater* held that the AER had no status as a creditor in relation to the ARO of a licensee. Further, even if it could be said that the AER were a creditor, there is not sufficient certainty that the AER would ever perform any remediation work and have a claim for reimbursement.

(III) ARO a Component of Value

[152] The Trustee alleges that the ARO obligation is a liability. That being the case, it is necessary to consider the meaning of the term “liability”.

[153] The jurisprudence has stated the term “liable” is not a legal term, and that it has no technical meaning: *Laurance (Re)* (1923), 55 OLR 196 at para 7, 25 OWN 482 (Ont SC). That

same jurisprudence went on to state that the concept of “liability” is “...primarily referable to the existence of the obligation and is not to be confined to the present right to enforce it”: *Laurance* at para 7. The Court also commented that the exact meaning of the term “liability” may vary with the context: *Laurance* at para 7.

[154] The *Laurance* decision involved the question as to whether a landlord was entitled to rank as a preferred creditor concerning certain property taxes paid by him, which were properly payable by an insolvent tenant. Mr. Laurance was the tenant of Mr. McConnell’s farm. Under the terms of the lease, Mr. Laurance had covenanted to pay the property taxes in respect of the subject farm land.

[155] The trustee in *Laurance* at para 4 opposed the claim for preference concerning the property taxes. He argued that a liability had not yet arisen because a specified time period had to lapse after a demand was made before the collector was entitled to seizure.

[156] The Court in *Laurance* at para 5 stated that the liability to pay property taxes does not arise only when payment is demanded. The Court noted that the liability for property taxes under the *Municipal Act* attached on January 1 of the particular calendar year for which the rates were imposed. That legislative framework establishes a liability in law, because it was referable to an existing legal obligation. Thus, the landlord, Mr. McConnell, was entitled to include in his proof of claim the portion of the 1923 property taxes that were properly payable by the insolvent, Mr. Laurance, under the terms of the lease: *Laurance* at para 11.

[157] There also have been occasions where the jurisprudence has recognized a liability in circumstances where no current action can be taken to enforce payment. This judicial recognition has occurred in the context of an undeclared dividend on preferred shares: *Fairhall v Butler*, [1928] SCR 369.

[158] The *Fairhall* decision involved a circumstance where Mr. Butler, on behalf of White Star Refining Company (“White Star”), had an option to acquire common shares in Western Motor Corporation Limited. (“Western Motor”). White Star accepted the option on the condition that Mr. Fairhall would furnish a statement “showing the assets and liabilities ...of Western Motor” (the “Western Motor Financial Report”): *Fairhall* at para 3.

[159] The Western Motor Financial Report was prepared by Chartered Accountants. That report included a balance sheet that allegedly disclosed the assets and liabilities of Western Motor.

[160] The context within which the Western Motor Financial Report was requested and prepared is important. White Star was interested in acquiring a controlling interest in Western Motor, and it planned on doing so through the acquisition of common shares in that target company. White Star protected itself under the option by stipulating the need for full disclosure of assets and liabilities because, I infer, any undisclosed liabilities would reduce the value of the Western Motor common shares.

[161] The capital structure of Western Motor included issued and outstanding preference shares (the “Western Motor Preferred Shares”). The Western Motor Preferred Shares were non-

participating and nonassessable, and they entitled the holders to a first, fixed, cumulative dividend at 8% per annum: *Fairhall* at para 6.

[162] White Star accepted the option, but noted that the acceptance was based on the disclosure presented in the Western Motor Financial Report: *Fairhall* at para 8. However, at the time of settlement, the undeclared and unpaid dividends on the Western Motor Preferred Shares presented a difficulty.

[163] The Western Motor Financial Report did not show the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares. This caused a dispute: *Fairhall* at para 8.

[164] The question underlying the dispute was whether the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares constituted a liability that should have been disclosed in the Western Motor Financial Report. The Supreme Court of Canada recognized that until a dividend is declared, no action is available to a shareholder to enforce payment: *Fairhall* at para 19. As such, the Court also acknowledged that a company incurs no liability until a dividend is declared by it: *Fairhall* at para 19.

[165] Notwithstanding the above recognition by the Supreme Court of Canada that no enforcement action was available in these circumstances, the Court in *Fairhall* went on to state "...that within the meaning of the contract, as understood by the parties, the undeclared dividends on preference shares were a liability which should have been disclosed [*sic*] in the report of the appellant's auditors": *Fairhall* at para 18. That is, the contractual framework in the form of the terms and conditions associated with the Western Motor Preferred Shares establishes an accruing liability in law because it is referable to an existing and accumulating obligation. The Court took this position, in part, because no dividend would be payable on the common shares of Western Motor until all of the accrued dividends were paid on the Western Motor Preferred Shares: *Fairhall* at para 19.

[166] In *Redwater*, the Supreme Court of Canada addressed the ARO liability allegation from a different viewpoint. Rather than being a form of liability, the Supreme Court held that the "...end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front": *Redwater* at para 157. In making this determination, the Supreme Court of Canada relied on *Daishowa-Marubeni International Ltd v Canada*, 2013 SCC 29 [*Daishowa*] at para 29.

[167] While courts should be cautious in relying too heavily on *Daishowa* because it approached the issue from an income tax perspective, it does touch on the very issue that was being argued in *Redwater*. In *Daishowa*, the Supreme Court found that statutory reforestation obligations of persons that held forest tenures in Alberta were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure's value at the time of sale: *Daishowa* at para 31.

[168] While those regulatory parameters depressed the value of the assets, the Supreme Court of Canada in *Daishowa* held that those "...reforestation obligations were not a distinct existing debt": *Daishowa* at para 35. That is, those future obligations did not equate to a current monetary claim.

[169] The Trustee equates an ARO obligation to that of a liability. That position is not supportable for at least four reasons.

[170] First, concerning the ARO associated with the Goodyear Assets, there is no creditor. That was confirmed by *Redwater*. Absent a creditor, there can be neither a debtor nor a corresponding liability.

[171] Second, concerning the ARO associated with the Good year Assets, there is neither a liability nor any amount referable to an existing obligation. In contrast to *Laurance*, there is no legislative framework that established a present liability in respect of the Goodyear Assets at the time of the Asset Transaction. Similarly, in contrast to *Fairhall*, there was no contractual framework that established an existing and accumulating obligation in respect of the Goodyear Assets at the time of the Asset Transaction.

[172] Third, to the extent that there is an ARO associated with the Goodyear Assets, it is a notional and contingent obligation. That is not sufficient to constitute a liability that needs to be considered for purposes of the Asset Transaction.

[173] Fourth, the alleged ARO obligation in the Asset Transaction is one step further removed from being a liability than was the case in *Redwater*. In *Redwater*, Abandonment Notices had been issued. In contrast, in this matter there is no evidence that Abandonment Notices were issued in respect of the Goodyear Assets on or before the date of the Asset Transaction.

3. The Application of the Law to the Facts

[174] Before I commence my analysis, a few preliminary comments are warranted.

[175] First, the Defendants are effectively challenging the Oppression Claim by contesting the standing of the Trustee to bring such a claim. Generally, Courts prefer to resolve questions of standing in conjunction with an assessment of the substantive merits of oppression claim. Indeed, some Courts have taken the position that the issue of standing on preliminary motions courts should not be allowed where the resolution of the issue requires them to explore the merits of the application: *Jabaco Inc v Real Corporate Group Ltd*, [1989] OJ No 68, 13 ACWS (3d) 352.

[176] Second, there are exceptions to the position that standing should not be addressed in preliminary motions courts. Courts have struck actions for want of standing as a preliminary matter where the nature of the claim strained the boundaries because the person seeking the oppression remedy was too far outside recognized parameters: *Hordo* at paras 14 and 15. Another exception is where the resisting party would not be held to be a "proper person" because they did not satisfy the Court "...that there was some evidence of oppression or unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer": *First Edmonton Place Ltd v 315888 Alta Ltd* (1988), 40 BLR 28 at 50-51 (Alta QB), 60 Alta LR (2d) 122, reversed on other grounds 1989 ABCA 274. This judicial comment suggests that there is a *prima facie* test, and that standing may be determined on a preliminary motion.

[177] Third, deciding whether the Trustee is an eligible complainant is a threshold issue. Given that the underlying application is a preliminary motion that challenges standing, disputed facts generally should be decided in favour of the resisting party, unless it is clear on the face of the

record that such an assumption is unfounded: *Levy-Russell Ltd v Shieldings Inc* (1998), 41 OR (3d) 54 at para 21 (Ont Ct J(Gen Div)), 165 DLR (4th) 183, leave to appeal refused 42 OR (3d) 215, 41 BLR (2d) 142.

[178] Assuming that the Oppression Claim of the Trustee is a collective and representative claim on behalf of all creditors, the inquiry turns to whether the Court should exercise its discretion to grant standing to the Trustee as a “complainant”.

[179] Returning to the particulars of this case, I will: (i) consider whether the record makes it possible to strike the Oppression Claim; and (ii) touch on the issue of summary judgment. Depending on my conclusions in respect of those three matters, the Oppression Claim may need to proceed to a trial.

[180] Before I turn to the analysis, an overview of some context is useful. First, in cross-examination, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction. That positions the Oppression Claim into a relatively narrow framework. Second, but for the alleged ARO and property taxes, the Trustee SOC provides no further particulars or allegations regarding the amounts or nature of the alleged liabilities. Amongst other issues, I will need to consider whether the approach taken by the Trustee is a selective action, and whether it violates a principle of bankruptcy law that all actions should be focused on the collective. Third, the Trustee SOC contains no allegation that any creditor had an actionable reasonable expectations of any kind, I raise this point because when considering whether there has been an oppression of a complainant, I must determine what the reasonable expectations of that person were according to the arrangements which existed between that alleged complainant and the body corporate: see *Mennillo v Intramodal inc*, 2016 SCC 51 at para 9. Fourth, the Trustee asserts that Sequoia Resources was “set up to fail”. The Trustee further asserts that this, in and of itself, constitutes oppression. With this background in mind, I turn to analyze the Oppression Claim.

a. Can the Oppression Claim be struck?

[181] I turn to whether the record makes it possible to strike the Oppression Claim under Rule 3.68(2)(b). A decision to strike must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application, and (ii) the applicable statutory and common law.

[182] The facts to which I can refer for purposes of Rules 3.68(2)(b) and 3.68(3) are limited. In particular, and as mentioned above, the facts to which I can refer are limited to what is in the Trustee SOC. The relevant particulars in that commencement document are as follows:

- a. The Goodyear Assets had significant associated ARO when PEOC acquired that property in the context of the Asset Transaction.
- b. The Asset Purchase Agreement is referenced, and the Trustee SOC reiterates that the amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified.

- c. The Goodyear Assets had significant net liability at the time of the Asset Transaction. The Trustee SOC further states that the liabilities assumed by PEOC when it acquired the Goodyear Assets were at least \$223,241,000.
- d. The value of the Goodyear Assets acquired in the Asset Transaction were at most \$5,670,200.
- e. The Goodyear Assets were high liability assets.
- f. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.
- g. PEOC will suffer costs incurred: (i) until the Goodyear Assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.
- h. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242.
- i. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[183] In considering the application to strike the Oppression Claim, there are three grounds that warrant review under Rule 3.68(2)(b). The first ground involves the factors that emanate from *Hordo*. The second ground involves the question as to whether this Oppression Claim is a collective action or a selective action. The third ground involves the impact of *Redwater*.

[184] Before I address Rule 3.68, an overview of the law associated with creditors in the context of an oppression action is warranted. The entitlement of a creditor to seek the oppression remedy is not automatic. The statutory framework requires a Court to exercise discretion: ss 239(b)(iii) and (iv) of the *ABCA*. A similar statutory framework applies to a proposed complainant who is "...any other person...: s 239(b)(iv) of the *ABCA*."

[185] There is a policy reason for not allowing a creditor automatic access to the oppression remedy in the *ABCA*. Importantly, a broad interpretation of the "proper person" phrase would open the oppression remedy to abuse from creditors. The policy concern is that if the oppression remedy is applied too broadly, creditor protection will impose a punishment on debtors when a business risk fails. That would allow creditors to "escape the consequences of their debtor's bad decisions...": Douglas G Baird & Thomas H Jackson, "Fraudulent Conveyance Law and Its Proper Domain," (1985) 38: 4 *Vanderbilt LR* 829 at 834.

[186] To address the concern that creditors might abuse the oppression remedy mechanism, the Courts have developed a series of factors to assist in determining which creditors will be granted standing (the "Factor-Based Approach"). The case most frequently cited for this Factor-Based Approach is *Hordo*.

[187] The *Hordo* case gathered and summarized factors from a number of different decisions. Under the Factor-Based Approach, an alleged creditor is typically denied standing where: (i) the plaintiff was not a creditor when the oppression occurred, but was merely a contingent creditor; (ii) the creditor's interest in the affairs of the Corporation are too remote; (iii) the complaints of

the creditor have nothing to do with the circumstances giving rise to the debt; (iv) the creditor is not in a position analogous to that of a minority shareholder; or (v) the creditor had no particular legitimate interest in the manner in which the affairs of the company are managed (collectively, the “Hordo Factors”).

[188] The Hordo Factors have been framed to ensure that the boundaries of what constitutes a “proper person” are not pushed beyond what is reasonable in the circumstances. The reason for the boundaries is because the oppression remedy is not intended to be a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a Court to accord with an assessment of a third-party as to what is just and equitable, especially on an *ex pose facto* basis. In this regard, it is not the function of the Court rewrite contracts: *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183 at para 60. Further, and as stated above, it is not the function of the Court to fix legislative or regulatory regimes. The need to reform regulatory regimes is the domain of the legislature. Courts should not participate in that process, except in a traditional adjudicative manner.

i. The Hordo Factors – Rule 3.68(2)(b)

[189] A creditor of a corporation may sue the corporation or its officers/directors for oppression only if the Court exercises its discretion in determining that the creditor qualifies as a “complainant”: see sections 239(b)(iii)(B) and 239(b)(iv) of the *ABCA*. Any other person may make an application to be granted “complainant” status, subject always to the discretion of the Court: section 239(b)(iv) of the *ABCA*. In both a “creditor” or “any other person” circumstance, the Court will exercise its discretion to grant a person standing as a complainant only if the applicant is a “proper person”.

[190] The Courts have restricted the application of the oppression remedy to creditors. As noted above, the Court in *Hordo* at para 14 commented that debt actions normally should not be turned into oppression actions.

[191] The Court in *Hordo* also stated that “complainant” status should be refused unless the creditor was “in a position analogous to a minority shareholder” with some “particular legitimate interest in the manner in which the affairs of the company are managed”: *Hordo* at para 14. This has been interpreted to mean having “a direct financial interest in how the company is being managed” but having “no legal right to influence or change what they see to be abuses of management or conduct contrary to the company’s interests”: *PRW* at paras 17-19, citing *Re Dawn Development Corporation* (1984), 54 BCLR 235 at 13, 10 DLR (4th) 216.

[192] The reason the Courts have been hesitant to grant “complainant” status to creditors is because the connection of a creditor is typically viewed as being too remote to the affairs of the subject corporation: *Hordo* at para 14. If the interest of a creditor in the affairs of a corporation is too remote, then the creditor is typically not a “proper person” for purposes of being designated as a “complainant”. Similarly, where the creditor has nothing to do with the circumstances giving rise to the debt, “proper person” standing is typically denied.

[193] When a trustee in bankruptcy is involved, additional factors must be considered. A trustee is neither automatically barred from being a complainant nor automatically entitled to that status: *PriceWaterhouseCoopers Inc v Olympia & York Realty Corp* (2003), 68 OR 3d 544 at

para 45, [2003] OJ No 5242 (CA) [*Olympia*]. The judge at first instance is the one tasked to determine whether the trustee is a “proper person” to be accorded standing as a “complainant”. It will be an exercise of discretion, based on the circumstances of the particular case.

[194] I acknowledge that the Trustee SOC states that the Trustee is a “proper complainant” within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute. As an aside, I assume that the Plaintiff intended to say that the Trustee was a “proper person” to be accorded standing as a “complainant”. For purposes of the analysis below, I will construe the phrase “proper complainant” in that manner.

[195] While I acknowledge the statement in that commencement document, I do not accept assertion therein that the Trustee is a “proper person” as a “fact” for purposes of Rule 3.68(2)(b). The assertion that the Trustee is a “proper person” to be accorded standing as a “complainant” is a legal conclusion. Whether the Trustee is a “proper person” is a question of law. Questions of law are not determined by a trustee. Such questions are the domain of the Court, and they must be left to the determination of the Court.

[196] As stipulated in section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*, only the Court is granted the right to exercise discretion to determine that threshold issue. In argument, the Trustee stated that it was seeking an Order pursuant to Part 19 of the Rules, which I construe to mean a determination under section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*. Until I exercise my discretion to decide, any assertion as to whether the Trustee is a “proper person” that is to be accorded standing as a “complainant” is mere speculation. Further, any conclusion to be drawn from the facts is solely a function of the Court.

[197] This distinction between pleading a legal conclusion and pleading facts is not new. A commencement document “...must plead the necessary facts, and a mere legal conclusion is not enough”: *Fallowka v Whitford*, (1996) 147 DLR (4th) 531 at 14, [1996] NWTJ No 95 (CA), leave to appeal to SCC refused [1997] SCCA No 58. Further, “...there is a big difference between pleading a mere conclusion of law and pleading a fact”: *Fallowka* at para 15.

[198] Courts are critical when conclusions are plead without the facts to support the conclusion: *Shiels v TELUS Communications Inc*, 2003 ABQB 53 at para 17. It is not enough for a commencement document to plead a legal conclusion without the necessary facts: *Stevenson & Côté 2019* at page 13-24. Absent the necessary facts, a legal conclusion cannot be drawn.

[199] This not to say that points of law cannot be stated in a commencement document. However, if a statement about a point of law is plead, then the facts that make the point of law applicable must also be plead: r 13.8(1)(b).

[200] Given my analysis above, I find that the allegation in the Trustee SOC that the Trustee is a “proper person” to be accorded standing as a “complainant” is an assumption (or speculation) that I am not required to treat as true for the purpose of an application under Rule 3.68: *Operation Dismantle* at para 27; *PR Construction* at para 29; and *McGregor* at para 10.

[201] I now turn to whether the Trustee SOC allows me to find that the Trustee is a “proper person” to be accorded standing as a “complainant” in the circumstances. This takes me to the Hordo Factors.

[202] To address the Hordo Factors, the Trustee SOC would need to include particulars that would allow me to be satisfied that the alleged creditors that it represents: (i) were closely connected with PEOC at the time of the alleged oppression; (ii) were in a position analogous to that of a minority shareholder at the time of the alleged oppression; and (iii) had a particular legitimate interest in the manner in which the corporation was managed at the time of the alleged oppression. I find that none of those prerequisites were addressed the Trustee SOC.

[203] Given the absence of particulars in the Trustee SOC to properly address the Hordo Factors, I find that the Trustee has not satisfied me that it is the “proper person” to be accorded standing as a “complainant” for purposes of the Oppression Claim. In making this finding, I emphasize that I am not permitted to look for evidence outside the four corners of the Trustee SOC (except in very limited circumstances): *HOOPP Realty* at para 25, Wakeling JA, concurring; *Operation Dismantle* at para 27; and *Borzoni* at para 30. That restriction prevents me from looking outside of the Trustee SOC for evidence that would assist the Trustee in establishing the necessary facts to support its “proper person” assertion, just as it prevents me from looking outside of the Trustee SOC for evidence that would assist the Defendants in respect of points that it would want to make.

ii. Collective Action – A Prerequisite

[204] An important bankruptcy principle is that the regime is a collective action to pursue claims of creditors: *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, at para 7; *Olympia* at para 46.

[205] The Trustee SOC advances the Oppression Claim by reference to the “interests of the creditors of PEOC, including its contingent creditors”. The Trustee SOC then frames the “interests of the creditors of PEOC, including its contingent creditors” by reference to only the ARO and unidentified municipalities.

[206] While the Trustee SOC provides some particulars in respect of the alleged ARO, it provides no further particulars or allegations concerning the amounts or the nature of other liabilities. Further, the scope of the alleged creditors is restricted to the ARO (and by inference, the AER) and the unidentified municipalities. That commencement document contains no allegation that any other creditor has any actionable reasonable expectation of any kind.

[207] In any oppression action pursued by a trustee in bankruptcy, it is important that it be framed to include all persons to whom the bankrupt is liable. That is a necessary prerequisite because a fundamental principle in bankruptcy is that the regime is a collective action: *Husky Oil* at para 7; and *Olympia* at para 46. That is, the bankruptcy regime pursues claims for all creditors. It must be a collective pursuit, and not a selective pursuit. Bankruptcy achieves this objective by replacing a regime that allows individual actions with a framework that is focused on a collective action: see Aleck Dadson, “Comment” (1986), 64 *Can. Bar Rev.* 755, at p. 755.

[208] In this case, we know that there are other creditors because they are referred to in the Trustee SOC in the context of alleged damages that PEOC has suffered. Those other creditors are described in the Trustee SOC as being persons who provide safety, environmental, and investigative services to PEOC in respect of the Goodyear Assets.

[209] Notwithstanding that the commencement document includes a claim for damages in respect of the costs associated with those other creditors, the Oppression Claim has not included them in the scope of creditors for purposes of the oppression allegation. Instead, the Trustee SOC focuses on just two creditor groups, being the AER (by inference, because the commencement document refers to ARO) and municipalities (which are not identified).

[210] If the Oppression Claim were framed to cover all creditors, that would satisfy the collective requirement. By framing the Oppression Claim to focus only on the AER and municipalities, the Trustee has breached a fundamental principle that is inherent in the collective approach that the Trustee must always follow in the execution of its duties. In my view, a trustee in bankruptcy cannot be permitted to pursue matters for a selective class, which would be a subset of the collective group to which it is responsible.

[211] Given the above analysis, I find that the Oppression Claim is framed too narrowly in the Trustee SOC because it only focuses on a selective class of alleged creditors. As a result, I will not exercise my discretion to find the Trustee to be a “proper person” in order to accord it standing as a “complainant” for purposes of the Oppression Claim. To reiterate, the reason for this finding is that I view a collective approach by the Trustee to be a prerequisite to the exercise of my discretion to find it to be a “proper person” entitled to seek standing as a “complainant”.

iii. The *Redwater* Ground – Rule 3.68(2)(b)

[212] The substantive focus of the Trustee SOC is on the ARO. It emphasizes that the ARO is significant, and that the Goodyear Assets were high liability assets. I infer that the “high liability” comment in the Trustee SOC is an indirect reference to the ARO.

[213] While the only facts to which I can refer are those included in the Trustee SOC (and anything which that commencement document references), I am permitted to refer to the common law, including the impact of *Redwater*. My authority to do so in the context of Rule 3.68 is threefold.

[214] First, the limitation in Rule 3.68(3) is only in respect of evidence. Decisions by a Court are not evidence; they are law. Also, the text set out in the Trustee SOC is not evidence.

[215] Second, the Alberta Court of Appeal has stated that a decision in respect of Rule 3.68(2)(b) must be based only on: (i) the facts alleged in the commencement document (which must be assumed to be true for the purpose of disposing of the application); and (ii) the applicable statutory and common law: *HOOPP Realty* at para 25, Wakeling JA, concurring. *Redwater* is a component of the common law.

[216] Third, in considering the application of Rule 3.68(2)(b), a member of the Alberta Court of Appeal suggests that it is appropriate to “...ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff’s prospects of success are extremely low”: *HOOPP Realty* at footnote 8, Wakeling JA, concurring (emphasis added). This point is relevant because *Redwater* is now part of the existing law.

[217] Based on the above authority, I turn to consider *Redwater*, and its relevance to Rule 3.68 in the context of the Oppression Claim.

[218] In this case, the Trustee relies on the argument that the AER had a contingent claim against PEOC at the time of the Asset Transaction, and has a contingent claim provable in the bankruptcy of Sequoia Resources (formerly PEOC). Given the findings by the majority of the Supreme Court in *Redwater*, I find that position is not supportable.

[219] I make this finding for the following five reasons. As required under Rule 3.68, I only consider the facts as stated in the Trustee SOC, excluding any assumptions or speculation that are in that commencement document.

[220] First, there is nothing in the Trustee SOC that suggests that the regulatory obligations of PEOC were “intrinsicly financial” at the time of the Asset Transaction: *Redwater* at para 121. In particular, there is nothing in that commencement document to suggest that AER had even issued an abandonment order in respect of the Goodyear Assets. In any event, the majority in *Redwater* disagreed with “intrinsicly financial” test, calling it “an erroneous interpretation of the third step of the *Abitibi* test”: *Redwater* at para 146; see also para 156.

[221] Second, in *Redwater* the AER advanced the position that it acted in the public interest and for the public good. The Supreme Court of Canada accepted that assertion, and went on to state that it is the public that is the beneficiary of those environmental obligations, and that the province does not stand to gain financially from them: *Redwater* at para 122.

[222] Third, on the facts in *Redwater* the Supreme Court of Canada at para 154 found that the Chambers judge erred in finding that there was sufficient certainty that the AER would ultimately perform the environmental work and assert a claim for reimbursement. In contrast, after a careful review of the Trustee SOC, I see nothing in that commencement document to support an assertion that AER would perform any environmental work on the Goodyear Assets or assert a claim to PEOC for reimbursement.

[223] Fourth, in *Redwater* the Supreme Court of Canada effectively held that the “creditor” test cannot be circumvented on the basis of a contingency. It reinforced this point by stating that a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test: *Redwater* at para 130.

[224] Fifth, in *Redwater* the Supreme Court of Canada stated that in order to be a provable claim, a contingent claim must be capable of valuation. It cannot be too remote or speculative: *Redwater* at para 138. In my view, being capable of valuation is also a prerequisite for a liability. If the alleged obligation is not capable of valuation, it is too remote or speculative to be characterized as a liability. In the case of PEOC, the Trustee SOC effectively reiterates that the amount of the ARO associated with the Goodyear Assets was not capable of being quantified: see para 6.1 of the Trustee SOC. Given that acknowledgment and on the authority of *Redwater*, I find that the ARO is not a liability.

[225] Given the above analysis, all of which pivots on the content of the Trustee SOC, I find that the ARO is not a liability for purposes of the Oppression Claim. I see no reason why the character of the future obligation (the ARO) should be different as between a bankrupt context

and an oppression remedy context. The Supreme Court of Canada in *Redwater* at para 135 held that the AER had no status as a creditor in relation to the ARO of a licensee. If the AER is not a creditor in respect of the ARO associated with the Goodyear Assets, it follows that PEOC could not have assumed a liability in respect of the ARO in conjunction with the Asset Transaction. In effect, *Redwater* holds that the AER is not a creditor.

[226] As stated by the Supreme Court, “[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes”: *Redwater* at para 158. As a result of the *Redwater* decision, the ARO referenced in the Trustee SOC is not a liability. Instead, it is a mere assumption, which can be disregarded for purposes of considering whether to strike or dismiss the Oppression Claim. Restated, I find that *Redwater* has nullified the Oppression Claim.

[227] This finding is consistent with the findings by the Alberta Court of Appeal in *Northern Badger*. In that case, the Alberta Court of Appeal acknowledged that the steps taken by the regulator were “...simply in the course of enforcing observance of a part of the general law of Alberta”: *Northern Badger* at para 34. The Alberta Court of Appeal went on to state that the regulator was not a creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: *Northern Badger* at paras 33 and 35.

[228] While I acknowledge that the Alberta Court of Appeal did comment that Northern Badger had a liability, it described that liability as being “inchoate”: *Northern Badger* at para 32. Given the use of the term “inchoate”, it was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: *Northern Badger* at paras 32 and 36.

[229] I also note that in *Daishowa* the Supreme Court found that statutory reforestation obligations were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure’s value at the time of sale: *Daishowa* at para 31. The Supreme Court of Canada further stated that those “...reforestation obligations were not a distinct existing debt”: *Daishowa* at para 35. That is, those future obligations did not equate to a current monetary claim. Based on what is stated in the Trustee SOC, I find that the same result applies to the ARO associated with the Goodyear Assets at the time of the Asset Transaction.

[230] In this case, the Trustee SOC refers to the fact that the ARO was significant when the Goodyear Assets were acquired by PEOC in the Asset Transaction. It refers to no other “significant” liability.

[231] I infer from the content of the Trustee SOC that the only significant liability in PEOC is the ARO associated with the Goodyear Assets. This inference is reinforced by the additional statement in the Trustee SOC which reiterated that the Goodyear Assets were “high liability” assets.

[232] Given that the ARO is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact, I need not consider the ARO as a true fact for purposes of Rule 3.68(2)(b). While I will detail matters out below under the “5. Conclusion”,

based on the above analysis I strike the Oppression Claim because it discloses no reasonable claim: Rule 3.68(1)(a) and Rule 3.68(2)(b).

b. Can the Oppression Claim be determined on a summary judgment basis?

[233] Given my finding in respect of the application of Rule 3.68(2)(b) and the consequential striking of the Oppression Claim, there is no need to address the application of Rule 7.3 and whether to resolve the Oppression Claim on a summary judgment basis. That said, a few comments are warranted.

[234] I initially paused on the issue of whether summary dismissal was appropriate in this case because of an overarching directive from the Alberta Court of Appeal cautioning that a summary dismissal may not be appropriate if there is a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor for purposes of an oppression action. Hence, this is the reason that I stated in my oral decision that I was not satisfied that summary dismissal was appropriate in respect of the Oppression Claim.

[235] While I need not consider summary dismissal because I have struck the Oppression Claim on the basis that there is no cause of action, I note in my conclusion below that the *Redwater* decision nullifies the Oppression Claim. That is, given the *Redwater* decision, what was initially the basis for a dispute on the material fact as it is framed in the commencement document has been eliminated. For the above noted reasons, the ARO is not a liability for purposes of the Oppression Remedy.

4. Conclusion

[236] Given the above analysis and findings, I strike the Oppression Claim under Rule 3.68(2)(b) on the basis that the claim does not constitute a cause of action. In summary, my reasons for this decision is threefold.

[237] First, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the Trustee SOC does not include the particulars necessary for me to address the prerequisites that are embedded in the Hordo Factors.

[238] Second, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the Oppression Claim is framed too narrowly in the Trustee SOC. In particular, the Trustee SOC frames the Oppression Claim in respect of two classes of alleged creditors (which is a selective focus), and not all creditors (which would be a collective focus).

[239] Third, I will not exercise my discretion to find that the Trustee is a “proper person” to be accorded standing as a “complainant” because the impact of the *Redwater* decision is to nullify the Oppression Claim. I exercise my discretion in this manner because, on the authority of *Redwater*, the very foundation underlying the Oppression Claim, the ARO, is not a liability. Instead, it is a future burden that has not crystallized into a liability.

[240] As a final comment on this matter, a member of the Alberta Court of Appeal has stated in a concurring decision that when a Chambers Judge is considering the striking of a claim under Rule 3.68(2)(b), it is necessary to ask whether the assumed facts and the state of the existing law,

or potential changes in the law considered together, lead to the conclusion that the plaintiff's prospects of success are extremely low: *HOOPP Realty* at footnote 8. In considering that important question in the context of the Oppression Claim, I find that the Trustee's prospect of success is extremely remote. I make this finding because of the impact of *Redwater*, and, based on the text within the commencement document, there is nothing to suggest that any of the creditors meet the oppression remedy prerequisites that the Courts have established over the last three or so decades.

[241] In summary, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I make this determination on two foundations. First, given the analysis above, I find that the Trustee is not a "proper person" that would accord it standing as a "complainant". Second, given the impact of *Redwater*, the Trustee has no cause of action in respect of the Oppression Claim because that decision of the Supreme Court of Canada has nullified that claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

1. Incremental Facts and Context

[242] The Public Policy Claim is referred to in a single paragraph of the Trustee SOC under the heading "Public Policy, Statutory Illegality and Equitable Rescission": para 24 of the Trustee SOC. The only claim is that the "Transactions" are "void", for one or more of three reasons. (I equate the term "Transactions" in the Trustee SOC to "Aggregate Transactions" for purposes of this section.) The reasons the Trustee alleges that the Aggregate Transactions are void are as follows.

1. The Trustee SOC asserts that the Aggregate Transactions are contrary to public policy because they are "reflected" in a statute, a regulation and three directives (collectively referred to as, the "**Regulatory Regime**"). There are no further particulars given regarding the alleged public policy (the "**Policy Claim**").
2. The Trustee SOC asserts that the Transactions are a statutory illegality because they are "expressly or impliedly" prohibited by the Regulatory Regime (the "**Illegality Claim**"). There are no particulars as to what aspects of, for example, the Share Purchase Agreement or the Asset Purchase Agreement are prohibited.
3. The narrative in the Trustee SOC makes a claim based on "equitable grounds" (the "**Equitable Claim**"). There is only a reference to the "reasons" and "circumstances" set out in the Trustee SOC. No further particulars are provided.

[243] The remedy section of the Trustee SOC seeks an Order setting aside the Asset Transaction, and declaring that transaction void as against the Trustee. The narrative in the Trustee SOC makes no claim for "Equitable Rescission". That phrase only appears in a heading, and not in the body of the Trustee SOC.

2. The Law

a. Cause of Action – The Prerequisites

[244] A pleading requires facts, not conclusions: *JO v Alberta*, 2012 ABQB 599 at para 137. A pleading need only include salient facts: *Klemke Mining Corporation v Shell Canada Limited*, 2008 ABCA 257 at para 30; see also *677960 Alberta Ltd v Petrokazakhstan Inc*, 2013 ABQB 47 at para 46. It need not name the cause of action: *Barclay v Kodiak Heating & Air Conditioning Ltd*, 2019 ABQB 850 at para 28; *Petrokazakhstan* at para 48; see also *MDI Industrial Sale Ltd v McLean*, 2000 ABQB 521 at para 7. While the difference between facts and evidence is sometimes a question of degree, the general rule is that evidence is not to be pleaded: *Wenzel v Nenshi*, 2015 ABQB 788 at para 12.

[245] While pleadings need not name a cause of action, they do govern (*i.e.*, regulate) the evidence to be led at trial: *WAR v AG Alta*, 2006 ABCA 219 at para 26. However, in order to have a cause of action, a pleading must include every fact necessary for the plaintiff to prove in order to support his or her right to a judgment: *Barclay* at para 29; see also *Read v Brown* (1888), 22 QBD at 128, Lord Esher M.

[246] The classical definition of a cause of action is simply a factual situation, the existence of which entitles one person to obtain from a judicial forum a remedy against another person: see *Letang v Cooper*, [1964] 2 All ER 929 at 934, 1 QB 232 (HL), Diplock LJ; and *Consumers Glass Co Ltd v Foundation Co of Canada Ltd* (1985), 1985 CanLII 159 (ON CA), 51 OR (2d) 385 at 8, 20 DLR (4th) 126 (CA). If the pleadings do not include the facts necessary to establish an entitlement to a remedy (*i.e.*, negligence), then no cause of action exists.

b. “Public Policy” Breaches and “Statutory Illegality”

[247] Neither an illegal contract nor a contract contrary to public policy is a cause of action: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, Ont: Thomson Reuters Canada Limited, 2011) (“*Fridman Textbook*”) at 338. Further, the doctrine of illegality is a defence, not a cause of action: *Brooks v Canadian Pacific Railway*, 2007 SKQB 247 [*Brooks*] at paras 116 to 118. Finally, the breach of a statutory duty is not a cause of action: *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225.

[248] With respect to breach of a statutory duty, Justice Dickson of the Supreme Court of Canada commented that “[a] duty to all the public (ratepayers, for example) does not give rise to a private cause of action whereas a duty to an individual (an injured worker, for example) may”: *Saskatchewan Wheat Pool*. At the conclusion of that case, Justice Dickson held that the “[c]ivil consequences of breach of statute should be subsumed in the law of negligence”: *Saskatchewan Wheat Pool* at 227.

[249] An allegation that a contract is contrary to public policy cannot “...be used to establish a cause of action, but rather to refuse to grant relief on policy grounds”: *Brooks* at para 122.

[250] Concerning the consequences of illegality, a claim cannot be made on such a foundation. A legal scholar has commented as follows: *Fridman Textbook* at 406 and 407.

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

...

This major consequence of such a contract is often expressed in one of two ways. The first is, *ex turpi causa non oritur action*. This means that a claim cannot be founded upon a base cause, namely, the breach of a statute or a contract that is against public policy. The second is, *in pari delicto potior est conditio defendentis*. This means that where the parties are equally at fault in their participation in illegality, the position of the defendant is the superior. It may be seen that these are two ways of saying the same thing, that rights or claims may not be founded upon illegality.

[251] Other legal scholars have also asserted that neither an illegal agreement nor the contravention of public policy is a ground for a cause of action in damages: see Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", *Annual Review of Civil Litigation 2007* ("*Kain and Yoshida Paper*") at note 183.

[252] There is a judicial aversion to concluding that a contract is prohibited by statute or to interfering with the rights and entitlements provide under the law of contract. This aversion is evident in the following judicial comment from this Court.

A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference", as Parke, B., put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent...: *Alberta Turkey Producers v Leth Farms Ltd*, 1998 ABQB 887 at para 17, citing *St John Shipping Corporation v Joseph Rank Ltd*, [1956] 3 All E.R. 683 at 690.

[253] Extending the doctrine of public policy beyond well-established categories would push the courts into the realm of the legislature. The "...courts have shown an awareness that in declaring new grounds of public policy they are really making law and they have rightly been hesitant in extending the doctrine beyond well-established grounds": *LE Shaw Ltd v Berube-Madawaska Contractors Ltd* (1982), 40 NBR (20) 374 at para 8, [1982] NBJ No 210 (CA).

c. "Equitable Rescission" or "Equitable Grounds"

[254] Equitable rescission is "a remedy, not a cause of action": *Fridman Textbook* at 761. That remedy is predicated on a plaintiff alleging that the contract:

- a. resulted from some fraud (and, as a result, the plaintiff mistakenly entered into the contract) or was mistakenly entered into on the basis of a misrepresentation; or

- b. was obtained by some unconscionable act: *Swan City Taekwon-Do Club v Podolchuk*, 2017 ABPC 244 at paras 143-144.

[255] The facts included in pleadings are critically important. Lawsuits must be determined within the boundaries of the underlying pleadings: *Bablitz* at para 9; *460635 Ontario Limited v 1002953 Ontario Inc*, [1999] OJ No 4071 at para 9, 1999 CanLII 789 (CA). If the statement of claim does not include the necessary alleged facts, a Court will not know the plaintiff's contentions.

[256] To obtain equitable rescission, generally "it must be possible to restore the parties substantially to their pre-contract position": *Kingu v Walmer Ventures Ltd (1986)*, 10 BCLR (2d) 15 (CA) at para 18(g), [1986] BCJ No 597. Although the Court always has discretion to grant the equitable remedy of rescission, it must consider matters carefully. Judicial scholars have framed the parameters as follows.

This is the possibility of being able to effect a true *restitutio in integrum* between the parties. Since the purpose or aim of the equitable remedy of rescission is to return the plaintiff to the position in which he was before the contract was made, and since one of the essential features of an equitable remedy is *mutuality*, that is, the potential availability of the remedy to both parties equally, 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: *Fridman Textbook* at 771.

3. Application of the Law to the Facts

a. The Pleadings and Argument – Preliminary Comments

[257] The Trustee SOC asserts that the Aggregate Transaction was effected in circumstances where PEOC acquired the Goodyear Assets with a significant net liability. The particular allegation in the commencement document is that PEOC acquired the Goodyear Assets at "undervalue".

[258] The Trustee SOC states that the Aggregate Transactions are void, presumably premised on the alleged undervalued transactions: see para 24 of the Trustee SOC. The Trustee has attempted to frame this "void" point as a fact. I find that it is not a fact. It is a legal conclusion.

[259] A legal conclusion is a determination for the Court, and not the Trustee. In particular, whether one or more components of the Aggregate Transaction are void will be determined by the Court, based on the evidence before it. By itself, there is no cause of action for the allegation that the "...[t]ransactions are void".

[260] Among other relief, the remedy section of the Trustee SOC seeks an order setting aside the Asset Transaction, and declaring the Asset Transaction void as against the Trustee. Consistent with that particular remedy sought, the Defendants acknowledged in argument that if it is ultimately determined on the evidence, first, that there was a transfer at undervalue; second, that the parties were not dealing at arm's length; third, that the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer; and, fourth, that the transfer occurred within the five-year period before bankruptcy, the Trustee is entitled to an order declaring the Asset

Transaction void as against the Trustee. That result would arise from an application of section 96 of the *BIA*.

[261] During argument, the Trustee addressed this point, albeit indirectly. The Trustee first alleged that all of the transactions are void because of the “scheme.” Specifically, the Trustee alleges that POT, POC and PEOC entered into an agreement, in part by which PEOC would retain a 1% legal interest in certain highly productive gas assets as bare trustee in trust for POT, and POT would retain the beneficial interest (the “**Retained Interests Agreement**”). The Trustee claims the objective of the transaction contemplated by the Retained Interests Agreement was to support PEOC’s License Liability Rating to allow the Aggregate Transaction to be completed without regulatory intervention by the AER. When it made this argument, the Trustee referred to the Retained Interest Agreement and the Licensee Liability Rating for PEOC. The Trustee then narrowed its focus to the Asset Transaction. In particular, the Trustee submitted that it was only “...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” (emphasis added).

[262] The question is whether the various components within the Public Policy Claim are causes of action.

b. Are Alleged “Public Policy” Breaches and “Statutory Illegality” Causes of Action?

[263] Concerning the alleged breaches of “public policy” and the alleged “statutory illegality”, there is nothing in the Trustee SOC that provides any particulars concerning the allegation that the Aggregate Transaction:

- a. is prohibited by the Regulatory Regime;
- b. is expressly or by necessary implication illegal; or
- c. could conceivably bring an agreement to transfer corporate shares (or viewed in isolation, an agreement to combine the beneficial and legal interest in assets [*i.e.*, the Asset Transaction]) within any of the recognized categories of agreements that are contrary to public policy.

[264] I acknowledge that there are categories of agreements that are contrary to public policy. These include contracts that (i) are injurious to the state; (ii) are injurious to the system of justice; (iii) encourage immorality; (iv) affect marriage; (v) are in restraint of trade; and (vi) are restrictive of personal liberties: *Kain and Yoshida Paper* at section III.2 to 6. Given the scope of these categories as currently defined, I find that no component of the Aggregate Transaction falls into any of these classes.

[265] If what is intended to be illegal or contrary to public policy is the alleged objective of the Retained Interests Agreement to support the Licensee Liability Rating for PEOC to allow the Transaction to be completed without regulatory intervention, the Trustee has not provided any basis that would make that objective expressly, nor by necessary inference, prohibited. In my view, the Trustee is fishing but it has neither a hook nor a net.

[266] Public policy considerations may be relevant to the question of whether a particular contract should be enforced. Similarly, public policy considerations may be relevant in

considering the consequences that should apply if a finding of the illegality is made: *Still v MNR* (1997), [1998] 1 FC 549 at para 48, [1997] FCJ No 1622 (FCA). However, neither of those points assume an independent legal force: *Kain and Yoshida Paper* at section III.1. That is, being contrary to public policy is not a cause of action.

[267] The doctrine of illegality is a defence, and not a cause of action: *Brooks* at 116. Similarly, an allegation that a contract is contrary to public policy does not establish a cause of action: *Brooks* at paras 117, 122.

[268] The key case on which the Trustee relied is *Sidmay Ltd v Wehltam Investments Ltd*, 1967 CarswellOnt 235, [1967] 1 OR 508 (ONCA). I find that case is of no assistance to the Trustee in this matter for three reasons.

[269] First, the Trustee is relying on *obiter* in the decision. In contrast, *Brooks* is on point, and I need not rely on *obiter* from *Sidmay*.

[270] Second, there are no particulars in the Trustee SOC that show that anything in the Aggregate Transactions was illegal. Pursuant to Rule 13.6(3)(e), grounds for pleading illegality of a contract must be provided. The Defendants should not need to guess what component of the Aggregate Transaction allegedly broke what law. The mere reference to the Regulatory Regime is not sufficient.

[271] Third, *Sidmay* was focused on an exception. The plaintiff in that case fell within the class of persons for whom the legislation was designed to protect. In contrast, I see nothing in the Trustee SOC that leads me to conclude that the Trustee falls within an exception.

[272] The Trustee also advanced *Chapman v Michaelson*, [1908] 2 Ch.612; aff'd [1909] 1 Ch. 238 as authority for it to apply to the Court for a declaration as to the illegality of the transaction. The Ontario Court of Appeal commented on that case in *Sidmay*. For the purposes of this case, the relevant comment was that “[d]ue 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”: *Sidmay* at para 54. This is a persuasive statement by an appellate Court, which cause me not to follow *Chapman*.

c. Is Either “Equitable Rescission” or “Equitable Grounds” a Cause of Action?

[273] As noted above, the facts included in a pleading are of critical importance: *Bablitz* at para 9. In this case, the phrase “equitable rescission” is only stated in the heading. That phrase is not stated in the body of the pleading. Most importantly, no particulars are included in the pleading. That is not sufficient to ground a cause of action. Appropriate facts must be plead. If pleadings do not include the facts necessary to establish an entitlement to a remedy, then no cause of action exists: *Barclay* at para 9.

[274] Concerning the claims based on “equitable rescission” and “equitable grounds”, I find that there is no cause of action because the necessary facts to support the remedy are not included in the Trustee SOC.

[275] Even if “equitable rescission” were pleaded, the claim would still fail because it is “a remedy, not a cause of action”: *Fridman Textbook* at 761. Further, it is an all or nothing remedy: *Fridman Textbook* at 761.

[276] The remedy of equitable rescission is predicated on (i) the plaintiff alleging the contract resulted from some fraud (and as a result, the plaintiff mistakenly entered into the contract); (ii) was mistakenly entered into on the basis of a misrepresentation; or (iii) was obtained by some unconscionable act: *Swan City Taekwon-Do* at paras 143,144. In this case, the Trustee SOC has neither included any of those claims nor stated any facts that would support such claims.

[277] Further, to obtain equitable rescission, “it must be possible to restore the parties substantially to their pre-contract position”: *Kingu* at para 18(g). Notwithstanding that the Trustee stated that it was only challenging the Asset Transaction (see paragraph 261 of this decision, above), its proposed application of “equitable rescission” would have to apply to the Aggregate Transaction, including the shares of PEOC. In this case, that is not possible. The Trustee does not have the shares of PEOC. 198Co owns them. Further, PEOC (now Sequoia Resources) is a bankrupt corporation. The *Sidmay* case is supportive of this conclusion.

[278] It is not possible to return the beneficial interest in the Goodyear Assets to POT some years after the Asset Transaction. To do so would be an attempt at partial rescission, which is not possible under the current framework of the law. No such remedy is known at common law or equity: *Kingu* at para 18.

[279] Finally, rescission is only available between parties to a contract: *Topgro Greenhouses Ltd v Houweling*, 2006 BCCA 183 at para 81 leave to appeal to SCC refused 31508 (14 September 2006). In this case, the Trustee is standing in the shoes of Sequoia Resources (formerly known as PEOC). Sequoia Resources was not a party to the Share Purchase Agreement. This is a fatal bar to the Trustee seeking rescission of the Share Purchase Agreement.

[280] 198Co was a party to the Share Purchase Agreement, but it is not a party to this action. If the Trustee intended to claim relief that would affect 198Co, it would be necessary for 198Co to be a party to this action: *Topgro* at paras 82 and 92.

4. Conclusion

[281] Given the lack of facts in the Trustee SOC and my analysis of the law, I strike the Public Policy Claim under Rule 3.68 on the basis that it discloses no reasonable claim, and, in particular, no cause of action in respect of the Public Policy Claim. In summary: (i) an allegation that a contract is contrary to public policy is not a cause of action: *Brooks* at para 122; (ii) neither a breach of statutory duty nor illegality is a cause of action: *Brooks* at paras 116 to 117; and (iii) equitable rescission is not a cause of action: *Fridman Textbook* at 761. Further, the decision in *Redwater* extinguishes the Public Policy Claim because the ARO is not a liability, and the AER is not a creditor of PEOC.

[282] Notwithstanding my striking of the Public Policy Claim, the Trustee is not precluded from seeking an order setting aside the Asset Transaction and declaring the Asset Transaction void as against the Trustee. That is a remedy sought by the Trustee, and it was framed properly

in the Trustee SOC. As stated above, the entitlement of the Trustee to seek an order to void the Asset Transaction is available in section 96 of the *BIA*.

[283] In making this decision, I recognize that there is no more important an arena for cooperative federalism than the environment: *Redwater* at para 60, describing dissenting reasons from 2017 ABCA 124 at para 107. That said, a cause of action premised on an overriding policy must be based on a contextual and purposive interpretation of a specific provision in a statute. To search for an overriding policy not based on such a foundation is incompatible with my role as a judge.

[284] As a final comment on this point, searching for some overarching and unarticulated policy and using such an inferred policy to override the Asset Transaction would inappropriately place the formulation of a contract in the hands of the judiciary. Absent a specific legislative framework that requires me to execute such task, it is inappropriate for me to do so: see *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at paras 41, 42. I also note that absent a specific legislative framework directing such an undertaking, the execution of such a task would be of general concern because of the indeterminate effect it would have on the business community. While I concede that such challenges are available under the ITA, that is only because section 245 of the statute introduced the general anti-avoidance rule in 1988. I am not aware of any similar legislative frameworks in other statutes that could be applied to challenge the Asset Transaction, and none have been plead.

D. Is the Release a complete bar to claims against Ms. Rose?

[285] The decision in *Redwater* nullifies the Trustee's assertions concerning the Release. Further, *Redwater* extinguishes any suggestion that Ms. Rose breached her duties, including her fiduciary duty and duty of care, because that case determine that ARO is not liability. As a consequence, the Director Claim embodies no reasonable cause of action. I make further comments on the "Director Claim" below: see part VI. E., below.

[286] Notwithstanding the impact of *Redwater*, I provide the following comments in respect of the Release.

1. Incremental Facts and Context

[287] The Share Purchase Agreement was negotiated between sophisticated parties. Each of those parties was represented by experience legal counsel.

[288] The Trustee does not challenge or seek to set aside the Share Purchase Agreement. Given that context, I find that the terms and conditions in the Share Purchase Agreement continue to stand.

[289] The Share Purchase Agreement stipulated the closing deliverables for Perpetual Energy, in its capacity as the vendor, including the following for the benefit of PEOC:

8.1(a)(xviii) resignations of all directors and officers of [PEOC] and a release from such directors and officers pursuant to which they release all Claims against [PEOC];....

[290] The Share Purchase Agreement also stipulated the closing deliverables of 198Co, in its capacity as the purchaser. These deliverables included the following reciprocal release in favour of Ms. Rose:

8.2(a)(xiii) releases signed by the new signing authorities of [PEOC] as appointed by the Purchaser releasing the directors and officers of [PEOC] from any Claims related to such directors and officers acting as a director or officer of [PEOC];....

[291] The term "Claim" is defined broadly in the Share Purchase Agreement as "any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing".

[292] As provided for in the Share Purchase Agreement, the new directors of PEOC signed the Release on behalf of PEOC. Those new PEOC directors did so under the new ownership of 198Co.

[293] PEOC and Perpetual Energy released Ms. Rose from any claims relating to her having acted as a director and officer of PEOC. The Release provides as follows:

Corporate Release

3. PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement), which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.

[294] As is evident from the above text in clause 3 of the Release, it includes an exclusion that provides that the Release does not apply if the Claim is based on the fraud, criminal conduct or deceit. None of the claims or particulars in the Trustee SOC allege fraud, criminal conduct or deceitful conduct in respect of Ms. Rose.

[295] The Release further provides:

Understanding & General

4. The parties acknowledge and declare that they have been provided with sufficient time and opportunity to consider all factors related to the execution of this Mutual Release and acknowledge a full awareness of its consequences and its voluntary execution. The parties acknowledge having received independent legal advice regarding the execution of this Mutual Release, or have voluntarily chosen not to receive such advice.

...

6. This Mutual Release shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.

2. The Law

[296] Releases are common in a variety of circumstances, including in purchase and sale agreements and where the parties have no previous relationship. The purpose of a release is typically to deal with events that are, or may be, yet to come.

[297] A release is an agreement. Its effectiveness is judged on the basis of ordinary contractual principles: *Fotini's Restaurant Corp v White Spot Ltd* (1998), 38 BLR (2d) 251 at para 8, [1998] BCJ No 598 (SC).

[298] The wording of a release typically suggests an intent to wipe the slate clean. The parties may look to make that fresh start when, for example, they wish to end a particular relationship or one party may be seeking to sever a connection with a prior relationship: *Bank of Credit and Commerce International SA (in Liquidation) v Ali*, [2001] 1 All ER 961 (HL) [Alf] at 970.

[299] A release is the abandonment, in whole or in part, of a right or claim: *Covia Canada Partnership Corp v PWA Corp* (1993), 105 DLR (4th) 60 at 75, [1993] OJ No 1757 (Ont Ct (Gen Div)), aff'd (1993), 106 DLR (4th) 608 (ONCA); *Keats v Arditti* (2000), 233 NBR (2d) 291 at para 104, [2000] NBJ No 498, (NBQB), aff'd 2001 NBCA 88, leave to appeal to SCC refused 28982 (20 June 2002); and *Re Donnell*, [1930] 4 DLR 1037 at 1037, [1930] OJ No 433 (Surr Ct). The essence of a release is that one party discharges the other party from an action: *Abouchar v Ottawa-Carleton (conseil scolaire de langue française section publique)* (2002), 58 OR (3d) 675 at 678, [2002] OJ No 1249 (SC).

[300] The intent of a release is to unchain a party from any liability or obligation to another party arising out of particular circumstances, and to do so once and for all: *Abundance Marketing Inc v Integrity Marketing Inc*, 2002 CanLII 23605 (ONSC) at para 22, 117 ACWS (3d) 227, [2002] OJ No 3796. That is, a release extinguishes the underlying liability. As a consequence, a release can be held up as a bar to a claim.

[301] The person requesting a release typically seeks to obtain a relinquishment of rights, which can be used as a bar against a future claim. Even where a release is not effective to bar a particular proceeding, it may still be relevant to bar the merits of the issues in that proceeding or in relation to the remedies that otherwise may be available: *Keewatin (Regional Health Board) v Peterkin* [1997] NWTR 93 at paras 7, 27, 29 CCEL (2d) 190 (NWTSC), at 198. Under long-standing common law principles, a release serves this purpose because it can be raised as a bar to an action on a debt or claim that has been discharged: *Brown v Owen*, [1939] OWN 522, 4 DLR 732 (SC); *Carey v Freeman*, [1938] 4 DLR 678 (Ont CA) at 681, [1938] OR 713; *Heitman Financial Services Ltd v Towncliff Properties Ltd* (1981), 35 OR (2d) 189 at 192-193, 12 ACWSC (2d) 294 (HCJ).

[302] A valid and enforceable release affords a complete defence to an action because its effect extinguishes the underlying cause of action. There is no need for the party relying on the release to make out a case that the commencement of the action constitutes a breach of contract. There is no necessity for pleading a counterclaim: *Carey* at 681.

[303] The effect of a release is to extinguish a cause of action in a manner similar to the expiry of a limitation period: *British Columbia Electric Railway Co v Turner* (1914), 49 SCR 470 at

496. The Judicial Committee of the Privy Council accepted this proposition as being correct: *British Columbia Electric Railway Co v Gentile*, [1914] AC 1034 (PC) at 1042.

[304] When a release is signed, the releasee is typically seeking to achieve finality. In this regard, authoritative courts have recognized that finality is an objective of both parties, and that the parties to a release do not confine the scope of the document to known claims: *Ali* at 970-71.

[305] The finality associated with judgments of a court are recognized as an important feature of the justice system in Canada, both for the parties involved in any specific litigation and for the community at large: *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 OR (3d) 257 at 275, 165 DLR (4th) 268 (CA) [*Tsaoussis*], leave to appeal to SCC refused, 26945 (28 January 1999).

[306] In *Tsaoussis*, the Ontario Court of Appeal considered a motion to set aside a judgment approving an infant settlement. For the parties, the Court noted that finality is an economic and psychological necessity: *Tsaoussis* at 275. The appellate Court in that case commented that finality “places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation”: *Tsaoussis* at 275. While the context in that case was not commercial, the premise remains the same. Courts emphasize the high value placed upon finality by our justice system.

[307] It is important that there be a point in time when parties can proceed on a basis that matters have been decided, and rights and obligations finally determined. Parties need to be secure in their knowledge that issues have been concluded on a final basis: *Tsaoussis* at 276. The common law recognizes this contractual entitlement in the form of a release.

3. Application of the Law to the Facts

[308] It is standard industry practice to release outgoing directors when there is a change of control. It would be highly unusual for a director not to seek protection in the form of a release.

[309] As I understand the Trustee’s argument, it seeks monetary damages from Ms. Rose on the theory that Ms. Rose caused Perpetual Energy to require 198Co to agree to the Release. On the balance of probabilities, I find that this allegation is without merit for the following reasons.

[310] First, there is no evidence that Ms. Rose caused Perpetual Energy to do anything. Indeed, the evidence is to the contrary. Perpetual Energy is a public company. It has its own board of directors. Further, there is no evidence that Ms. Rose controlled Perpetual Energy. Given that context, I find that Ms. Rose did not control Perpetual Energy.

[311] Second, the Release confirmed that Ms. Rose acted as a director and officer of PEOC at the request of Perpetual Energy.

[312] Third, counsel for the Trustee conceded in court that “[t]his was Perpetual Energy doing this transaction through a subsidiary.”

[313] Fourth, PEOC was a special purpose corporation that was a wholly owned subsidiary of Perpetual Energy. That being the case, legal control flowed from the parent corporation, which was Perpetual Energy, to the subsidiary, which was PEOC.

[314] Fifth, 198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate Transaction with the assistance of experienced legal counsel. There is no evidence that 198Co was forced or "required" to agree to anything in respect of the Release.

[315] Sixth, the terms of the Release acknowledge that the parties have been provided with sufficient opportunity to consider all factors related to the execution of that document. Also, the parties specifically acknowledged a full awareness of its consequences, and its voluntary execution.

[316] The Trustee also alleges that Ms. Rose breached her duties to PEOC by acting contrary to section 122(3) of the *ABCA*. Section 122(3) of the *ABCA* provides as follows.

(3) Subject to section 146(7) [unanimous shareholder agreements], no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director from any liability for a breach of that duty.

[317] Section 122(3) of the *ABCA* embodies the principle that officers and directors may not contract out of existing duties owed to the corporation. The object of that statutory provision is to ensure that existing directors of the corporation comply with their duties to the corporation while they are in office.

[318] I struggle with the argument advanced by the Trustee. If the Trustee's position is that section 122(3) of the *ABCA* precludes a corporation from entering into a mutual release with a former director, that would be extraordinary for the following five reasons.

[319] First, the use of a mutual release by business people in transactions is common practice. If I accepted the position advanced by the Trustee, it would displace decades of business convention.

[320] Second, the implication inherent in the position of the Trustee is that directors can never be released in transactions that involve an acquisition of control. If that was the law, directors would be exposed to liability for an indeterminant length of time.

[321] Third, there are books written on the use of releases. My review of that literature does not support the proposition advanced by the Trustee.

[322] Fourth, there is a need for finality: *Tsaoussis* at 275. But for releases, a director may never achieve finality. As a matter of contract, the proposition advanced by the Trustee would be ironic in that it was PEOC (now Sequoia Resources) that negotiated and signed the Release. The implication of the Trustee's apparent position would be that Sequoia Resources could walk away from the very bargain that it negotiated.

[323] Fifth, the evidence is that Ms. Rose took her responsibilities as a director and officer of PEOC seriously, considered the best interests of PEOC, its stakeholders, and then exercised her business judgment to the best of her ability. Importantly, her evidence was to the effect that the ultimate decision to enter into the Aggregate Transaction was that of Perpetual Energy and its board of directors.

[324] The evidence before me is that the Release was negotiated at arm's length between Perpetual Energy and 198Co, and that the Release was signed on behalf of PEOC by the new directors, who were appointed by 198Co.

[325] As noted above, the parties to the Release acknowledged and declared that they were provided with sufficient time and opportunity to consider all factors related to the execution of the Release, and they acknowledged a full awareness of its consequences and its voluntary execution. The parties also acknowledged having received independent legal advice regarding the execution of the Release, or voluntarily chose not to receive such advice.

[326] These acknowledgments distinguish the circumstances of this Release from the one referred to in *Tongue v Vencap Equities Alberta Ltd* (1994), 148 AR 321, 17 Alta LR (3d) 103 (QB), aff'd 1996 ABCA 208. In *Tongue* at paras 139 and 141, the Court stated that the Release did not allow the directors to contract out of their duties. The decision in that case turned on disclosure, and the Court stated that the Releases did not contemplate liability for certain breaches because certain confidential information was not disclosed during the transaction: *Tongue* at paras 135-136. In contrast to *Tongue*, there is no suggestion in this case that there was not full disclosure. Further, the evidence is that both parties to the Release had experienced legal counsel advising them.

[327] Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee's claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be no damages against Ms. Rose and she is shielded from financial exposure.

4. Conclusion

[328] The Trustee's claims against Ms. Rose are solely in relation to her having acted as a director of PEOC. I find this to be directly contrary to the express terms of the Release.

[329] The Trustee's segregation of the Asset Transaction from the Aggregate Transaction puts it in the unusual position of conceding that the Release was part of the negotiated transaction, but somehow disconnected from the Asset Transaction. This inconsistency cannot be reconciled.

[330] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

1. Incremental Facts and Context

[331] For convenience, I include key facts here notwithstanding that they may have been included above.

[332] The value of the Goodyear Assets received by PEOC on the Asset Transaction was alleged in the Trustee SOC to be no more than \$5,670,200. This amount does not include any value attributed to the Gas Marketing Contract, which the evidence indicates was \$12.9 million. Further, this amount does not include additional information from the models that the Trustee compiled.

[333] The evidence provided by the Trustee estimated the liabilities assumed by PEOC in the Asset Transaction to be as follows: (i) ARO abandonment costs of \$98,855,218; (ii) ARO reclamation costs of \$93,272,056; and (iii) ARO facility costs of \$26,831,000. These ARO liabilities aggregate to a total of \$218,958,274.

[334] The evidence provided by the Trustee alleged municipal property taxes in the amount of \$10,047,744. Based on my review of the evidence, I note that those municipal property taxes were from a 2015 listing. Since the Asset Transaction was effected in 2016, I focused on the municipal property taxes associated with that calendar year. Based on my review of the evidence, I find the relevant outstanding municipal property tax to be in the amount of \$1,560,890.

[335] During my review of the evidence, I did not see any record of the municipalities issuing notices of default in respect of the property taxes that are associated with the Goodyear Assets.

[336] The Trustee asserted that Asset Transaction resulted in a net deficit of \$217,580,800. In my review of that calculation, in conjunction with a detailed review of the evidence, I identified an amount of “value” that was deducted twice (\$5,765,000).³ There also were some minor rounding adjustments (\$18, being a net amount).

[337] The Trustee SOC alleges that Ms. Rose determined that the Goodyear Assets were high liability assets. It further asserts that Ms. Rose failed as a director of PEOC to consider the implications of ARO as a liability of PEOC.

[338] Ms. Rose filed the application before me, amended twice, for summary dismissal and striking pleadings. She asked that this action against her be summarily dismissed pursuant to Rule 7.3, or in the alternative to be struck pursuant to Rule 3.68.

³ See Exhibit N to the Darby Affidavit. The alleged net deficit of \$223,241,000 already reflects a reduction of \$5,765,000. When the \$223,241,000 is reduced again by the amount of \$5,670,200, the net result of \$217,570,800 is recorded. That matches the amount claimed, but the double deduction of value was required to come to that “net amount”.

2. The Law

[339] *Redwater* has a significant impact on the Director Claim. I have already commented on *Redwater* extensively above. To the extent it is relevant, I incorporate by reference my above comments on *Redwater*.

[340] In addition, *Daishowa* touches on the alleged liability issue from a different perspective. The comments of the Supreme Court of Canada in *Daishowa* on the alleged liability issue are instructive, including at paras 3, 29, 37 and 40:

[3] The issue in this case is whether [Daishowa-Marubeni International Ltd. (“DMI”)] was required to include in its “proceeds of disposition” for each sale an estimate of the cost of the reforestation obligations that the purchasers assumed. In my view, DMI was not required to do so. The obligation to reforest areas harvested in accordance with a forest tenure in Alberta is a future expense that is embedded in the tenure. As such, the obligation serves to depress the value of the forest tenure. It is not a separate existing debt of the vendor that is assumed by the purchaser as part of the sale price of the forest tenure.

...

[29] I agree with Mainville J.A., DMI and the industry interveners that the assumed reforestation obligations are not appropriately 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.

...

[37] In sum, the reforestation obligations imposed by Alberta law on DMI’s forest tenures are embedded in those tenures and, as such, are future expenses tied to ownership of the property. They are not a liability that can be separated from the forest tenure, the assumption of which would form part of the sale price of the tenure.

...

[40] However, DMI’s argument that the reforestation obligations should not be included in its proceeds of disposition because they are a “contingent liability” is misplaced and appears to have caused some confusion in the courts below. The argument is problematic because, in focusing on whether the reforestation obligations are contingent or absolute, it implicitly accepts that the cost of reforestation is a liability of the vendor that is not embedded in the forest tenure and would constitute proceeds of disposition but for the contingent nature of the liability; see Frankovic, at p. 4. This implicit assumption is incorrect. As I have explained above, the cost of reforestation is not a distinct existing liability of the vendor. The assumption of the cost of reforestation would thus be excluded from proceeds of disposition independent of whether the cost is absolute or contingent.

3. Analysis

[341] I have already indicated that the Director Claim embodies no reasonable cause of action when the Trustee SOC is read as a whole in the context of what fiduciary duty and duty of care mean: see paragraph 285 of this decision, above. That is fatal to the Director Claim. I make this comment because *Redwater* held that ARO is not a liability, which nullifies the Trustee's arguments concerning fiduciary duty and duty of care.

[342] While *Redwater* and the consequential lack of a cause of action are sufficient to strike the Director Claim, Ms. Rose also sought summary dismissal of this matter. For completeness, I will address the question of summary dismissal of the Director Claim.

a. Summary Dismissal

[343] I am required to assess whether it is possible to resolve the Director Claim on a summary basis, based on the record before me. I find that there is sufficient evidence for me to do so.

[344] For purposes of this analysis, I will use the Trustee's alleged value of consideration received, being the amount of \$5,670,200. Concerning the liabilities associated with the ARO and municipal property taxes, the alleged liabilities will be examined through the lens of the law as it currently stands.

[345] In considering summary dismissal, I must assess whether Ms. Rose has demonstrated on a balance of probabilities that, on the facts as proven, there is no merit to the Director Claim.

[346] The Alberta Court of Appeal has cautioned that a summary dismissal should not be considered if there is a dispute on material facts: *Weir-Jones* at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor. I considered that issue above. That is a question of law, and *Redwater* is relevant. To the extent the parties dispute the application of *Redwater*, I find that the Trustee's position is without merit. That being the case, *Redwater* should be considered in Ms. Rose's summary dismissal application.

[347] The Trustee alleges that Ms. Rose had determined that the Goodyear Assets were high liability assets. The Trustee also alleges that Ms. Rose was aware that PEOC was unable to meet the obligations associated with Goodyear Assets.

[348] In contrast, Ms. Rose argues that the above allegation has no relevance to her duties to PEOC, and that she acted in accordance with her statutory duties under the *ABCA*.

[349] Notwithstanding Ms. Rose's arguments, I will address the liability issue because that is the foundation of the Trustee's argument. To do this, it is necessary to consider the Asset Transaction in the context of the liability issue.

[350] The Perpetual Energy Defendants assert that the ARO is not a liability. They take this position on the authority of *Redwater*.

[351] In contrast, the Trustee asserts that the Supreme Court of Canada in *Redwater* did not address the broader question of whether the AER was a creditor for any purpose. The Trustee also argued that *Redwater* would have no effect on its standing to advance various claims, and

that the concept of a “provable claim” was not relevant to the oppression analysis that the Court needed to address.

[352] PWC asserted in the Trustee’s June 2019 Submission that the “provable claim” issue was a red herring. It advanced this argument apparently because it is of the view that *Redwater* impacts a definition in the *BIA* that is not relevant to the analysis that the Court must undertake on other fronts. I disagree.

[353] The Trustee also submits that the Defendants’ assertions that *Redwater* holds that the ARO is not a liability are without merit based on the facts in *Redwater* and *Daishowa*. To support its position, the Trustee refers to the following:

- a. All licenses held by Redwater were received by it, subject to the end-of-life obligations that would one day arise: *Redwater* at para 157.
- b. The issue in *Daishowa* was whether the reforestation obligations assumed by the purchaser depressed the value of the tenures sold or were separate liabilities to be included in the seller’s proceeds of disposition for tax purposes: *Daishowa* at paras 6, 7 and 25, 26. The Trustee argues that, as in *Redwater*, there is no dispute in *Daishowa* that the reforestation obligations were a form of liability: see Trustee’s June 2019 Submission at para 12.
- c. The ARO associated with the assets transferred to PEOC had a present effect on the fair market value of those assets, the same as if the associated costs had been paid upfront: *Redwater* at para 157.

[354] To properly consider the nature of Trustee’s assertions, I need to review the definition of “liability”. The nature of the “liability” issue is important to the Director Claim because it will assist in determining whether there is any merit to that claim, as framed by the Trustee.

[355] Based on my review of the evidence in the context of the law as it currently reads, the record allows me to make a finding on this liability issue. Indeed, the Trustee, by its own admission, asserted that “...facts are not complex or disputed”.⁴ The Trustee also states that “...there is no reason why complex *legal* issues require a trial and cannot be determined on an application” (emphasis in the original).⁵

[356] Based on the evidence before me, I find that the ARO does not represent a liability for the following four reasons.

[357] First, the Trustee asserts that the ARO is a liability because *Redwater* referred to that regulatory responsibility as an end-of-life obligation that would one day arise: *Redwater* at para 157. Contrary to the Trustee’s position, I find that judicial comment supports the position that ARO is not a liability. In particular, that judicial comment in *Redwater* recognizes that an

⁴ See paragraph 28 of the Trustee’s Brief. See also the Trustee’s statement in paragraph 11 of its Brief where it asserts that “[t]he relevant facts are simple.” The Trustee also states that “[t]he complexity of a transaction or the amount involved does not, on its own, preclude the Trustee from proceeding by way of a summary application”: see paragraph 27 of the Trustee’s Brief. Given that statement, I am of the view that the argument goes both ways to permit applications to be brought against the Trustee as well.

⁵ See paragraph 29 of the Trustee’s Brief.

obligation will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability.

[358] Concerning this point, the issue of whether a current liability exists is binary. There is no middle ground. A liability either exists or it does not. Further, a liability is quite different from a future obligation, particularly one that can be quantified only by reference to broad assumptions. While financial statements may record an accounting provision for various obligations, such accounting provisions do not, in and of themselves, create a liability that is recognized in Canada under the laws of general application.

[359] Second, the Trustee relies on *Daishowa* to assert that there is no dispute that the reforestation obligations were a form of liability: *Daishowa* at paras 25, 26. As I understand the Trustee's position, it asserts that a "form of liability" is therefore a liability.

[360] I find that assumption to be in error because a "form of liability" is, at best, a contingent liability. A contingent liability is not a liability in law. This very point has been made by the Supreme Court of Canada: *Daishowa* at para 40 (which is stated above at paragraph 340 of this decision).

[361] Third, the Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: *Hordo* at para 15. Absent a creditor, there cannot be a liability. One goes with the other because they are linked inextricably.

[362] Fourth, during the hearing of this matter, the Trustee made an unqualified admission to the effect that ARO associated with the Goodyear Assets was not a PEOC liability. While the Trustee's June 2019 Submission suggests that the Trustee is retreating from that admission, that concession during argument highlights the weak ground on which the Trustee stands.

[363] Based on the evidence before me, the current state of the law and my analysis above, I find that the AER, on the balance of probabilities, was not a creditor of PEOC at the time of the Asset Transfer and that PEOC was not subject to a current or enforceable liability in respect of the ARO that was allegedly associated with the Goodyear Assets. As a result, I also find that Ms. Rose has demonstrated, on the balance of probabilities, that, on the facts proven, there is no merit to the Director Claim. Restated, if the AER is not a creditor, the foundation of the Trustee's argument concerning the Director Claim is nullified.

[364] I am able to make these findings based on the nature and quality of the evidence before me. The record was sufficient to consider this "liability" issue on a summary application, and there was no "credibility" issue that had to be tested (in contrast to my finding above in respect of the *BIA* Claim).

[365] Having found that there is no merit to the Director Claim, I find that Ms. Rose discharged her burden. That said, I need to assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the Director Claim: *Weir-Jones* at para 30, 47. This latter assessment will be based on the nature of the issues and their merits.

[366] Undoubtedly, the Trustee is of the view that there is a genuine issue requiring a trial. As I noted above, the Trustee asserts that the Supreme Court of Canada in *Redwater* did not address

the broader question of whether the AER was a creditor for any purpose. The Trustee also asserted that *Redwater* has not determined the liability issue. In particular, the Trustee takes the position that the argument that the ARO is not a liability is without merit.

[367] Before Supreme Court of Canada decision in *Redwater*, I may have considered the argument advanced by the Trustee. However, on the authority of *Redwater*, I find that the AER is not a creditor in respect of the ARO associated with the Goodyear Assets. Consistent with that finding, I also conclude that the ARO associated with the Goodyear Assets was not a liability of PEOC (Sequoia Resources) at the time that the Asset Transfer was effected.

b. Financial Review – *Redwater* Impact

[368] My conclusion is supported by the financial component of the “Value and Consideration” in respect of the Asset Transaction. That financial result is as follows (see the “*Post-Redwater*” column):

| | Trustee SOC | Post- <i>Redwater</i> |
|--|------------------------|-----------------------|
| Alleged Value of Consideration Received | <u>\$5,670,200</u> | <u>\$5,670,200</u> |
| Trustee Estimate of Liabilities Assumed: | | |
| • ARO abandonment costs | 98,855,218 | NIL |
| • ARO reclamation costs | 93,272,056 | NIL |
| • ARO Facilities | <u>26,831,000</u> | <u>NIL</u> |
| Alleged Aggregate ARO | 218,958,274 | NIL |
| Alleged Aggregate Property Taxes | <u>10,047,744</u> | <u>1,560,809</u> |
| Sub-Total | 229,006,018 | 1,560,809 |
| Reconciling Adjustment ⁶ | <u>(5,765,018)</u> | <u>NIL</u> |
| Alleged Aggregate Liabilities | <u>223,241,000</u> | <u>1,560,809</u> |
| Net Asset (Deficit) | <u>(\$217,570,800)</u> | <u>\$4,109,391</u> |

[369] In effect, the decision in *Redwater* extinguishes the Trustee’s assertion that the Asset Transaction resulted in a significant net deficit. This “*Post-Redwater*” determination further demonstrates that there is no merit to the Director Claim insofar as it was premised on the ARO being a liability. Accordingly, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

⁶ This adjustment is included in order to reconcile with the figure that the Trustee used. See footnote 3, above.

[370] Given the above facts and analysis, I find that the Trustee has not established that there is a genuine issue requiring a trial in respect of the Director Claim because the Trustee's foundation for the Director Claim was premised on the ARO being a liability. That position has been nullified by *Redwater*.

[371] Given this determination, the guidelines in *Weir-Jones* require that I take one last step. That is, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the Director Claim: *Weir-Jones* at para 47(d); see also *Geophysical Service* at para 40. Based on my review, I am satisfied that the state of the records permits me to exercise discretion to summarily dismiss the Director Claim.

4. Conclusion

[372] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

VII. Summary of Conclusions

[373] For convenience, I summarize my above conclusions as follows.

A. *BIA* Claim – Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA*?

[374] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[375] Given the above facts and analysis, I will not strike the *BIA* Claim.

B. Oppression Claim – Is the Trustee a “complainant” that is entitled to bring an oppression claim under section 242 of the *ABCA*?

[376] Given the above facts and analysis, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I do so on the basis that the Trustee is not a “proper person” that would accord it standing as a “complainant”, and, alternatively, because the Trustee has no cause of action in respect of the Oppression Claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

[377] Given the above facts and analysis, I strike the Public Policy Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

D. Is the Release a complete bar to claims against Ms. Rose?

[378] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

[379] Given the above facts and analysis, I strike the Director Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

[380] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3.

VIII. Costs

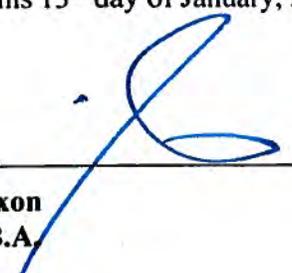
[381] If the parties cannot otherwise agree, they may speak to costs at their convenience.

Heard on the 08th and 09th day of November, 2018 and the 17th day of December, 2018.

The parties provided further written submissions on June 4, 2019, June 11, 2019 and June 14, 2019.

Oral Reasons for Judgment given on 15th day of August, 2019.

Written Reasons for Judgment dated at Calgary, Alberta this 13th day of January, 2020.



D.B. Nixon
J.C.Q.B.A.

Appearances:

Mr. Rinus de Waal and Mr. Luke Rasmussen
for the Plaintiff

Mr. Daniel McDonald Q.C. and Mr. Paul Chiswell
for Perpetual Energy Inc.

Mr. Steven Leitl and Mr. Aditya Badami
for Susan Riddell Rose

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| | | |
|---|--|---------------|
| COURT FILE NUMBER | 1801-10960 | Clerk's stamp |
| COURT | Court of Queen's Bench of Alberta | |
| JUDICIAL CENTRE | Calgary | |
| PLAINTIFF | PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity | |
| DEFENDANTS | PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE | |
| DOCUMENT | ORDER | |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | <p>Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA</p> <p>Steven H. Leidl Gunnar Benediktsson steve.leidl@nortonrosefulbright.com gunnar.benediktsson@nortonrosefulbright.com Tel: 403.267.8140 403.256.8256 Fax: +1 403.264.5973</p> <p>Lawyers for the Defendant Susan Riddell Rose File no.: 1001040549</p> <p>Burnet, Duckworth & Palmer LLP 8th Avenue Place, East Tower 2400, 525 – 8th Avenue SW Calgary, Alberta T2P 1G1</p> <p>Lawyers: D.J. McDonald, QC/Paul G. Chiswell Phone: (403) 260-5724/(403) 260-0201 Fax: (403) 260-0332 Email: djm@bdplaw.com/pchiswell@bdplaw.com File No.: 59140-43</p> <p>Counsel for Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp.</p> | |

DATE ON WHICH ORDER WAS PRONOUNCED: August 15, 2019

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon

LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATIONS of the Defendants; UPON review of the pleadings and evidence filed by the Defendants and the Plaintiff; AND UPON consideration of the written and oral submissions of the parties:

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Defendants' applications to strike and/or dismiss the Plaintiff's claim pursuant to s. 96(1) of the *Bankruptcy and Insolvency Act* are dismissed, subject to paragraph 5.
2. The Plaintiff's claims pursuant to s. 242 of the Alberta *Business Corporations Act* are struck as against all Defendants pursuant to Rule 3.68.
3. The Plaintiff's claims on the grounds of public policy, statutory illegality and equitable rescission are struck as against all Defendants pursuant to Rule 3.68.
4. The Plaintiff's claims against the Defendant Susan Riddell Rose (**Rose**) for breach of fiduciary duty and breach of duty of care are dismissed pursuant to Rule 7.3 and struck pursuant to Rule 3.68.
5. The application of Rose to dismiss all of the Plaintiff's claims against her on the basis of the Resignation & Mutual Release effective October 1, 2016 is granted pursuant to Rule 7.3.
6. Costs shall be determined by the Court following the parties' submissions thereon.

Justice of the Court of Queen's Bench of Alberta

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COURT OF APPEAL OF ALBERTA

MEMORANDUM

DATE: January 30, 2020
TO: Distribution List
FROM: Justice Veldhuis
RE: **PricewaterhouseCoopers Inc. v Perpetual Energy Inc, 2020 ABCA 36**
Appeal Number: 1901-0255-AC
Date Filed: January 29, 2020

CORRIGENDUM

The following change has been made:

On the appearance page the order of counsel for the Applicant, Susan Riddell Rose has been amended to read:

S.H. Leitl/G. Benediktsson
for the Applicant, Susan Riddell Rose

Please replace in your hard copy of the judgment.

Encl.



In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 36

Date: 20200129
Docket: 1901-0255-AC
Registry: Calgary

Between:

**PricewaterhouseCoopers Inc., LIT, in its capacity as the
Trustee in Bankruptcy of Sequoia Resources Corp.
and not in its Personal Capacity**

**Respondent
(Plaintiff)**

- and -

**Perpetual Energy Inc., Perpetual Operating Trust,
Perpetual Operating Corp. and Susan Riddell Rose**

**Applicants
(Defendants)**

Corrected judgment: A corrigendum was issued on January 30, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis**

Applications to Post Security for Costs

Appearances:

R. de Waal/L. Rasmussen
for the Respondent

D.J. McDonald, Q.C./P.G. Chiswell
for the Applicants Perpetual Energy Inc., Perpetual Operating Trust and
Perpetual Operating Corp.

S.H. Leitl/G. Benediktsson
for the Applicant, Susan Riddell Rose

Corrigendum of the Reasons for Decision

On the appearance page the order of counsel for the Applicant, Susan Riddell Rose has been amended to read:

S.H. Leitl/G. Benediktsson
for the Applicant, Susan Riddell Rose

In the Court of Appeal of Alberta**Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABCA 36****Date: 20200129****Docket: 1901-0255-AC****Registry: Calgary****Between:**

**PricewaterhouseCoopers Inc., LIT, in its capacity as the
Trustee in Bankruptcy of Sequoia Resources Corp.
and not in its Personal Capacity**

**Respondent
(Plaintiff)**

- and -

**Perpetual Energy Inc., Perpetual Operating Trust,
Perpetual Operating Corp. and Susan Riddell Rose**

**Applicants
(Defendants)**

**Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis**

Applications to Post Security for Costs

**Reasons for Decision of
The Honourable Madam Justice Barbara Lea Veldhuis**

Background

[1] Two applicants, Susan Riddell Rose and a group of companies collectively referred to as Perpetual, seek orders requiring the respondent, PricewaterhouseCoopers Inc. in its capacity as trustee for the bankrupt estate of Sequoia Resources Corp. (Sequoia), to post security for costs for the respondent's appeal either pursuant to rule 14.67(1) of the *Alberta Rules of Court*, AR 124/2010, or s. 254 of the *Alberta Business Corporation Act*, RSA 2000, c B-9 [ABCA].

[2] Sequoia was previously named Perpetual Energy Operating Corp. (PEOC), and was a wholly owned subsidiary of one of the companies. Perpetual created PEOC to hold natural gas assets in trust for the benefit of Perpetual. Ms. Rose was the sole director of PEOC. In early 2016, Perpetual decided to sell some of the natural gas wells held in trust by PEOC (referred to as the Goodyear Assets) to a third-party.

[3] To affect the sale, the parties were required to engage in a series of transactions and other steps which occurred in conjunction with each other in October 2016. Among other things, beneficial and legal title to the Goodyear Assets was consolidated in PEOC and all the shares of PEOC were sold to the third-party.

[4] PEOC was renamed as Sequoia. Sequoia operated for approximately 17 months before it assigned itself into bankruptcy in March 2018.

[5] Following bankruptcy, the respondent sued the applicants and brought an application seeking to set aside one of the transactions. Alternatively, the respondent sought damages against the applicants personally in the minimum amount of \$217,570,800. The grounds for the application include allegations that the transaction constituted a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] or was void on the basis of public policy, statutory illegality or equitable rescission. The respondent also alleged that the applicants engaged in oppressive conduct and that Ms. Rose breached her duty of care and fiduciary duties to PEOC in directing PEOC to enter into the series of transactions.

[6] The applicants filed applications to stay the respondent's application and to dismiss the respondent's claims. After some interlocutory steps, the dismissal and stay applications proceeded to hearing in November 2018, with additional submissions made later. On August 15, 2019, the chambers judge gave oral reasons, with written reasons to follow. The written reasons were released several weeks after these applications were heard: 2020 ABQB 6. The parties did not seek to make further submissions with respect to these applications.

[7] In the written reasons, the chambers judge struck the respondent's oppression claim on two grounds. First, the respondent was not a "proper person" that would accord it standing as a "complainant" entitled to make this claim under the *ABCA*. Second, given the impact of *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 the respondent has no cause of action in respect of oppression because the Supreme Court of Canada has nullified the claim. The chambers judge also struck the respondent's public policy claim for disclosing no reasonable cause of action. The chambers judge struck and summarily dismissed the allegations that Ms. Rose breached her fiduciary duty and duty of care. In any event, the chambers judge found that Ms. Rose's release would act as a complete bar to the claims against her. The respondent appeals the chamber judge's decisions on these claims. The applicants seek security for costs for this appeal.

[8] The chambers judge found the evidence did not permit him to summarily dismiss or strike the claim that the impugned transaction was a transfer at undervalue pursuant to s. 96 of the *BIA*. The applicants have cross-appealed this finding. No security for costs application has been brought for this cross-appeal.

Section 243(3) of the *ABCA*

[9] In its factum, the respondent states that s. 243(3) of the *ABCA* is a complete bar to the relief requested in these applications since the respondent has alleged oppression. Section 243(3) states:

243 (3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

[10] While there is little case law on this section, *Broadway v Robson*, 2018 ABQB 463 at para. 12 suggests that to receive the benefit of this section, a party must establish an arguable case that they are a complainant. Here, the chambers judge has found the respondent is not a complainant, although this finding is subject to appeal.

[11] As further set out below, I am unable to say that this ground of appeal lacks merit. As a result, I decline to find that this provision has no application to a security for costs application on appeal.

[12] Assuming the respondent is a complainant, the next step is to examine the claim to determine whether it, or part of it is a non-oppression claim clothed as one of oppression: *Mudrick Capital Management v Wright*, 2018 ABQB 194 at para 18.

[13] There are a variety of claims made against the applicants, some together, some that would apply only individually (like the breach of fiduciary duty claim against Ms. Rose). I cannot say that the "core" of the claim is one of oppression such that the entire application is barred. Instead, I follow the practice of finding that a proportion of the claim constitutes "oppression" and reduce the quantum posted by that amount. In these circumstances, I find that 20% of the claim constitutes oppression.

Tests for Security for Costs

[14] Pursuant to rule 14.67(1) of the *Rules*, a single appeal judge may order a party to provide security for costs under rule 4.22 if it is just and reasonable to do so, considering the following:

- (a) whether it is likely that the applicant for an order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to pay the costs award;
- (c) the merits of action;
- (d) whether an order to give security for costs would unduly prejudice the respondent's ability to continue the action; and
- (e) any other matter the court considers appropriate.

[15] Security for costs is a discretionary order involving the balancing of the right to the economic security of one party with the other party's right to legal process: *Arcuri v Adamson*, 2006 ABCA 360 at para 6. A party's right to access the legal process does not mean they can advance an appeal without the fear of costs consequences: *Aski Construction Ltd v Markos*, 2017 ABCA 341 at para 11. The applicant bears the onus of proving these factors weigh in their favour: *Aski* at para 8.

[16] Alternatively, pursuant to s. 254 of the *ABCA*, security for costs may be sought against a corporation:

In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

[17] The parties argue this Court can grant security for costs against a corporation under either test citing *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018 ABQB 281. Other decisions have held that s. 254 of the *ABCA* is the only applicable test: *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 58. I decline to comment on which is the correct approach. That matter is best left for a panel on another day. In the circumstances of this case, I have considered the parties' arguments under each approach.

[18] Under either test, the applicants bear the initial burden of establishing, on a balance of probabilities, that it is just and equitable to order security for costs or that the respondent will be unable to pay its costs. If the applicants satisfy this onus, the evidentiary burden shifts to the

respondent to satisfy the court that the court should not exercise its discretion to grant security for costs: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at para 8 [*Mudrick #2*].

Analysis

[19] I have reviewed the extensive records provided by the parties including filed affidavits, transcripts of the cross-examinations of the individual (PD) acting on behalf of the respondent, and the oral and written reasons for decision of the chambers judge. I am satisfied that the applicants have met their burden under both tests.

The Ability of the Respondent to Pay the Costs Award

[20] The test for security for costs under the *Rules* asks whether it is unlikely the respondent will be able to pay an adverse costs award. Section 254 of the *ABCA* provides a more stringent financial assessment and considers whether the corporation will be unable to pay costs: *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABQB 457 at para 16.

[21] Before these applications were brought, the applicants requested the respondent to confirm that it would be personally liable for a costs award, or that it would post commercially reasonable security for the appeal. The respondent has failed to do so. Since the respondent will not post security, this requirement focuses on the financial situation of the bankrupt estate of Sequoia.

[22] The applicants submit, relying on a preliminary report of the estate prepared by the respondent in April 2018, that no funds will remain in the bankrupt estate to pay an adverse costs award after the claims of secured creditors are paid. The applicants provided an affidavit swearing that:

- (i) at the time of the filing of the Trustee's claim, there were insufficient assets in the Sequoia estate to satisfy any cost claim made in favour of the [applicants];
- (ii) currently, there are even fewer or no exigible assets in the Sequoia estate; and
- (iii) an order of costs in favour of the [applicants] against the estate of Sequoia will accordingly not be enforceable against any exigible assets in Alberta.

Affidavit of Susan Riddell Rose, Sworn September 23, 2019 at para 27.

[23] It remained open to the respondent to provide meaningful rebuttal evidence. Rather, PD, acting for the respondent, filed an affidavit merely stating that:

[T]here are sufficient funds available in the Estate to pay a costs award in favour of the Defendants, even in the amount estimated by Ms. Rose. The Trustee's Preliminary Report does not reflect the current financial position of the Estate for a

number of reasons, including the receipt of funds from the collection of accounts receivable and the sale of assets.

Affidavit of PD, sworn on October 18, 2019 at para 4.2.

[24] The applicants attempted to cross-examine PD on this point. During the hearing, the applicants argued excerpts, which were provided to the Court, to demonstrate that while PD was aware of his duty of candour as an officer of the court, he purposefully hindered meaningful cross-examination. For example, the following exchange related to the value of the claims of secured creditors:

Q Do you know the amount of claims made by the secured creditors in the estate?

A No. Not off the top of my head, no.

Q Do you agree with me it's in the millions?

A Yes.

Q My number is closer to 10 million, but is that approximately correct?

A I can't comment without looking at it.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 57/1-8.

[25] While this response in and of itself may not be objectionable, when it is paired with numerous other instances of non-responses and refusals to provide relevant and material financial information about the estate or to reference financial documents put before him, as further discussed below, the only conclusion I am left to draw is that the respondent was intentionally preventing the discovery of relevant and material financial information of the estate for the purpose of these applications.

[26] While Perpetual was permitted to examine records of the estate, the respondent objected to any financial records being marked as exhibits while Ms. Rose was present during questioning (notwithstanding that she is a party to this litigation). The respondent justified its position on the basis that Ms. Rose, acting personally, was not permitted to view the records of the estate. The applicants pointed to the conundrum created by this position:

Q So the position is that Perpetual can see the records, but the chief executive of Perpetual [Ms. Rose] may not; is that right?

A [counsel for the respondent]: Not in her personal capacity, Mr. Leidl.

Q How does she separate then?

A [counsel for the respondent] I don't know.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 11/5-11.

[27] PD even refused to review recent financial statements of the estate during the questioning which would have informed him about the estate's financial affairs:

Q You don't want to look at the bank statements right in front of you?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 20/4-6.

[28] As it was clear that the cross-examination of PD was producing no information, the applicants requested that the respondent make the accounts and financial records of the estate available for use in these applications. The applicants also requested undertakings that the respondent produce the most recent costs estimate for Sequoia's estate, the books and records of the estate, cash flow projections for the estate, and the respondent's position on the secured creditors' claims in the estate and their dollar amounts. The respondent refused these requests.

[29] Upon further questioning, PD had limited awareness of the estate's current financial position and appeared to be unnecessarily obstructive:

Q ...what is the bank balance for the estate?

A As of?

Q As of today.

A I don't know.

...

Q Okay. Let me go to one of my questions which is how much money is in the operating account for the estate?

A I already answered that question. I don't know the exact number today. I manage over a hundred bank accounts. Expect me to memorize every account would be – it's a useless question.

Q I'm not expecting you to memorize it. I've got the numbers right in front of you. You're welcome to look at it.

A Today's number? I don't think you have today's number right in front of you.

Q [D]o you want to look at the records you've got in front of you to get a close approximation?

A I gave you a good approximation.

...

Q Do you know what the initial receipt of funds was approximately in March of 2018?

A No.

Q Do you know what the receipt of funds has been in the estate from March of 2018 to today?

A From memory, no.

Q Do you know what the collection of accounts receivable for the estate has been?

A From memory, no.

...

Q And, sir, do you know how much the estate of Sequoia has made from the sale of assets?

A From memory, no.

...

Q Did you look at the books and records of the estate before attending today?

A No.

...

Q When was the last time you looked at the claims register for the estate?

A I don't recall.

Q Was it within the last couple of weeks?

A No.

...

Q Did you review the claims register before you swore your affidavit?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 19/1-5; 22/12-26; 32/18-26; 33/11-13; 35/14-16; 57/15-19; 71/6-8.

[30] Upon further examination PD admitted that it was highly unlikely that costs could be paid:

Q So unless you win the suit against [the applicants]...the unsecured creditors get [nothing] right?

...

A There's a high probability that the unsecured creditors get nothing.

...

Q So you've got assets of marginal value that you don't intend to sell or try to sell. You've got expensive lawsuits. You've got secured claims that may or may not be allowed, and you've got a very remote prospect of unsecured creditors being paid anything unless you win on all your lawsuits; right?

A Yes.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 111/3-6, 9-10, 22-27; 112/1.

[31] During the hearing, counsel for the respondent defended PD's behavior on the basis that the test for security for costs asks whether there are assets available to satisfy a costs award at the moment of assessment and ignores whether this will be the case going forward. I have not been provided with any authority that the ability to pay requirement looks at assets in isolation from liabilities or ignores whether these assets will be available on the date costs are awarded. In the context of bankruptcy proceedings, common sense suggests that a court must consider that assets

in the estate will be subject to a hierarchy of claims and may or may not end up being exigible assets.

[32] In conclusion, the applicants provided financial statements that were not current but suggested that unsecured creditors (which would include their costs award) would not be paid from the estate. The respondent did not seriously challenge this assertion. PD was examined on his affidavit filed in opposition to these security for costs applications that directly put in issue the ability of the estate to pay the large costs award. He was unaware of the value of the claims of secured creditors, did not know the balance of funds in the estate, nor did he have general knowledge of the current financial status of the estate. It was open to PD to apprise himself of this information before swearing his affidavit, before attending questioning or during questioning. He chose not to do so. Based on the records before me, I am satisfied the respondent will be unlikely and unable to pay costs.

Enforcing an Order or Judgment Against Assets in Alberta

[33] In oral argument, the respondent suggested 2500 wells will remain in the estate, subject to the appeal, that may be used to satisfy an adverse costs award. The respondent has given no indication as to their value or any liabilities associated with these assets. This does not allow this Court to make any meaningful assessment about whether they can be used to pay costs. In Alberta's current economic climate "2500 wells", with nothing more, may well be equivalent to a \$3 bill.

The Merits of the Appeal

[34] At the time of oral argument, the chamber judge's written decision was not available for the respondent to formalize its grounds of appeal. While written reasons are now available, an in-depth assessment of the merits of the appeal is best left to a panel with the benefit of the parties' written argument.

[35] For these applications, an assessment of whether there is a serious question to be tried and the appeal is not frivolous is sufficient consideration of the merits: see *RDX Technologies Corporation v Appel*, 2019 ABCA 338 at para 37.

[36] The respondent has suggested various grounds of appeal which may be reviewed on a correctness standard. At this stage, I cannot say that the appeal lacks merit.

Undue Prejudice

[37] Given PD's lack of cooperation, it is unclear whether an order requiring the estate to post security for costs will prevent the respondent from bringing this appeal. It is expected that a trustee, as an officer of the court, will act consistently with his duty of candour and disclose any prejudice, or lack thereof, that would result from such an order.

[38] It appears the respondent takes the position that it is in the best interest of the estate to pursue the appeal and it is willing to use the estate's available funds to finance the appeal. There is no evidence before this Court to suggest that an order for security for costs will hinder the respondent from pursuing its appeal.

Result

[39] The applicants have satisfied me that both tests for security for costs have been met.

Quantum of the Security for Costs Order

[40] The applicants seek security for costs on a solicitor-client basis. Alternatively, the applicants request security for costs based on five times the amount at Column 5, Schedule C of the *Rules*.

[41] Solicitor-client costs are reserved for exceptional circumstances where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: *Twinn v Twinn*, 2017 ABCA 419 at para 25. They are only awarded in rare circumstances: *Lotoski v Lotoski*, 2019 ABCA 262 at para 3.

[42] The unique circumstances of these applications make it difficult to assess whether solicitor-client costs are likely to be awarded. Costs on appeal are generally awarded on the same level as the scale awarded at trial: *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 254 at para 7. The chambers judge did not address costs in the oral or written decisions.

[43] Security for enhanced costs may be awarded at a multiple of Schedule C in the *Rules* if it is likely that enhanced costs will be awarded: *Mudrick #2* at paras 43-48. The following factors support the likelihood of enhanced costs in these applications: the respondent claims amounts greatly exceeding Column 5 of Schedule C in the *Rules*, resulting in the applicants being especially vigilant in their defense: *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at para 26; and the conduct of the respondent falls short of what is expected of a responsible litigant: *Lotoski* at para 7.

[44] The applicants provided a sworn affidavit that each applicant will incur solicitor-client costs in the amount of \$400,000 as a result of the respondent's appeal. The applicants support the request for \$400,000 on the basis that it represents 75% of the costs incurred in the proceedings below, the respondent's intent to seek leave to file a 50-page factum, and that the appeal record will include a large amount of evidence.

[45] Costs incurred in the proceedings below are likely to be materially different than the costs of the appeal. The proceedings below required numerous applications, affidavits, briefs and supplemental written arguments as well as numerous court attendances. Costs in the proceedings

below also included costs for the entire action, while these applications for security for costs are related to the respondent's appeal and would not include the costs of the applicants' appeal.

[46] The applicants have not provided a draft bill of costs in support of the alternative quantum requested (five times Column C), although based on my review of Column C, the fees alone under this alternative calculation could be as high as \$98,000 for all steps taken in the appeal.

[47] The fixing of quantum is a discretionary decision. There are no specific rules. A court must decide quantum on a case-by-case basis: *Beacon Hill Service (2000) Ltd v Esso Petroleum Canada*, 2000 ABCA 326 at para 10.

[48] While I am not satisfied that security for costs should be ordered in the amount of \$400,000 for each party in this appeal, given the factors addressed above, \$150,000 is an appropriate amount for each of the applicants. These amounts must then be reduced by 20% to take into account the prohibition against security for costs in oppression claims.

[49] Therefore:

- (a) In its appeal against Ms. Rose, the respondent shall post \$120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Ms. Rose will be deemed abandoned and struck.
- (b) In its appeal against Perpetual, the respondent shall post \$120,000 with this Court for security for costs within 30 days of the date of this decision, failing which the appeal in their action against Perpetual will be deemed abandoned and struck.

Comments on the Trustee's behaviour

[50] A trustee of a bankrupt estate serves as an officer of the court to facilitate the goals of the *BIA*, namely, to provide for the orderly liquidation of a bankrupt's estate: LW Holden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2015, release 9) ch 1 at 2. As an officer of the court, the trustee should promote the effective operation of the judicial system. The trustee has a duty of candour and must act impartially as codified by the *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 39:

Trustees shall be *honest and impartial* and shall provide to interested parties *full and accurate information* as required by the Act with respect to the professional engagements of the trustees. [emphasis added]

[51] When a trustee brings a claim to set aside an impugned transaction, it is expected that the trustee will not assume an adversarial role and will present relevant facts to the court in an impartial manner: *Canada (Attorney General) v Norris Estate*, 1996 ABCA 357 at para 24.

[52] In previous questioning it was apparent that PD was aware of his obligation to act impartially:

Q You're aware of your role as a trustee to be an officer of the court?

A Yes.

Q And you understand that you're supposed to be neutral and impartial? Yes?

A Yes.

Q Would you include answering my questions to be part of that?

A Yes.

Transcript of Questioning on Affidavit of PD sworn August 2, 2018, held on October 22, 2018 at 74/11-19.

[53] As expressed above, I question whether PD has fulfilled his obligations to act impartially and with candour in these applications. I am troubled by the adversarial approach taken by PD and his failure to provide meaningful responses upon cross-examination. He made no efforts to apprise himself of the estate's financial situation prior to or during questioning though this information was clearly relevant to assertions he had made in an affidavit.

[54] I am further troubled by statements made in PD's affidavit which appear to suggest the applicants were responsible for the difficulty in determining whether future costs could be paid. PD asserted that the applicants had "made no request to inspect the books, records and documents relating to the administration of the Estate or to request a report from the Trustee regarding the condition of the Estate or the moneys on hand". Subsequent cross-examination revealed this to be a hollow statement as PD had no intention of allowing one of the applicants to review relevant material:

Q So when you swore this affidavit, were you prepared to allow Ms. Rose to inspect the records?

A No.

Transcript of Questioning on Affidavit of PD sworn October 18, 2019, held on November 6, 2019 at 108/11-13.

[55] It is unclear why PD would provide an affidavit to this Court that suggests the applicants failed to take steps that PD, acting for the respondent, would prevent them from taking. It is not clear to me how this assertion can be seen to be within the confines of PD's duty of candour.

[56] My concerns should not be read to suggest the respondent should refrain from exercising its right to appeal the chamber judge's decision, nor that the respondent is necessarily required to provide full disclosure of the financial status of the estate to a court: *North American Polypropylene* at paras 27-30. I merely question whether the adversarial nature in which PD has chosen to proceed on behalf of the respondent is in harmony with the underlying goals of the *BIA*, his role as an impartial trustee and his duty of candour.

[57] These applications are granted as set out above.

Applications heard on November 21, 2019

Reasons filed at Calgary, Alberta
this 29th day of January, 2020




Veldhuis J.A.

Appearances:

R. de Waal/L. Rasmussen
for the Respondent

D.J. McDonald, Q.C./P.G. Chiswell
for the Applicants Perpetual Energy Inc., Perpetual Operating Trust and
Perpetual Operating Corp.

G. Benediktsson/S.H. Leitl
for the Applicant, Susan Riddell Rose

Action No.: 1801-10960
E-File No.: CVQ20PRICEWATERHOUSECOOPERS
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

Calgary, Alberta
August 26, 2020

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2
3 August 26, 2020

Afternoon Session

4
5 The Honourable

Court of Queen's Bench

6 Mr. Justice Nixon (remote appearance)

of Alberta

7
8 L. Murphy (remote appearance)

For PricewaterhouseCoopers Inc

9 P.J. Darby (remote appearance)

For PricewaterhouseCoopers Inc

10 R.F. Osuna (remote appearance)

For PricewaterhouseCoopers Inc

11 D.J. McDonald, QC (remote appearance)

For Perpetual Energy Inc , Perpetual Operating
Trust, Perpetual Operating Corp

12
13 P.G. Chiswell (remote appearance)

For Perpetual Energy Inc , Perpetual Operating
Trust, Perpetual Operating Corp

14
15 S.H. Leitl, QC (remote appearance)

For S. Rose

16 G. Benediktsson (remote appearance)

For S. Rose

17 L. Rasmussen (remote appearance)

For the Trustee in Bankruptcy

18 R. de Waal (remote appearance)

For the Trustee in Bankruptcy

19 S. Ko (remote appearance)

For the Industry Intervenors

20 A.N. Stempien (remote appearance)

For the Intervenor

21 G.G. Plester (remote appearance)

For Brownlee LLP

22 P. Petrova

Court Clerk

23
24
25 THE COURT CLERK:

Counsel, everyone, good afternoon. Justice

26 Nixon, I see has -- is now in the virtual courtroom.

27
28 This matter is being heard in courtroom 1201 and court is now in session. Thank you.

29
30 THE COURT:

Can I be heard okay?

31
32 THE COURT CLERK:

Sir, this is the clerk --

33
34 UNIDENTIFIED SPEAKER:

You can be heard, yes.

35
36 THE COURT:

Okay, just want to check.

37
38 Just turning to business today, we have three applications and I will be giving rulings
39 separately on each.

40
41 I will start with the Rose Costs Decision.

1
2 **Reasons for Judgment (Rose Costs Application)**

3
4 This concerns Sue Riddell Rose and PricewaterhouseCoopers Inc. These are the oral
5 reasons for judgment of myself, Justice Blair Nixon.

6
7 Insofar as this is an oral judgment, I retain the right to review the transcript and to add case
8 names and citations. It is likely that I will issue a written decision concerning this particular
9 matter.

10
11 In oral judgments, it is not my practice to cite the legislation, jurisprudence, or the *Rules of*
12 *Court* in detail notwithstanding that they have all been considered.

13
14 [Note to Reader: The first 28 pages of this oral decision relate to the Rose Cost Application.
15 The decision under that Application will be issued in September 2020. See 2020 ABQB
16 513.]

17
18 I turn first to the introduction.

19
20 I. Introduction

21
22 THE COURT: PricewaterhouseCoopers (who I will refer to as
23 "PWC Inc") is involved in this litigation in its capacity as the Trustee in Bankruptcy. I will
24 refer to them as the Trustee of Sequoia Resources Corp (who I will refer to sometimes as
25 "Sequoia" or sometimes as "SRC"). SRC formerly operated under the name of Perpetual
26 Energy Operating Corp (which I will refer to sometimes as "PEOC").

27
28 A sales process and negotiation occurred in 2016 between Kailas Capital Corp and
29 Perpetual Energy Inc I will refer to those two entities as "Kailas Capital" and "PEI" from
30 time to time, or in the latter case, "Perpetual" or "Perpetual Energy" from time to time.

31
32 The substance of the negotiation between these two corporations and their respective
33 affiliates involved the transfer of ownership and control of certain oil and gas assets (which
34 I will refer to as "Goodyear Assets") from the Perpetual Group to 1986114 Alberta Inc (I
35 will refer to that as "198Co").

36
37 There were a number of steps underlying the transaction, including the combination of the
38 legal and beneficial ownership of the Goodyear Assets within PEOC; the transfer of the
39 PEOC shares from PEI to 198Co (which I will refer to sometimes as the "PEOC Share
40 Transaction"); the resignation of Ms. Susan Riddell Rose (who I will refer to as "Ms.
41 Rose") as the director of PEOC; and PEOC's change of name from Perpetual Energy

1 Operating Corp to Sequoia Resources Corp (collectively, I refer to those transactions as
2 the "Aggregate Transaction").
3

4 Prior to the PEOC Share Transaction, PEOC was a wholly owned subsidiary of PEI, a
5 widely held public company. The defendant, Ms. Rose, was one of the several directors
6 on the boards of PEI.
7

8 The above mentioned combination of the legal and beneficial ownership of the Goodyear
9 Assets within PEOC occurred immediately before the PEOC Share Transaction. The legal
10 ownership of the Goodyear Assets was already held by PEOC. The beneficial ownership
11 of the Goodyear Assets was shifted from Perpetual Operating Trust (which I will refer to
12 as "POT") to PEOC in order to effect the desired combination (I will refer to that particular
13 transaction as the "Asset Transaction").
14

15 198Co is a wholly owned subsidiary of Kailas Capital. The holding shares of Kailas
16 Capital are owned 50 percent by Mr. Wang and 50 percent by Mr. Yang. Those two
17 individuals are the only directors of Kailas Capital and they are also the principals of 198Co
18 (I will refer to them as the "198Co Principals").
19

20 In *PricewaterhouseCoopers v. Perpetual Energy*, 2020 ABQB 6, I inferred that each of
21 Mr. Wang and Mr. Yang were at arm's length with all members of the Perpetual Group and
22 Ms. Rose: at para 55. There was no evidence that the 198Co Principals were acting in
23 concert with either the Perpetual Group or with Ms. Rose. Further, there was no evidence
24 that the 198Co Principals were related to the Perpetual Group or Ms. Rose, or that they
25 were, as a question of fact, dealing with each other on a non-arm's length basis.
26

27 After the PEOC Share Transaction, the 198Co Principals also became the principals of
28 Sequoia, formerly PEOC (I will refer to them collectively as the "Sequoia Principals").
29

30 During the hearing before this Court, counsel for the Trustee conceded this was PEI doing
31 its transaction through a subsidiary. I find the subsidiary being referred to by the Trustee
32 is PEOC.
33

34 PWC Inc filed a Statement of Claim against Ms. Rose and others on August 2, 2018 (I will
35 refer to that filing as the "August 2018 SOC" or the "August 2018 Statement of Claim").
36

37 The August 2018 Statement of Claim advanced a number of allegations against Ms. Rose,
38 including that she benefitted personally from the asset transaction, that the asset transaction
39 was clearly not in the best interests of PEOC, thus amounting to oppression or prejudice,
40 and that Ms. Rose caused 198Co to agree to a release. I will refer to that collectively as
41 the "Action". Ms. Rose was successful in her defence of the Action. As a result of that

1 success, Ms. Rose is seeking costs (I refer to that as the "Rose Costs Application").

2
3 She is also seeking an order directing that PWC Inc be personally liable for any costs
4 awarded to her.

5
6 PWC Inc concedes that Ms. Rose is entitled to costs but states that she is entitled only to
7 Schedule 'C' costs, taxable in the normal course.

8 9 II. The Issues

10
11 The issues before me relate to the scale of costs and PWC Inc's personal liability.

12
13 In particular, should Ms. Rose's costs be awarded: first, on a solicitor-and-own-client basis,
14 which would allow for the recovery on a full indemnity basis; second, on a solicitor-client
15 basis, which would allow for recovery of reasonable legal fees and disbursements; or, third,
16 on a party-party basis, which would allow for the recovery by reference to Schedule 'C' of
17 the *Alberta Rules of Court* (I will refer to those as the "*Rules*").

18
19 Should PWC Inc be personally liable for the costs rather than have the costs payable by the
20 estate of Sequoia Resources Corp (I will refer to that as "Sequoia Estate").

21
22 I turn to the law of costs, first some general comments.

23 24 III. Law of Costs

25 26 A. General Comments

27
28 Typically, costs are assessed on a pay-as-you-go basis and are payable forthwith. Ms. Rose
29 was successful in responding to the extraordinary claims made against her. As a result, she
30 is entitled to an award of costs.

31
32 The Court has wide discretion to award costs. The discretion extends to awarding any
33 amount that the Court considers to be appropriate in the circumstances, including an
34 indemnity to a party for that party's lawyers' charges.

35 36 B. Rules of Court

37
38 The *Alberta Rules of Court* set out the guidelines regarding the exercise of the Court's
39 discretion in awarding costs. The *Rules* state that a successful party to an application, a
40 proceeding, or an action is entitled to a costs award against the unsuccessful party, and the
41 unsuccessful party must pay the costs forthwith. The rule is premised on the assumption

1 that the unsuccessful party can pay.

2
3 Deciding whether to impose, deny, or vary an amount in a costs award, the Court may
4 consider, among other factors: (i) the conduct of a party that was unnecessary, or that
5 unnecessarily lengthened or delayed the Action or any stage or step of the Action; and (ii)
6 whether any application, proceeding, or step in the Action was unnecessary, improper, or
7 a mistake.

8 9 C. Categories of Costs

10
11 Where costs are warranted, the Court tends to look at three types of categories of costs
12 awards. I have touched on them above but I will summarize them here again in a bit more
13 detail.

14
15 First, solicitor-and-own-client costs. Where this category of costs is applied, the successful
16 party receives full indemnity for their legal fees and proper disbursements.

17
18 Second, solicitor-client costs. Where this category of costs is applied, the successful party
19 receives reasonable legal fees and disbursements which amounts to less than full
20 indemnity.

21
22 Third, party costs. Where this category of costs is applied, the successful party typically
23 references Schedule 'C' of the *Rules*.

24
25 Ultimately, the individual circumstances of each case best inform the exercise of judicial
26 discretion.

27 28 D. Scale of Costs

29
30 First, solicitor-and-own-client costs, which are full indemnity. This Court confirmed the
31 obligation to compensate a wrongfully accused party. Costs may stem from the
32 reputational and personal impact of serious and unfounded allegations.

33
34 While this costs category is not closed, an award of costs and own-client costs is virtually
35 unheard of, except where they were provided for by contract. In particular, costs awarded
36 on this basis will be available only if one of the successful litigants identifies a contractual
37 foundation for full indemnification.

38
39 In this case, there is no evidence of a relevant contract so that factor is not available to
40 justify an award of costs on a solicitor-and-own-client basis.

41

1 However, as stated above, this category of costs is not closed. In one case, this Court held
2 that full indemnity for legal costs was justified in order to discourage allegations of bias
3 and dishonesty where no reasonable basis existed to support such allegations.
4

5 I turn to solicitor-client costs. An award of solicitor-client costs is more common than an
6 award of solicitor-and-own-client costs. Solicitor-client costs are awarded in
7 circumstances where the successful party should receive reasonable legal fees and
8 disbursements because the situation warrants an award that is less than full indemnification.
9 This award equates to an amount of reasonable fees and disbursements but no frills or
10 extras which should not be fairly passed on to the unsuccessful litigants. Solicitor and
11 client costs only apply to litigation expenses that arise from the litigation in question.
12

13 Solicitor and client costs awards are also rare. They must be based on a finding of
14 intentional misconduct during the litigation. The kinds of misconduct that attract this level
15 of award has been described as reprehensible, egregious, scandalous, or outrageous. The
16 Alberta Court of Appeal has identified a number of factors which favour an award of
17 solicitor and client costs.
18

19 I turn to party-party costs. I include comments on party-party costs for completeness. The
20 party-party costs are awarded by reference to Schedule 'C' of the *Rules*. Schedule 'C' was
21 recently amended effective May 1st, 2020, and apply, subject to agreement or court order
22 to the contrary, to all assessable items whether the activity described in the item happened
23 before or after that date.
24

25 Prior to the amendment of Schedule 'C', the Court addressed its longstanding deficiencies
26 through enhancements including by way of one or more of the following: first, a multiplier
27 against the applicable column; second, an inflationary adjustment; third, an extra lump-
28 sum amount; or fourth, a modifier based on a percentage of actual legal costs.
29

30 The Trustee conceded that an award of costs calculated by reference to Schedule 'C' was
31 available to Ms. Rose. This concession sets the floor amount. Given the circumstances of
32 this case, I do not address this option further on this occasion.
33

34 E. Jurisdiction to Award Costs Against Non-parties 35

36 Common law courts have the jurisdiction to award costs against nonparties on the basis
37 they were the promoter of the unsuccessful litigation. The Court has stated that when the
38 real litigant who puts up a man of straw in whose name the litigation is carried on in order
39 to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be
40 cited by notice to appear and show cause, and may thereupon be ordered in a proper case
41 to pay costs of the opposite party even when the nominal litigant has had legal status similar

1 to that of the real litigant to instate the proceedings.

2
3 In one particular case, the Court of Appeal awarded costs against a receiver-manager. In
4 that case, the Court stated the following, and I quote: (as read)

5
6 Exposure to possible liability for costs on the part of a private receiver
7 has been the subject of surprisingly little comment in both case law
8 and text authority. Nonetheless the general power of the court to
9 award costs against the real promoter of the litigation, although
10 unnamed as a party to it, seems clear. The power was inherent in the
11 Court of Chancery and has survived today. It is also contemplated by
12 the *Rules of Court*.

13 ...

14 The traditional test is who is the real promoter of the litigation? Once
15 that is determined exposure to liability for costs may arise should that
16 litigation fail ... In misconduct cases solicitors may have to pay. The
17 extended liability has reached insurers ...

18
19 That Coopers & Lybrand carried the litigation here is confirmed by
20 the fact that the application for the ex parte injunction was backed by
21 the affidavit of John MacNutt, an officer of Coopers & Lybrand. The
22 intended beneficiaries in the action were 20th Century, the insolvent
23 debtor, and the Bank of British Columbia which sought to avoid the
24 honouring of its letter of credit and put Coopers & Lybrand in as their
25 private receiver-manager under its debenture from 20th Century.

26 27 F. Personal Liability of Trustees in Bankruptcy for Costs

28 29 First, Bankruptcy Proceedings

30
31 Bankruptcy court is a separate court in Canada that deals exclusively with bankruptcies. A
32 judge who presides over bankruptcy court is specifically educated and trained in these types
33 hearings and is heavily experienced and knowledgeable about Canadian bankruptcy and
34 insolvency.

35
36 While this action is not a bankruptcy proceeding, I will provide a few preliminary
37 comments. In particular, section 197 of the BIA provides authority of the courts to award
38 costs in bankruptcy proceedings and it reads as follows: (as read)

39
40 197 (1) Subject to this Act and to the General Rules, the costs of and
41 incidental to any proceedings in court under this Act are in the

1 discretion of the court.

2
3 (2) The court in awarding costs may direct that the costs shall be taxed
4 and paid as between party-party or as between solicitor and client, or
5 the court may fix a sum to be paid in lieu of taxation or of taxed costs,
6 but in the absence of any express direction costs shall follow the event
7 and shall be taxed as between party-party.

8
9 (3) Where an action or proceeding is brought by or against a trustee,
10 or where a trustee is made a party to any action or proceeding on his
11 application or the application of any other party thereto, he is not
12 personally liable for costs unless the court otherwise directs.

13
14 Subsection 197(3) of the BIA is noteworthy for the purposes of this case. Even in
15 bankruptcy proceedings, the Court has the discretion to award costs against trustees
16 personally. In summary, the policy in bankruptcy proceedings is loser pays. That policy
17 is a common thread in most litigation forums.

18 19 Second, Civil Law Proceedings

20
21 Section 197 of the BIA applies to bankruptcy proceedings. In this case, the Trustee is the
22 plaintiff in a civil lawsuit. The Trustee elected to sue outside of Bankruptcy Court to seek
23 civil remedies. In doing so, the Trustee lost any protection from personal liability for costs.
24 The Trustee and the lawsuit are governed by the *Alberta Rules of Court*.

25
26 The *Alberta Rules of Court* offer no immunity to trustees in bankruptcy from orders for
27 costs. A summary of the law in this area is as follows, and I quote: (as read)

28
29 Section 197(3) only applies to proceedings in the bankruptcy court. If
30 a trustee in bankruptcy takes proceedings or has proceedings taken
31 against it in the ordinary civil courts, section 197(3) has no application
32 and if the trustee is unsuccessful in such proceedings, it will be
33 personally liable for costs. A trustee is, however, entitled to
34 indemnity out of the bankrupt estate unless it has been guilty of some
35 misconduct in bringing the proceedings or has taken them out without
36 permission. Costs of civil litigation may, in an appropriate case, be
37 awarded against the trustee on a solicitor and client basis.

38
39 I note for the record that I have not included the various cases in that quote.

40
41 Ordinary civil litigation is not a proceeding under the BIA. In civil litigation cases, well

1 established law makes a trustee a person liable for the costs of litigation. Though a trustee
2 must take steps to recover or protect the bankrupt's property, its duties do not extend to
3 elaborate and expensive investigative and litigation in civil courts. Justice Newbould
4 commented on this area as follows, and I quote: (as read)

5
6 The general rule is that a receiver or trustee litigates at its peril if there
7 is no source of indemnity available to it, with the two standard sources
8 of indemnity residing in the assets of the estate or a contract of
9 indemnity from one or more creditors. The discipline imposed by a
10 "loser pays" costs rule applies equally to decisions to commence
11 proceedings by a receiver or a trustee.
12

13 A bankruptcy trustee has no duty to sue. However, section 39(1)(d) of the BIA provides
14 that a trustee in bankruptcy may, with the permission of the inspectors, bring, institute, or
15 defend any action or other legal proceeding relating to the property of the bankrupt. This
16 legislative framework in section 30 of the BIA raises a few points.
17

18 First, the purpose of section 30 of the BIA is to protect the estate. Inspectors are part of
19 that protective process. That legislative framework is deliberate and is structured that way
20 to allow a trustee to benefit from the business experience of the inspectors.
21

22 When inspectors are appointed, their permission must be sought before certain actions are
23 taken by the trustee.
24

25 One of the powers on which the trustee needs to seek inspector approval before proceeding
26 concerns legal proceedings. In particular, a trustee may only bring, institute, or defend any
27 action or other legal proceeding relating to the property of the bankrupt if it has the
28 permission of the inspectors. Failure of the trustee to seek permission from the inspectors
29 as a prerequisite to exercising certain powers has been held by other superior courts to be
30 fatal. That is, absent evidence that a trustee obtained the permission from the inspectors to
31 assign a contract, the Court cannot assume that it was properly authorized.
32

33 Second, section 30 of the BIA refers to the need for the trustee to seek permission from the
34 inspectors as a prerequisite to certain actions. The inspectors are appointed as
35 representatives of all creditors and they occupy positions of trust. They are expected to
36 assist the trustee by virtue of their experience and are required to supervise certain aspects
37 of the administration that is carried out by the trustee.
38

39 The authorization will ordinarily be given through a properly called meeting of inspectors.
40 The inspectors must authorize the legal proceedings. Mere acquiescence is not sufficient.
41

1 In particular, inspectors give direction and advice to the trustee regarding specific actions
2 to be taken in the administration of the estate. They also supervised the trustee's
3 administration and ensure the trustee acts in accordance with their direction.
4

5 In this case, the Trustee was asked for evidence that the inspectors approved the Action.
6 The Trustee never produced any evidence of inspector approval of the lawsuit against Ms.
7 Rose, notwithstanding that it was asked for this information.
8

9 Third, the phrase "property of the bankrupt" is defined in section 67 of the BIA. The
10 lawsuit must be in the best interests of the estate noting the costs and risks associated with
11 the litigation.
12

13 If the lawsuit is to pursue claims for the benefit of the estate's creditors, it must concern
14 claims of the creditors generally and not individual creditor claims. In this case, however,
15 the Trustee made claims against Ms. Rose which, on their face, related to two alleged
16 individual creditors. The conduct of the trustee is also relevant, and I quote: (as read)
17

18 If a trustee brings legal proceedings without first proper investigation
19 and inquiries to see if there is a sound basis for the proceeding, the
20 court may order the trustee to pay costs personally. Where the trustee
21 acted in a highhanded manner in proceedings with the sale of assets
22 when a motion had been brought by a secured creditor for possession
23 of certain assets, the Court ordered the trustee to pay costs of the
24 creditor personally.
25

26 Where a trustee caused litigation by carelessness and lack of common
27 sense, the Court ordered the trustee to pay the costs of litigation
28 personally.
29

30 Where the trustee gave an unfair and improper advantage to a
31 prospective purchaser of assets, it was ordered to pay costs personally
32 of all of the proceedings.
33

34 Where a trustee acted improperly in connect with an appeal launched
35 by the bankrupt prior to the bankruptcy with respect to a debt alleged
36 to be owing to the bankrupt, the trustee was ordered to pay costs
37 personally.
38

39 Again, I did not cite all of the relevant jurisprudence that was in that quote.
40

41 In the context of proceedings under the BIA, courts have ordered costs to be personally

1 payable by a trustee of a proposal trustee in various circumstances, including the following:
2 first, where the trustee has taken an improper and perverse view as to its duties; second,
3 where the assets of the estate are insufficient to pay the award of costs; third, where the
4 trustee failed to take a neutral view of the case; fourth, where the trustee failed to
5 impartially represent the interests of all creditors; and fifth, where the trustee advanced an
6 adversarial strategy, including as to the issues of debateable merit.

7
8 While section 197 of the BIA contemplates party-party costs in bankruptcy proceedings,
9 in civil proceedings the Court may award costs on any scale against the trustee, including
10 on a solicitor-client basis. The courts have awarded escalated costs against a trustee in the
11 following circumstances: first, the trustee's conduct in the litigation deserving of rebuke,
12 including because it abandoned its neutral role in the proceedings; second, where a trustee
13 adopts an adversarial stance in litigation with no justifiable reason; third, where the trustee's
14 conduct has put the party opposite to unnecessary considerable expense; and fourth, where
15 the trustee took a position opposite clear precedent.

16 17 IV. Trustees in Bankruptcy are held to Higher Standards than other Civil Litigants

18 19 A. General Principles

20
21 A trustee in bankruptcy is held to high standards. The trustee is an officer of the court.
22 This requires the trustee to report all relevant information to the Court and act neutrally.

23
24 The trustee is governed by the BIA and a Code of Ethics. The trustee has duties at common
25 law. This requires the trustee to conduct itself with a high degree of integrity, honesty, and
26 impartiality.

27
28 Even when involved in litigation, a trustee should not adopt an adversarial and hostile role.
29 Rather, the trustee should present all relevant facts in a dispassionate non-adversarial
30 manner.

31
32 The Alberta Court of Appeal has noted the applicability of this duty to the trustee in this
33 very manner. A trustee in bankruptcy has an obligation to act fairly and justly, and to do
34 so and to do what is morally right and honest. Where the trustee chooses to commence
35 litigation in respect of an alleged improper transaction, it is not to "take up the cudgel" in
36 favour of any particular creditor and should not assume an adversarial or hostile role from
37 the witness stand in its conduct or in its affidavit format.

38
39 Adopting an adversarial and hostile role in litigation, including in respect of reviewable
40 transactions, while presenting a bare bones skeletal case just sufficient to invoke the
41 presumption in section 95(2) without disclosing to the Court those facts which might weigh

1 against the presumption, is conduct by a trustee as an officer of the court which must not
2 be tolerated or condoned. As an officer of the court, the trustees should just present the
3 facts. In doing so, it is critically important that a trustee conduct a proper investigation.
4

5 Further, in the course of providing evidence in an affidavit format, the trustee must
6 remember that it should restrict its evidence to the facts. In this case, the Trustee opined
7 in its affidavit that the Asset Transaction was not in the best interests of PEOC. This was
8 not a matter on which the trustee should express an opinion. Generally, affidavits which
9 include opinions, arguments, conclusions, and law will be struck out or ignored. Any
10 conclusion based on the evidence is a function of the Court, not of the affiant.
11

12 B. Investigating a Director

13 1. Procedural Fairness - Neutral Approach

14 The consequences of suing a director of a public company are significant. This is especially
15 the case where the allegations against the director include assertions that his or her conduct
16 was oppressive, unfairly prejudicial, or unfairly disregarded the interests of the creditors of
17 the corporation.
18
19

20
21 The decision of a trustee in bankruptcy to sue a director of a public company is a
22 discretionary decision. The foundation underlying that decision are in the nature of
23 investigative proceedings.
24

25 An investigative proceeding that may result in a lawsuit by a trustee in bankruptcy against
26 a director of a public company must include the full participation by the individual affected.
27 The procedural guarantees that are therefor necessary and would include the following:
28 first, the director must be informed of the nature of the allegation against her or him;
29 second, the director must be able to respond to the allegations.
30

31 In my view, the greater the potential impact of a lawsuit on a director, the greater the need
32 for procedural protections to meet the common law duty of fairness in the requirement of
33 fundamental justice. When conducting an investigation, the trustee in bankruptcy has an
34 obligation to follow a procedure that is in compliance with the principles of procedural
35 fairness. This means fairness to and in respect of the director who is being investigated.
36

37 Fairness in this context includes disclosure of the facts against him or her. It requires that
38 the director be given an opportunity to respond fully to the facts and allegations. It also
39 requires that the director be informed of the investigator's objectives. As well, the decision
40 maker must have all of the facts in order to make an informed decision.
41

1 The question that should always be asked by the trustee is whether it adhered to those
2 principles in conducting the investigation.

3
4 The rules of procedural fairness include the conduct of a neutral and thorough
5 investigation. The investigation file prepared by the trustee must be objective. That is, the
6 investigative report must present the position of the director in a factual and balanced way.

7
8 In my view, it is important that a trustee in bankruptcy comply with the rules of procedural
9 fairness when it is conducting an investigation into a director, and certainly any director of
10 a public company.

11
12 In this regard, I adopt the comments of Lord Denning in a particular case that he
13 commented on in 1976. While he made those comments in the context of a Race Relations
14 Board that was charged with duties similar to those of the Canadian Human Rights
15 Commission, I view the statements as being instructive of the duty any investigative body
16 has to act fairly. The comments of Lord Denning in this regard are as follows, and I quote:
17 (as read)

18
19 In recent years, we have come to consider the procedure of many
20 bodies who form an opinion. In all these cases it has been held that
21 the investigating body is under a duty to act fairly, but that which
22 fairness requires depends on the investigation and the consequences
23 which it may have on the persons affected by it. The fundamental rule
24 is that if a person may be subjected to pains or penalties, or be exposed
25 to prosecution or proceedings, or deprived of remedies or redress, or
26 in some such way adversely affected by the investigation and report,
27 then he should be told the case made against him and be afforded a
28 fair opportunity of answering it. The investigating body is, however,
29 the master of its own procedure. It need not hold hearings. It can do
30 everything in writing. It need not allow lawyers. It need not put every
31 detail of the case against a man. Suffice it if the broad grounds are
32 given. It need not name its informants. It can give the substance only.
33 Moreover it need not do everything itself. It can employ secretaries
34 and assistants to do all the preliminary work and leave much to them.
35 But, in the end, the investigating body must come to its own decision
36 and make its own report: *Selvarajan v Race Relations Board*, [1976]
37 1 All ER 12 (CA).

38
39 I note that particular case has been cited with approval by the Supreme Court of Canada in
40 a 1989 case in that court: see *Syndicat des Employes de Production d Quebec et l'Acadie*
41 *v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at para 27.

1
2 While the trustee in bankruptcy is not obligated to investigate every nuance or interview
3 every possible witness, the failure to interview a key witness could demonstrate a serious
4 deficiency in the investigative process. The broad discretion vested in the trustee in
5 bankruptcy in respect of the investigative process it wishes to implement, including which
6 witnesses to interview, does not allow it to short-circuit the investigative process and ignore
7 a key witness. To the contrary, the failure to interview a person who is significantly
8 connected to the subject transaction may lead to an inference of prejudice by the trustee.
9

10 2. Suggested Conduct

11
12 In my view, if a trustee is considering the prospect of suing a director such as Ms. Rose,
13 the trustee must do two things.
14

15 First, it must conduct an appropriate investigation. In the course of conducting the
16 investigation, the trustee must ensure that she or he seeks, reviews, considers all of the
17 relevant and material evidence to determine whether it has a viable lawsuit.
18

19 Using the present case as an example, the standard requires a trustee to: first, ask questions
20 of the relevant parties; second, review the relevant documentary evidence it thinks
21 necessary for the litigation of a claim; and, third, ensure that the issues that are to be
22 litigated have at least been raised with the possible defendant such that they have an
23 opportunity to provide feedback before the litigation is formally commenced. Once the
24 trustee has the benefit of all of the relevant and material facts, they must consider the
25 totality of the potential evidence in the context of the case they wish to consider pursuing.
26

27 Second, the trustee must comply with section 30 of the BIA and seek permission of the
28 inspectors. In my view, if a trustee fails to conduct a reasonable investigation of the
29 allegations that it wishes to pursue, the trustee has not fulfilled its duties to the court.
30

31 V. PWC Inc's Actions

32
33 It is clear from all of the above that the Trustee's actions are at the heart of its costs in this
34 costs analysis with respect to the scale of costs and PWC's personal liability.
35

36 A. Trustee's Preliminary Review - The June 26, 2018, Letter

37
38 On June 26th, 2018, the Trustee wrote PEI and advised that it had completed a preliminary
39 review of the material provided by the Perpetual Group (I refer to that as the "June 26th,
40 2018, Trustee Letter"). The June 26th, 2018, Trustee Letter focused on the Asset
41 Transaction and asked the Perpetual Group if there was anything specific it wanted the

1 Trustee to consider with respect to the following: first, the apparent non arm's length nature
2 of the transaction between POT and SRC, then PEOC; second, the fact that the
3 consideration received by SRC from the transaction appeared to have been conspicuously
4 less than the consideration given by SRC, particularly taking into account the ARO; third,
5 the timing of the transaction; and, fourth, the financial position of SRC immediately before
6 and immediately after the transaction and the benefit of the transaction to SRC.

7
8 The June 26th, 2018, Trustee Letter then asked the Perpetual Group if there was anything
9 else it considered relevant to the review by the Trustee. The letter closed by asking the
10 Perpetual Group to let the Trustee know so that it could consider any such additional
11 information.

12 13 B. Summary of Key Events

14
15 The following is an overview of the events leading up to: first, the June 26, 2018, Trustee
16 Letter; and, second, the August 2018 Statement of Claim which was filed on August 2nd,
17 2018. These particulars stem from my review of the questioning of the Trustee.

18
19 First, the Trustee received an email from Ms. Rose dated June 13th, 2018. In that email,
20 Ms. Rose indicated to the Trustee that she was just reaching out concerning the data that
21 had been provided to the Trustee on the prior Wednesday. In that email communication,
22 Ms. Rose stated explicitly that she was available to walk through any of the information or
23 spreadsheets with evaluation work, if required.

24
25 Second, on June 14th, 2018, the Trustee replied that, "We are reviewing the data provided
26 and will get back to you." Ms. Rose responded to the Trustee on the same day and asked,
27 "Any idea when you might be ready for a discussion?"

28
29 Third, on June 15th, 2018, the Trustee replied to Ms. Rose and stated, "We're still reviewing
30 the information, not sure on timing." Ms. Rose responded to the Trustee on the same day
31 and stated, "When you can give us a better indication on timing, that would be great."

32
33 Fourth, on questioning the Trustee confirmed that by June 26, 2018, he had reached a
34 preliminary view that the Asset Transaction was a non-arm's length transfer. The Trustee
35 also confirmed in questioning that in respect of the non-arm's length transfer, there was no
36 further work required.

37
38 Fifth, on June 26th, 2018, the Trustee communicated its preliminary views to Ms. Rose
39 concerning the Aggregate Transaction in the June 26th, 2018, trustee letter. That letter
40 made no reference to a claim against Ms. Rose.

1 Sixth, Ms. Rose responded to the June 26, 2018, trustee letter on that same day. She
2 communicated to the Trustee that, "We would like to meet tomorrow, if possible, as we do
3 not agree with your preliminary conclusions."
4

5 Seventh, on June 27th, 2018, the Trustee responded to Ms. Rose that, "Once we have
6 reviewed any additional information or comments you choose to provide, the Trustee may
7 request a meeting." Ms. Rose responded to the Trustee the same day and said:
8

9 Thank you for the opportunity to provide this additional information.
10 We will prepare a document in that regard and work diligently toward
11 providing it in as timely a fashion as possible. It will likely be next
12 week given the scope.
13

14 Eighth, on July 6th, 2018, Ms. Rose communicated to the Trustee and stated:
15

16 I am just touching base to let you know we are working diligently to
17 pull together the additional information. I believe we are on pace for
18 later next week. Thanks so much.
19

20 (I refer to that as the "Rose July 6th, 2018, Reporting Email".)
21

22 Ninth, in questioning the Trustee confirmed that he received the Rose July 6th, 2018,
23 Reporting Email. There is no evidence that the Trustee responded to that email from Ms.
24 Rose. Further, there is no evidence that the Trustee communicated with the Perpetual
25 Group between July 6th, 2018, and August 2nd, 2018, when it filed the August 2018
26 Statement of Claim.
27

28 Tenth, during questioning, the Trustee justified its actions by stating that, "Time was
29 passing. There's 2,500 wells in this package that need attention. We're a bankruptcy
30 trustee. We need to move fast."
31

32 Eleventh, in questioning the Trustee asserted a number of times that there was an urgent
33 need to deal with the wells. Notwithstanding that assertion, there is no evidence as to on
34 what the Trustee needed to move fast. In considering this comment, I find that we are now
35 in August of 2020 and there is still no evidence the Trustee has reclaimed a single well
36 during the last two years. Further, I find there is no evidence to connect the alleged urgency
37 concerning the wells with the urgency to file the August 2018 Statement of Claim against
38 Ms. Rose and others, particularly without warning to her.
39

40 Twelfth, during questioning the Trustee was asked whether it occurred to him to provide
41 Ms. Rose with a response date. Specifically, the Trustee was asked whether it was a

1 reasonable thing to do. The Trustee responded that there was no response to his request
2 for further information. The Trustee further stated, "We completed our review. We gave
3 them ample time to respond." At a hearing on August 30th, 2018, the Trustee represented
4 to this Court that the Trustee requested information or an explanation in the June 26, 2018,
5 Trustee Letter. At the August 30th, 2018, hearing the Trustee stated that none was provided
6 and, as a result, the Statement of Claim was filed on August 2nd.
7

8 Based on my review of the June 26th, 2018, Trustee Letter, I find the Trustee: first, did
9 request further material but did not specify or request anything in particular; second, did
10 not set any deadline by which the Perpetual Group was to respond; and, third, made no
11 reference to a claim against Ms. Rose.
12

13 C. Alleged Benefit Factors 14

15 In the August 2018 Statement of Claim, the Trustee alleged that Ms. Rose would benefit
16 personally from the Asset Transaction. I reiterate that the Trustee did not disclose to Ms.
17 Rose prior to filing the commencement document on August 2nd, 2018, that she would be
18 named as a defendant in the Action. In cross-examination concerning this allegation, the
19 Trustee made the following three admissions:
20

21 First, in cross-examination the Trustee confirmed that Ms. Rose was not asked whether she
22 received a personal benefit for the deal. Based on this evidence, I find that the Trustee did
23 not provide Ms. Rose with the opportunity to address the benefit allegation before the
24 August 2018 Statement of Claim was filed.
25

26 Second, in cross-examination the Trustee asserted that Ms. Rose benefited because
27 liabilities were removed from the Perpetual Group. I infer that the liabilities the Trustee is
28 referring to in this answer are primarily the asset retirement obligations (which I define as
29 "ARO"). I find that in making this assertion, the Trustee drew a legal conclusion without
30 asking Ms. Rose for her position on the matter.
31

32 Third, in cross-examination the Trustee stated that he did not remember having the
33 conversation with anyone whether or not we should ask Ms. Rose about the alleged benefit.
34 Based on the evidence before me, I find the Trustee did not ask Ms. Rose a single question
35 concerning the alleged benefit applicable to her before it filed the August 2018 Statement
36 of Claim.
37

38 D. Oppression and Prejudice Factors 39

40 In an affidavit filed on August 2nd, 2018 (I refer to that as the "August 2018 Trustee
41 Affidavit"), the Trustee opined that the Asset Transaction was clearly not in the best

1 interests of PEOC.

2
3 Based on the evidence before me, I find the Trustee did not ask Ms. Rose any questions
4 concerning oppression or prejudice prior to filing the August 2018 Statement of Claim. In
5 particular, I find that the Trustee did not ask Ms. Rose any questions concerning the
6 exercise of her business judgment as a director of PEOC.

7
8 While the evidence is that the Trustee interviewed the Sequoia principals, I find the Trustee
9 did not ask those individuals any questions concerning their participation in the negotiation
10 of the Aggregate Transaction before the filing of the August 2018 Statement of Claim. I
11 make this finding concerning the Sequoia Principals because the Trustee conceded in cross-
12 examination that he did not know what occurred between the vendors and the purchasers.

13
14 Based on the evidence before me, I find that the Trustee did not ask the Sequoia Principals
15 any questions concerning the allegations it was going to make in the August 2018
16 Statement of Claim regarding: first, the release; second, the Asset Transaction; third, the
17 Aggregate Transaction; and, fourth, Ms. Rose.

18
19 The Trustee went on to state in cross-examination that the Asset Transaction was its focus.
20 The Trustee further stated that, "We looked at the transaction in isolation."

21
22 In cross-examination, the Trustee stated that the Sequoia Principals were involved in other
23 transactions around town. The Trustee also conceded that the Sequoia Principals
24 understood the oil and gas industry.

25
26 In cross-examination, the Trustee was asked whether he would be better able to discharge
27 his duty if he had, among other steps, followed up with Ms. Rose on her advice that they
28 were providing additional materials. The answer of the Trustee to that question was
29 twofold.

30
31 First, the Trustee stated that the review was complete. Based on my review of the evidence,
32 I infer the Trustee meant that he had completed his review of the evidence by June 26th,
33 2018. The nature of this comment suggests that the Trustee had closed his mind to further
34 consideration at that point. As a result, I find the Trustee had developed tunnel vision by
35 that June 26, 2018, date.

36
37 Second, the Trustee stated that they had provided Ms. Rose and the Perpetual Group ample
38 time to respond. Based on my review of the evidence, including the last communication
39 from Ms. Rose to the Trustee and the argument advanced by the Trustee, I find the alleged
40 "ample time" given by the Trustee to Ms. Rose to respond was between the Rose July 6th,
41 2018, Reporting Email and August 2nd, 2018. That equates to 18 clear business days

1 which includes five days of Stampede week.

2
3 The Trustee represented to this Court that its claim was filed because PEI failed to provide
4 the Trustee with certain requested information. Based on my review of the events generally
5 and the contents of the June 26, 2018, Trustee Letter specifically, I find no merit in this
6 representation. To the contrary, I find the Trustee presented its alleged preliminary position
7 in the June 26th, 2018, Trustee Letter. Then it declined to meet with Ms. Rose.

8
9 Contrary to the argument advanced by the Trustee, I also find that it did not request any
10 additional information from PEI or Ms. Rose. Instead, I find the Trustee stated it would
11 review any additional information or comments that Ms. Rose chose to provide and it might
12 then request a meeting. I make this finding because, as noted above, the June 26th, 2018,
13 Trustee Letter did not request any particular information. That letter simply listed five
14 areas in respect of which Ms. Rose or PEI might want to provide further particulars.

15
16 Ms. Rose reached out twice to the Trustee and both times indicated that materials were
17 being prepared for its review. Concerning the Rose July 6th, 2018, reporting email, I find
18 the Trustee never provided Ms. Rose with the courtesy of a reply.

19
20 As noted above, the Trustee indicated on June 27th, 2018, in a communication to Ms. Rose
21 that it would review any additional information provided. When I first reviewed that
22 evidence, I took comfort from that reply because it suggested the Trustee had an open mind
23 at that juncture. An open mind at that juncture is consistent with its responsibility to
24 investigate matters appropriately. However, I find the Trustee contradicted itself on that
25 point during questioning.

26
27 When asked during questioning whether it would have been reasonable for it to provide a
28 deadline concerning the additional data that Ms. Rose was assembling for the Trustee, the
29 Trustee answered that Ms. Rose had not responded to its request for further information. I
30 find the Trustee's response is inconsistent with the late June and early July communications
31 in evidence. I find no request from the Trustee for additional information. What the
32 Trustee stated was that it would review additional information if provided by Ms. Rose.
33 Again, I find that the Trustee had developed tunnel vision by June 27th, 2018.

34
35 Based on my review of the evidence, I find PEI and Ms. Rose were offering to provide
36 additional data to the Trustee, and the Trustee was on notice of that fact.

37 38 E. Release Allegations

39
40 The Trustee alleged that Ms. Rose caused 198Co to agree to the Release. Some background
41 is warranted here for context.

1
2 The purchase of PEOC by 198Co was outlined above. That acquisition by 198Co occurred
3 on October 1st, 2016.
4

5 In the Pricewaterhouse reasons that I gave earlier this year, I inferred that each of 198Co
6 Principals were at arm's length with: first, all members of the Perpetual Energy Group of
7 entities; and, second, Ms. Rose. As noted above, the 198Co Principals were Mr. Wang and
8 Mr. Yang.
9

10 The voting shares of Kailas Capital were owned 50 percent by Mr. Wang and 50 percent
11 by Mr. Yang, and 198Co is a wholly owned subsidiary of Kailas Capital. The evidence is
12 that Kailas Capital and 198Co were represented by the law firm of McCarthy Tetrault LLP.
13

14 The Release is dated October 1st, 2016, and was signed by Ms. Rose on one hand and by
15 one of the 198Co Principals on the other hand. But for the allegation made by the Trustee,
16 there is nothing unusual about that Release. The evidence is that the Release is a common
17 document in transactions that involve the purchase and sale of shares.
18

19 The Trustee's Preliminary Report dated April 11th, 2018, which I referred to as the
20 Trustee's April 2018 Preliminary Report, indicated that the strategy implemented by the
21 Sequoia Principals appears to be successful until around August 2017 when gas prices in
22 Alberta began to decline significantly.
23

24 The Trustee was aware of the Release when it sent its preliminary views to PEI. The
25 Trustee expressed no concerns about the Release at the time it issued the June 26th, 2018,
26 Trustee Letter.
27

28 In the August 2018, Statement of Claim, the Trustee alleged that Ms. Rose personally
29 caused PEI to require 198Co to deliver the releases which had been executed by the new
30 directors of PEOC.
31

32 The assertion in the August 2018 Statement of Claim is that Ms. Rose caused PEI to require
33 198Co to agree to the Release (I refer to that as the "Trustee's Release Assertion"). Based
34 on my review of the evidence, I find the Trustee did not ask Ms. Rose any questions
35 concerning the Trustee's Release Assertion before the August 2018 Statement of Claim
36 was filed. Similarly, I find the Trustee did not ask the 198Co Principals any questions
37 concerning the Trustee's Release Assertion before the August 2018 Statement of Claim
38 was filed.
39

40 VI. Application of the Law to the Facts 41

1 A. Did the Trustee conduct an appropriate investigation?
2

3 Given the evidence and analysis, I find the Trustee did not conduct an appropriate
4 investigation in respect of the lawsuit that it launched against Ms. Rose. This finding is
5 supported by a number of evidentiary factors.
6

7 First, the Trustee asserted that certain documents spoke for themselves and that he did not
8 need to ask Ms. Rose any questions. I disagree. The context that Ms. Rose could have
9 provided to the Trustee undoubtedly would have been useful in the exercise of his
10 judgment, especially considering the nature of the Action.
11

12 Second, I found above that the Trustee did not ask the Sequoia Principals any questions
13 concerning the allegations it was going to make in the August 2018 Statement of Claim
14 regarding the Release, the Asset Transaction, the Aggregate Transaction, or Ms. Rose.
15 Again, the context that the Sequoia Principals could have provided to the Trustee likely
16 would have been useful in the exercise of its judgment considering this action. I state that
17 because the Trustee's August 2018 Preliminary Report indicated that the strategy
18 implemented by the Sequoia Principals appeared to be successful until around August
19 2017, when gas prices in Alberta began to decline significantly. That comment, by itself,
20 warranted follow-up questions by the Trustee.
21

22 Third, I also note with significance the additional wells which SRC acquired as reported
23 on page 1 of the Trustee's 2018 report. In particular, by its own hand, the Trustee reports
24 that SRC grew between the date that 198Co acquired SRC and August 2017. Based on the
25 evidence before me, as summarized by the Trustee, that growth in SRC was from the
26 original well count of 2,500 wells to 3,200 wells.
27

28 The Trustee's April 2018 preliminary report indicates that those additional wells were
29 acquired in separate asset purchases from: first, Husky Oil Operations Ltd.; second,
30 Waldron Energy; and, third, various other operators. In outlining this data which is
31 presented on the face of the Trustee's 2018 report, I make no findings. However, it suggests
32 that certain questions should have been raised for the benefit of all stakeholders, including
33 the Court.
34

35 As an example, in the August 2018 Statement of Claim, the Trustee asserts that, "As a
36 result of the transaction generally and the Asset Transaction, in particular, if PEOC was
37 not insolvent, it was rendered insolvent all for the benefit of Rose personally". Given that
38 assertion in the pleadings, the Trustee should have asked the Sequoia Principals why they
39 were adding assets to a corporation that was allegedly insolvent.
40

41 While I make no determination concerning these additional asset purchases, I think the

1 Court would want to know the answer to that question. Further, I am of the view that as
2 an officer of the court, the Trustee should have asked at least the Sequoia Principals a
3 question of that nature. The answers to questions of that nature may add important context
4 to the elements that the Trustee needs to prove as the plaintiffs in this action. Indeed, the
5 answers to such questions may be critical to the proper administration of justice in matters
6 of bankruptcy.

7
8 In relation to the investigation as a whole, I find that the Trustee drew a legal conclusion
9 concerning the alleged benefit involving the ARO without allowing Ms. Rose to put her
10 position forward. Indeed, the Trustee did not ask Ms. Rose a single question concerning
11 the alleged benefit that he was going to include in the August 2018 Statement of Claim
12 against her.

13
14 While additional data from Ms. Rose may not have changed the alleged preliminary views
15 of the Trustee, it had an obligation to consider any additional evidence that was provided.
16

17 In that regard, I am troubled by the assertion of the Trustee that it had provided Ms. Rose
18 with ample time to respond.

19
20 In these circumstances, I find that Ms. Rose was not provided with ample time to respond.
21 I make this finding for four reasons:

22
23 First, the Trustee was positioning himself to launch a claim in the range of \$220,000,000
24 against Ms. Rose in circumstances where it did not provide her with any notice of the
25 forthcoming lawsuit against her. Not only should the Trustee have given notice of that
26 possibility to Ms. Rose, it had a duty to properly investigate the circumstances and to
27 provide her with the opportunity to address the issues before it filed the lawsuit.

28
29 Second, Ms. Rose had indicated that further data was going to be provided for the Trustee
30 to consider. While Ms. Rose did not meet her own self-imposed deadline, I do not view
31 that as justification for the Trustee to "move fast" in terms of filing the lawsuit. Based on
32 my review of the evidence, I find no indication that the Trustee ever set a deadline by which
33 Ms. Rose was to provide the additional particulars.

34
35 Third, in any dispute between parties, it is important to provide sufficient time for the
36 potential defendant to answer questions and provide its position on matters. In this case,
37 there was a total of 18 clear business days between the last communication of Ms. Rose to
38 the Trustee, which occurred on July 6th, 2018, and the filing of the August 2018 Statement
39 of Claim on August 2nd, 2018. Given the magnitude of the case that it was going to launch
40 against Ms. Rose, I find that time span was not ample. Indeed, the fact that the Trustee had
41 not alerted Ms. Rose to her personal exposure in the lawsuit further supports the finding

1 that the time span was neither ample, nor sufficient, particularly when her potential
2 exposure was in the range of \$220,000,000.

3
4 Fourth, I disagree with the alleged justification given by the Trustee that it had to move
5 fast. While I do not minimize the ultimate need for the attention that needs to be given to
6 2,500 wells, in the circumstances of this case I do not accept that as being the justification
7 for the Trustee to "move fast". I find no evidence before me of any emergencies that had
8 to be dealt with forthwith. Further, I find no evidence as to why the filing of the August
9 2018 Statement of Claim, a mere 18 clear business days after Ms. Rose indicated on July
10 6th, 2018, that additional data would be forthcoming, would address any emergency. This
11 finding is supported by the fact that there is no evidence that the Trustee has reclaimed any
12 wells since it was appointed in March 2018.

13
14 Given the overall context, I find that the investigation carried out by the Trustee was not
15 complete insofar as he did not ask the key witness, being Ms. Rose, any questions
16 concerning the alleged benefit issue as it pertained to her. Again, I find no evidence the
17 Trustee informed Ms. Rose that it was going to make a claim against her concerning his
18 perception that she benefitted from the Asset Transaction. Given the facts and analysis, I
19 also find the Trustee failed in its obligation to conduct a thorough investigation when it
20 failed to question Ms. Rose and the 198Co Principals.

21
22 As a result, the Trustee breached his duty of procedural fairness by not providing a
23 thorough and neutral investigation. Given the nature of the allegations made by the
24 Trustee, which include: first, the alleged failure to exercise business judgment; second, the
25 alleged oppression; third, an allegation of being unfairly prejudicial; and, fourth, an
26 allegation of unfairly disregarding the interests of the creditors of the corporation, and the
27 magnitude of the claim against Ms. Rose which was in the range of \$220,000,000, I find
28 that the conduct of the Trustee was egregious. The fact that this tactic was pursued by an
29 officer of the court is even more concerning.

30
31 As noted above, the Trustee's Release Assertion in the August 2018 Statement of Claim is
32 that Ms. Rose caused PEI to require 198Co to agree to the Release. On the face of that
33 pleading, I am not bothered by that factual allegation. This allegation suggests that PEI
34 forced 198Co to do something. That may have been the case but this allegation is an
35 important factor in this case because of the manner in which the August 2018 Statement of
36 Claim is framed.

37
38 While the Trustee is the master of its own investigative procedure, it is under a duty to act
39 fairly. I am troubled by what came before me in evidence during the underlying hearing.

40
41 In this circumstance, the Trustee saw no reason to ask Ms. Rose about the Release. He saw

1 no reason to ask her whether she had caused PEI to require 198Co to agree to the Release
2 notwithstanding it planned to allege that very point in the August 2018 Statement of Claim.
3 Based on the evidence before me, I find the Trustee's Release Assertion was made without
4 proper investigation. It was merely an assumption.

5
6 Concerning that evidence, I have two comments.

7
8 First, I acknowledge that the commencement document need only plead important facts
9 that, in law, create a certain cause of action. In the August 2018 Statement of Claim, the
10 Trustee pleaded that Ms. Rose breached her duties to PEOC by causing PEI to require
11 198Co to agree that, as a condition of closing the share transaction, 198Co would deliver
12 to PEI Releases executed by PEOC's new directors purporting to release Rose from any
13 claims by PEOC relating to her conduct as a director of PEOC. While it is trite law, I state
14 for the record that a fact alleged in a pleading is not evidence.

15
16 The Trustee stated in questioning that he did not question the 198Co Principals because he
17 was not aware of any evidence where they had been involved in the asset purchase
18 agreement. During the same questioning, the Trustee also confirmed that it did not occur
19 to him that he would be better able to discharge his duty to be honest and impartial, and
20 provide interested parties with full and accurate information, if, first, he examined more
21 carefully the records received from SRC or from PEI concerning the negotiation of the
22 asset purchase agreement, or, second, followed up with Ms. Rose on her advice that they
23 were providing additional information to the Trustee.

24
25 Similarly, I also find the Trustee did not ask Ms. Rose any questions concerning the
26 Trustee's release assertion. Indeed, based on my review of the June 26, 2018, Trustee
27 Letter, I find no mention of the Release.

28
29 When asked during questioning why he did not ask Ms. Rose for her side of the story, the
30 Trustee stated, "The evidence speaks for itself". In the context of that same cross-
31 examination, the Trustee also confirmed that he did not think it was proper to ask Ms. Rose
32 about the Trustee's release assertion. During the initial hearing, counsel for the Trustee
33 tried to justify the lack of questioning of Ms. Rose by asserting that he was "... not sure
34 what she should have been asked, the Release is clear. The circumstances are clear and,
35 really, there's nothing sinister about the fact there's nothing more to ask her about that
36 except her opinion about whether it's legal, I suppose."

37
38 I do not accept that assertion on behalf of the Trustee. My reasons are fourfold.

39
40 First, Ms. Rose provided evidence in affidavit format that the Release was negotiated at
41 arm's length. That evidence from Ms. Rose contradicts an important element in the

1 Trustee's Release Assertion. The Trustee did not cross-examine on that evidence or tender
2 reply evidence.

3
4 Second, given the nature of the Trustee's Release Assertion in the August 2018 Statement
5 of Claim, I would have expected the Trustee to at least ask the 198Co Principals the
6 following question - Did Ms. Rose cause PEI to require you, the 198Co Principals, to
7 execute the release against your will? There is no evidence to suggest that a simple
8 question of that type was asked of these key stakeholders.

9
10 Third, given that the Trustee was going to claim \$220,000,000 against Ms. Rose, I would
11 have expected a thorough investigation. While the domain of the investigation in these
12 circumstances is under the control of the Trustee, I find that a thorough investigation would
13 have required the Trustee to ask the key stakeholders some questions. In this case, the
14 evidence of Ms. Rose was that at no time did the Trustee ask her any questions about the
15 Release or suggest that it is not binding on SRC. The Trustee did not cross-examine on
16 that evidence or tender reply evidence.

17
18 Fourth, implicit in the Trustee's Release Assertion in the August 2018 Statement of Claim
19 is the allegation that the 198Co principals were not acting on a non-arm's length basis in
20 respect of one or both of Ms. Rose or PEI. Notwithstanding that allegation, I find that the
21 Trustee provided no evidence that 198Co was operating on a non-arm's length basis in
22 respect of either Ms. Rose or PEI.

23
24 To the contrary, the evidence is that 198Co was a sophisticated party that was at arm's
25 length of both Ms. Rose and PEI. Further, the evidence is that 198Co was represented by
26 the law firm of McCarthy Tetrault LLP and it vigorously negotiated all aspects of the
27 Aggregate Transaction. In the absence of evidence, the suggestion that McCarthy Tetrault
28 was forced to do anything in the context of a deal is inconceivable to me.

29
30 Based on the evidence before me during the hearing, I found no basis whatsoever to suggest
31 that Ms. Rose caused PEI to cause 198Co to agree to the Release. To the contrary, I find
32 there is a lack of evidence to support the allegation that was included in the August 2018
33 Statement of Claim. I make this preliminary finding because the Trustee did not carry out
34 a proper investigation. He just made certain assumptions and did not take steps to
35 investigate the necessary underlying facts. I find this to be inexcusable conduct for any
36 investigative officer, particularly an officer of the Court.

37
38 Given the facts and analysis, I find the Trustee did not investigate the Trustee's Release
39 Assertion appropriately. As a result, I find no evidence that the Trustee established an
40 evidentiary foundation to support its allegation that Ms. Rose caused PEI to cause 198Co
41 to agree to the Release.

1
2 In summary, I find the Trustee effectively took no steps to investigate the merits of the
3 allegations against Ms. Rose that it included in the August 2018 Statement of Claim in
4 respect of the Release. He just made assumptions.
5

6 B. Scale of Costs 7

8 The Trustee has expressed concern that the submissions advanced by Ms. Rose in the
9 context of the Rose Costs Application suggest that the Trustee engaged in various forms
10 of misconduct. In particular, the Trustee asserts that Ms. Rose alleges that various claims
11 made against her in the Action were without any benefit, were without any belief that they
12 were all well founded, legally and factually. The Trustee asserts that there is no reasonable
13 basis, in law or fact, for these submissions by Ms. Rose.
14

15 While I acknowledge the assertions advanced by the Trustee, I disagree. For the reasons
16 already discussed, I find the allegations advanced by Ms. Rose are well founded both in
17 law and fact.
18

19 I find that an award of solicitor-client costs in favour of Ms. Rose is warranted. I make
20 this finding because this is a circumstance where justice can only be done by a substantial
21 indemnification for costs.
22

23 Ms. Rose swore an affidavit on May 1st, 2010, that attached a bill of costs indicating her
24 solicitor-client costs were in the amount of approximately \$683,431 (I refer to that as the
25 "Rose Bill of Costs").
26

27 Counsel for each of the Perpetual Group of entities and Ms. Rose allocated work between
28 themselves. The purpose of this work allocation was to reduce or avoid the duplication of
29 effort on common issues (I refer to that as the "Defendants' Work Allocation").
30

31 The Trustee did not cross-examine Ms. Rose on the Rose May 2020 affidavit. Further, the
32 Trustee did not file any evidence in response to this application.
33

34 The Defendants' Work Allocation is relevant to the Rose Costs Application because much
35 of the work carried out by counsel for the Perpetual Group otherwise would have been
36 duplicated by counsel for Ms. Rose. There is no evidence that the Trustee challenged the
37 Defendants' Work Allocation. Based on the facts and analysis, I find the Defendants' Work
38 Allocation to be a prudent course of conduct in the circumstances.
39

40 Given that the Trustee did not cross-examine Ms. Rose on her May 2020 affidavit, I accept
41 the Rose Bill of Costs at \$683,431.

1
2 I set the award of costs at 85 percent of the Rose Bill of Costs. I make this determination
3 because I find the Trustee exercised very poor judgment that equates to positive
4 misconduct. The positive misconduct to which I refer is fourfold.

5
6 First, the Trustee did not conduct as thorough of an investigation of the matters as he should
7 have done in the circumstances of this case. While the Trustee might have decided to
8 proceed with the lawsuit, the need for a thorough investigation as a prerequisite to that
9 litigation move is of fundamental importance.

10
11 Second, the Trustee did not provide Ms. Rose with notice of the possible claim in the range
12 of \$220,000,000 against her. For the record, I find this lack of notice inexcusable. The
13 provision of notice is of fundamental importance in many areas of the law and one of those
14 areas includes the need for a trustee to give notice in the context of a potential lawsuit. I
15 expect no less from an officer of the court.

16
17 Third, the Trustee should have provided Ms. Rose the opportunity to provide additional
18 data for it to consider. I find it outrageous that Ms. Rose notified the Trustee that further
19 particulars were forthcoming and that it neither waited for the additional particulars, nor
20 gave Ms. Rose a deadline by which she should have submitted those particulars to the
21 Trustee.

22
23 Fourth, I find that Ms. Rose was not given sufficient time to address matters. In the
24 circumstances of this case, I find that the conduct of the Trustee in this regard is egregious.
25 If a Trustee is going to sue a director of a public company and make the type of allegations
26 it did in this case, it needs to provide that individual with time to address matters. This
27 point overlaps with notice, but is a separate issue.

28
29 As a final comment, I make this particular award of costs so that other officers of the court
30 are deterred from similar conduct. When this type of conduct occurs, the responsible party
31 should be penalized beyond the ordinary order of costs.

32 33 C. PricewaterhouseCoopers Liability for Ms. Rose's Costs

34
35 The Trustee sued Ms. Rose personally in civil court in relation to a corporate transaction.
36 Nearly four years have lapsed since the Aggregate Transaction was effected. Much has
37 happened in the world since then, including in respect of the financial prospects of SRC.

38
39 The Alberta Court of Appeal has recognized that the Sequoia Estate will not be able to pay
40 costs. Indeed, the Trustee also conceded that the Sequoia Estate would not likely be able
41 to pay costs.

1
2 Based on my review of the law, I find I have the jurisdiction to award costs against non-
3 parties on the basis that they were the promotor of the unsuccessful litigation. I find that
4 PWC Inc shall personally bear the responsibility for the costs awarded in the Rose Costs
5 Application. As a result and given the circumstances of this case, I order PWC Inc to be
6 directly liable for the costs, rather than the Sequoia Estate.

7
8 VII. I turn to my conclusions.

9
10 **Decision (Rose Costs Application)**

11
12 Given the evidence, findings, and analysis above, my conclusions are as follows.

13
14 First, costs shall be granted in favour of Ms. Rose.

15
16 Second, the costs in this action concerning Ms. Rose shall be granted on a solicitor-client
17 basis. I make this finding because this is a circumstance where justice can only be done by
18 a substantial indemnification of costs. I set the award of costs at 85 percent of the Rose
19 Bill of Costs.

20
21 Third, PWC Inc shall be directly liable for the costs to Ms. Rose.

22
23 That concludes my decision in respect of the Rose Costs Application.

24
25 I will turn next to the Perpetual Costs Application. Just as an aside, I will ask at the end of
26 the third decision if there is any particulars or any other business that we should address.

27
28 **Reasons for Judgment (Perpetual Costs Application)**

29
30 Turning to the second application, this being the Perpetual Costs Application, this involves
31 Perpetual Energy Inc and Pricewaterhouse Inc These are the oral reasons for judgment of
32 myself, Justice Blair Nixon.

33
34 Insofar as this is an oral judgment, I retain the right to review the transcript and to add case
35 names and citations. I may issue a written decision in respect of this matter, but I have not
36 yet made a final determination. As an aside, unlikely I will issue a written decision on this
37 second matter.

38
39 In oral judgments, it is not my practice to cite legislation, jurisprudence, or the *Rules of*
40 *Court* in detail notwithstanding that they have been considered.

41

1 I. Introduction

2
3 The Perpetual Energy defendants, who I will refer to as the "Perpetual Defendants" are
4 seeking costs concerning the litigation that was launched against them by
5 PricewaterhouseCoopers Inc, LIT. I will refer to them as PWC Inc. In their quest for costs,
6 the Perpetual Defendants filed an Application for Costs (I will refer to that as the "Perpetual
7 Costs Application"). The Perpetual Defendants are seeking an order directing that PWC
8 Inc be directly liable for any costs awarded to it. The Perpetual Defendants seek costs
9 because they allege that they were substantially successful at this stage of the litigation.

10
11 II. The Issues

12
13 There are a number of issues in the Perpetual Costs Application. I frame those issues as
14 follows.

15
16 First, should costs be granted in favour of the Perpetual Defendants?

17
18 Second, if the Perpetual Defendants are entitled to costs in respect of this action, should
19 such costs be granted: (a) on a solicitor-and-own-client basis, which would allow for full
20 indemnity recovery; (b) on a solicitor-client costs basis, which would allow for reasonable
21 legal costs and disbursement recovery; or (c) on a party-party basis, which would allow for
22 recovery by reference to Schedule 'C' of the *Alberta Rules of Court*.

23
24 If costs are granted, should PWC Inc be directly liable for the costs rather than the estate
25 of Sequoia Resources Corporation (I will refer to that as the "Sequoia Estate").

26
27 III. Facts and Findings

28
29 The Perpetual Defendants were successful in striking, first, the oppression claim and,
30 second, the aggregate of the public policy, statutory illegality, and equitable rescission
31 claims against them. The Perpetual Defendants were not successful in striking the BIA
32 claim against them.

33
34 The Trustee sought full indemnity costs against the Perpetual Defendants. The bill of costs
35 which the Perpetual Defendants put in evidence shows solicitor-client costs for all matters
36 relating to the Action up to February 14th, 2020, are in the amount of \$772,003.40 (I will
37 refer to that as the "Perpetual Bill of Costs").

38
39 The Perpetual Bill of Costs amount does not include the costs of this application which the
40 Perpetual Defendants also seek.

41

1 The Trustee did not cross-examine on the Perpetual Bill of Costs or tender responding
2 evidence.

3
4 Perpetual Energy Inc is a publicly traded corporation with directors, officers, employees,
5 and shareholders.

6 7 IV. Analysis

8
9 The Trustee elected to sue the Perpetual Defendants in the civil court. As a result, the
10 Trustee is subject to the jurisdiction of this court.

11 12 A. The Law

13
14 I reviewed the framework of costs in my earlier decision today concerning the Rose Costs
15 Application. Much of that same law applies to the Perpetual Costs Application. I
16 incorporate by reference the review of the law which I outlined in the oral decision I gave
17 in respect of Ms. Rose.

18
19 Just as individuals have reputations that can be damaged by inappropriate attacks on their
20 character, so too do corporations. This has been recognized by the Alberta Court of Appeal
21 which has commented that at risk in the proceedings were not only damages but the
22 industry reputation of the respondent corporations and their officers.

23 24 B. Application of the law to the facts

25
26 The Perpetual Defendants assert they should be awarded two-thirds of their full indemnity
27 costs for their successful application which struck two of the three claims against them.
28 They have further asserted that the costs related to the BIA claim should be in the cause,
29 to be assessed when that claim is finally determined.

30
31 While the Perpetual Defendants advance many good arguments, I find it is not appropriate
32 to order any costs at this stage in respect of those applications. I make this finding for two
33 reasons.

34
35 First, the Perpetual Defendants have only won on, first, the oppression claim and, second,
36 the aggregate of the public policy, statutory illegality and equitable rescission claims. While
37 the Perpetual Defendants have not lost on the BIA claim, the Court has pressed the pause
38 button on that matter.

39
40 Second, the Perpetual Defendants will be advancing arguments concerning the BIA claim
41 in approximately six weeks. Once I have decided the BIA claim in respect of the

1 Application to Strike and for Summary Dismissal, it will be appropriate for me to consider
2 a costs application, provided such an application is filed by the successful party.

3
4 C. Conclusion

5
6 **Decision (Perpetual Costs Application)**

7
8 Given the facts and analysis concerning this application, my conclusion on the three above
9 mentioned issues are as follows.

10
11 First, I exercise my discretion and direct that costs not be granted in favour of the Perpetual
12 Defendants at this time. Based on my analysis above, I will only consider costs in respect
13 of the Perpetual Defendants after I have decided the Application to Strike and for Summary
14 Dismissal. As noted above, the application by the Perpetual Defendants will be heard in
15 approximately six weeks.

16
17 Second, since I have not awarded any costs to the Perpetual Defendants at this time, I need
18 not consider the basis upon which the costs should be granted. That determination can be
19 made after I decide the Application to Strike and for Summary Dismissal, provided the
20 winning party brings a costs application.

21
22 Third, since I have not awarded any costs to the Perpetual Defendants at this time, I need
23 not consider if PWC Inc should be directly liable for the costs.

24
25 That concludes my decision in respect of the second application.

26
27 **Reasons for Judgment (Security for Costs Application)**

28
29 I turn to the Security for Costs application by Perpetual Energy. Again, this is an
30 application by Perpetual Energy as applicant and PricewaterhouseCoopers Inc as
31 respondent.

32
33 These are the oral reasons for judgment of myself, Justice Blair Nixon. Insofar as this is
34 an oral judgment, I retain the right to review the transcript and to add in case names and
35 citations. I may issue written reasons but I have not yet made a final decision in that regard
36 in respect of this third matter.

37
38 In oral judgments, it is not my practice to cite the legislation, jurisprudence, or the *Rules of*
39 *Court* in any detail notwithstanding that they have all been considered.

40
41 I. Introduction

1
2 The Applicants, who I will refer to collectively as the Perpetual Defendants, are seeking
3 Security for Costs (which I will refer to as "Security for Costs"), concerning the litigation
4 that was launched against them by PricewaterhouseCoopers Inc, LIT (which I will refer to
5 as "PWC Inc"). In the underlying action, which I will refer to as the "Action", PWC Inc is
6 acting in its capacity as trustee in bankruptcy of Sequoia Resources Corp, and not in its
7 personal capacity (I will refer to it as the "Trustee" from time to time).
8

9 The Perpetual Defendants seek Security for Costs because they are concerned that the
10 estate of Sequoia Resources Corporation (which I will refer to as the "Sequoia Estate"),
11 may not have the financial resources to fund any costs that may be awarded to the
12 Applicants in the event they are ultimately successful. The Perpetual Defendants also seek
13 an order directing that PWC Inc be directly liable for any costs awarded in favour of the
14 applicants.
15

16 II. Issues

17

18 The issues below are as the Perpetual Defendants frame them in their brief that they filed
19 in respect of this application, albeit as restated by me.
20

21 First, does the Court have jurisdiction to grant an order for Security for Costs?
22

23 Second, is the application for Security for Costs an abuse of process by the Perpetual
24 Defendants?
25

26 Third, will the Sequoia Estate be able to pay costs in the event the Perpetual Defendants
27 are successful in this action?
28

29 Fourth, if the Sequoia Estate will not be able to pay costs in the event the Perpetual
30 Defendants are successful in this action, should the Security for Costs be ordered under
31 either section 4.22 of the *Alberta Rules of Court* or section 254 of the *Alberta Business*
32 *Corporations Act*.
33

34 Fifth, if an order for Security of Costs is to be granted, should this Court direct PWC Inc
35 to advance to the clerk of the Court of the Queen's Bench of Alberta Security for Costs of
36 this action (I will refer that as a "Security")?
37

38 Sixth, if the order for Security for Costs is granted, what should be the quantum?
39

40 Seventh, if the Court grants an order for Security for Costs, should it direct that the Security
41 be held by the clerk until further order of the Court as security for any costs award in favour

1 of the Perpetual Defendants in this action?

2
3 III. Facts and Findings

4
5 Some general comments. The Alberta Court of Appeal has ordered the Trustee to post
6 Security for Costs concerning its appeal of an order of this Court which struck, first, the
7 oppression remedy and, second, the director liability claim, and third, the public policy
8 claim: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36 (Veldhuis
9 JA in Chambers) [*Veldhuis Reasons*]. All of those reasons were appealed by the Trustee
10 to a panel of the Alberta Court of Appeal. The appellate panel dismissed the Trustee's
11 application: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 254.

12
13 The Trustee filed no evidence opposing this application for Security for Costs.

14
15 The Trustee confirmed on cross-examination that there was a high probability that the
16 unsecured creditors would get nothing from the Sequoia Estate unless the plaintiff, PWC
17 Inc, was successful in all of its lawsuits. The Trustee also confirmed in cross-examination
18 that the prospect of returning anything to unsecured shareholders was very remote.

19
20 Based on the facts that were before the Alberta Court of Appeal concerning the Sequoia
21 Estate, that appellate court determined that the Sequoia Estate would be unlikely and
22 unable to pay costs: *Veldhuis Reasons* at para 32.

23
24 Based on the evidence and findings and analysis, I find on a balance of probabilities that
25 the Sequoia Estate will be unable to pay a costs award concerning this litigation in the event
26 the Perpetual Defendants are successful in their defence of this action.

27
28 IV. Analysis

29
30 A. Jurisdiction

31
32 The Trustee asserts that I do not have jurisdiction to deal with a Security for Costs
33 application. This is a threshold issue.

34
35 1. The Civil Court v. Bankruptcy Court

36
37 A trustee in bankruptcy may proceed by an action in the ordinary civil courts
38 notwithstanding that the relief sought might also have been claimed by a court sitting in
39 bankruptcy: Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2020*
40 *Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2020) at 588 (para I§8)
41 [*Houlden and Morawetz 2020 Annotated BIA*]. The determination of which court a trustee

1 in bankruptcy is advancing a claim is made by the trustee.

2
3 If the trustee elects to come before this court sitting in bankruptcy, it needs to title the
4 documents in accordance with the appropriate *Bankruptcy and Insolvency General Rules*.
5 The fact that the trustee can select either court, sitting in a civil context or sitting in
6 bankruptcy, is touched on in the *Houlden & Morawetz 2020 Annotated BIA* commentary.
7 That commentary states that if the proceeding were taken in the ordinary court and the
8 court trying the matter is of the opinion that the summary procedure of the court sitting in
9 bankruptcy would have been more appropriate, it can show its disapproval when it deals
10 with the matter of costs: *Houlden and Morawetz 2020 Annotated BIA* at 588.

11
12 I make the determination as to whether I am sitting in a bankruptcy or ordinary civil court
13 by my initial review of the commencement documents: *Houlden and Morawetz 2020*
14 *Annotated BIA* at 1288 (para M§12). When a matter is brought before this Court sitting in
15 bankruptcy, the commencement documents used in the proceedings must be dated and
16 entitled in the name of the court in which they are used together with the words "In
17 Bankruptcy and Insolvency": see section 9(1) of the *Consolidated Regulations of Canada*,
18 c 368. Further, when a trustee is advancing a matter in the court sitting in bankruptcy,
19 every document used in the filing of a bankruptcy application or used after the filing of an
20 assignment must be entitled "In the matter of the bankruptcy of ...": see section 9(2) of
21 the *Consolidated Regulations of Canada*, c 368.

22
23 I reviewed the commencement documents in this action. Based on my review of the
24 relevant documents, there is no indication that the Trustee was advancing this action in the
25 context of this Court sitting in bankruptcy. While this Court has the jurisdiction to sit either
26 in a civil context or a bankruptcy context, I find that the August 2018 Statement of Claim
27 is not framed as being in the name of the bankruptcy court.

28
29 Similarly, neither the applications for costs nor the application for Security for Costs are
30 framed as being in the bankruptcy court. Given the facts and analysis, I find the Trustee
31 elected to sue the Perpetual Defendants in the civil court, being the Alberta Court of
32 Queen's Bench and not in the context of this court sitting in bankruptcy.

33
34 Since the Trustee elected to sue in the context of the civil court, I find the Trustee and its
35 claims against the Perpetual Defendants are subject to the statutory and common law
36 jurisdiction of this Court.

37
38 2. Does this Court have jurisdiction to grant an order for Security for Costs?

39
40 A body corporate that holds a licence as a trustee may perform the duties and exercise the
41 powers of a trustee, albeit only through a director or officer of the body corporate who

1 holds a licence as trustee. It is the responsibility of the trustee, before accepting an
2 appointment, to protect itself against the contingency of having to bear its own expenses
3 of administering the estate because of the insufficiency of assets: *Re Hoyt* (1933), 14 CBR
4 486 at 491 (NB KB); *Re Auto Experts Ltd* (1921), 1 CBR 418 (Ont SC).

5
6 Section 254 of the ABCA is alleged by some to be the sole measure which applies if the
7 respondent in a Securities for Costs application is a corporation. The respondent is a
8 corporation. As a result, it follows that section 254 of the ABCA may govern this
9 application. Some say that in all other fact patterns, section 4.22 of the *Alberta Rules of*
10 *Court* is the template.

11
12 For completeness, I will address both frameworks because, in my opinion, the better view
13 is that the Court has authority to grant Security for Costs against a corporation under either
14 test: see *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018
15 ABQB 281 at paras 41-44, 49-53; and *ConocoPhillips Canada Operations Ltd v 1835651*
16 *Alberta Ltd*, 2020 ABQB 14 at paras 60-68. While I acknowledge there is conflicting
17 jurisprudence on the issue, I am of the view that the two frameworks are alternative grounds
18 for awarding Security for Costs against a corporate litigant.

19
20 a. Section 254 of the ABCA

21
22 Notwithstanding the Trustee's oral arguments to the contrary, I find that the plaintiff is a
23 corporation. As a result, 254 of the ABCA has potential application, provided the
24 prerequisites of that provision are met. I will have more to say about that in my written
25 decision, if I choose to do one. Section 254 of the ABCA reads as follows:

26
27 In any action or other legal proceeding in which the plaintiff is a body
28 corporate, if it appears to the court on the application of a defendant
29 that the body corporate will be unable to pay the costs of a successful
30 defendant, the court may order the body corporate to furnish security
31 for costs on any terms it thinks fit.

32
33 Section 254 only requires some evidence that a corporation will be unable to pay a costs
34 award: *North American* at para 41. Some evidence includes that the respondent is an
35 insolvent corporation or a small business engaged in expensive litigation: *North American*
36 at para 45.

37
38 The Trustees report to the Court disclosed that the Sequoia Estate only had \$1,776,109 of
39 available funds as at the date of bankruptcy and secured claims totalling \$7,054,630.
40 Further, in November 2019, the Trustee testified that it was guessing the estate had
41 approximately 2.3 million in cash but that the secured creditors' claims were greater than

1 the cash on hand.

2
3 An applicant is *prima facie* entitled to Security for Costs against a bankrupt litigant where
4 the bankrupt estate cannot pay costs: *Future Health Inc. (Trustee of) v State Farm Mutual*
5 *Automobile Insurance Co. of Canada*, 35 CPC (6th) 168 at para 8 (Ont SCJ). The burden
6 then shifts to the respondent who bears the very heavy onus to show that it is not able to
7 raise the security: *Future Health* at para 12-14; and *Trimove Inc v Serous Credit Union*,
8 2017 ABQB 50 at para 108. If the Trustee intended to attempt to meet its burden to show
9 why it should not be required to post security, it would have filed an affidavit. It did not.

10
11 Based on my review of the evidence, I find that the Sequoia Estate will not be able to pay
12 the costs award. Further, based on the fact that the Trustee did not file an affidavit in
13 response to this application, I find it did not address its burden to show why it should not
14 be required to post security.

15
16 The relevant statutory framework ranks a cost award against a bankrupt as a preferred
17 unsecured claim. As a result, a costs award in favour of the Perpetual Defendants will rank
18 behind: (i) all secured claims; and (ii) the Trustee's claim for its fees. In these
19 circumstances, I find the priority of a costs claim over unsecured claims to be irrelevant.

20
21 In another Security for Costs application involving the same parties, the Alberta Court of
22 Appeal, in January of this year, concluded - as I read the case - on the balance of
23 probabilities, that the Sequoia Estate would not be able to pay costs: *Veldhuis Reasons* at
24 para 30 and 32.

25
26 Based on my review of the law, this is the type of case where section 254 of the ABCA
27 should apply. That is, it should apply in the case of an insolvent plaintiff or a plaintiff with
28 outstanding judgments against it, or with sufficient unpaid creditors: *Autoweld Systems*
29 *Ltd. v CRC-Evans Pipeline International Inc*, 2011 ABQB 265 at para 17. This conclusion
30 is supported by the comments of the Alberta Court of Appeal where it has stated that section
31 254 is founded in a concern that a limited liability company with few assets can enjoy the
32 proceeds of a lawsuit if it wins and walk away if it loses: 2011 ABCA 243 (O'Ferrall JA
33 in Chambers) at para 12.

34
35 b. Section 4.22 of the *Alberta Rules of Court*

36
37 As I noted above, I am of the view that Security for Costs can also be awarded under *Rule*
38 *4.22* notwithstanding the conflicting jurisprudence. Concerning the application of that
39 Rule, the issue is whether it is just and reasonable to grant Security for Costs. That Rule
40 reads as follows, and I quote: (as read)

41

1 The Court may order a party to provide security for payment of a costs
2 award if the Court considers it just and reasonable to do so, taking into
3 account all of the following:

- 4
- 5 (a) whether it is likely the applicant for the order will be
6 able to enforce the order or judgment against assets in
7 Alberta;
 - 8 (b) the ability of the respondent to the application to pay the
9 costs award;
 - 10 (c) the merits of the action in which the application is filed;
 - 11 (d) whether an order to give security for payment of a costs
12 award would unduly prejudice the respondent's ability
13 to continue the action;
 - 14 (e) any other matter the Court considers appropriate.
- 15

16

17 An order to post Security for Costs under *Rule 4.22* is discretionary. It requires the Court
18 to consider whether it is just and reasonable. The following principles apply.

19

20 First, *Rule 4.22* is intended to protect defendants from plaintiffs who have nothing to lose
21 by proceeding to litigation and are immune from execution: *1251165 Alberta Ltd v Wells*
22 *Fargo Equipment Financing Co*, 2013 ABQB 533 at para 46.

23

24 Second, the initial onus is on the Perpetual Defendants to show that the Trustee will
25 unlikely be able to pay the costs award. If that onus is satisfied by the Perpetual
26 Defendants, the burden shifts to the Trustee to establish why it should not be required to
27 post security: *Trimove* at para 1081; and *ConocoPhillips* at para 81.

28

29 Third, the parties' right to access the legal process does not mean they can advance
30 litigation without fear of costs consequences: *Veldhuis Reasons* at para 15; *Aski*
31 *Construction Ltd v Markos*, 2017 ABCA 341 at para 11.

32

33 I turn to address the just and reasonable aspects as required by *Rule 4.22*. In that regard, I
34 look at: first, financial capacity; second, the merits of the Action; and, third, whether there
35 is an undue prejudice concern.

36

37 i. Sequoia Estate Financial Capacity to Fund Costs Unlikely

38

39 Based on my review of the evidence, I find it extremely remote that the Perpetual
40 Defendants will be able to enforce a costs order against the Sequoia Estate. This finding
41 is supported by the following five factors. As a bankrupt corporation, Sequoia is not an

1 active operating company and has no employees or operating revenue. Second, the secured
2 claims against the Sequoia Estate exceed its exigible assets. Third, the Sequoia Estate has
3 limited resources. Fourth, the Sequoia Estate has significant ongoing costs.

4
5 Given the facts, findings, and analysis, I find that it is not likely the Perpetual Defendants
6 will be able to enforce an order or judgment against the assets in Alberta because the
7 respondent will not have the ability to fund an award of costs.

8
9 ii. The Merit Assessment

10
11 A meritorious defence is sufficient to weigh in favour of granting Security for Costs: *Attila*
12 *Dogan Construction v AMEC Americas Limited*, 2011 ABQB 175 at para 17. No in-depth
13 analysis of the defence is necessary: *Spectrum Centre for Physical Therapy and Athletic*
14 *Rehabilitation Ltd v Filipenko*, 2011 ABQB 340.

15
16 While I am certainly not in a position to comment on whether the Perpetual Defendants
17 will win, I acknowledge that there is substance to the various arguments currently being
18 advanced by them. In making this comment, I have reviewed and considered each of the
19 following points: first, arm's length issue; second, the transfer at under value issue; and,
20 third, the insolvency issue. That said, I state for the record that the Trustee's arguments as
21 reflected in the August 2018 Statement of Claim warrant careful consideration.

22
23 Given the facts and findings, I find the defence advanced by the Perpetual Defendants is
24 sufficiently meritorious to weigh in favour of granting Security for Costs.

25
26 iii. Unduly Prejudiced

27
28 It is for the Trustee to prove that it cannot raise the necessary security and no party can
29 underwrite or guarantee payment of the Sequoia Estate costs: *Future Health* at paras 8,
30 11-12 (Ont SCJ); *Autoweld CA* at paras 14-18. The evidence is that despite a written
31 request, PWC refused to acknowledge personal liability for any costs notwithstanding that
32 Canadian courts have held that a trustee in bankruptcy will be personally liable for costs
33 where a trustee brings on an action and the estate has insufficient assets to pay the costs if
34 the trustee is unsuccessful: *Future Health* at paras 9-12 (Ont SCJ).

35
36 Based on my review of the policy in this area, I find that it would be unjust for PWC Inc
37 and the Trustee to immunize themselves from the economic consequences of this litigation
38 or engage in litigation with a one-way risk.

39
40 Consistent with that determination, I find that it would be equally unjust for the Perpetual
41 Defendants to be successful in this litigation and be denied costs because the Trustee

1 pursued litigation without assuring any ability to pay costs awarded against it: *Crossing*
2 *Company Inc v Banister Pipelines Inc*, 2004 ABQB 56 at paras 18-19.

3
4 Given the facts, findings, and analysis I find no evidence that the Trustee's ability to pursue
5 this litigation will be unduly prejudiced by an order to post Security for Costs. I make this
6 determination in part because it did not meet its burden.

7 8 3. Summary Comments

9
10 Based on the facts and analysis, I find that the Court of Queen's Bench has the jurisdiction
11 to grant Security for Costs under two frameworks.

12
13 First, section 254 of the *Alberta Business Corporations Act* provides this Court with
14 authority to grant Security for Costs. For reasons noted above, the prerequisite tests under
15 that statutory provision have been met.

16
17 Second, section 4.22 of the *Alberta Rules of Court* provides this Court with authority to
18 grant Security for Costs. For reasons noted above, the prerequisite tests under that rule
19 have been met.

20 21 B. Is the application for Security for Costs an abuse of process by the Perpetual 22 Defendants?

23
24 The Trustee has drawn my attention to two different affidavits that the Perpetual
25 Defendants have provided to this Court. The Trustee alleges that there is an inconsistency
26 between the two affidavits. In particular, the Trustee asserts that the Perpetual Defendants
27 attempt to rely on two inconsistent versions of the same key facts in two affidavits sworn
28 by the same affiant on the same day.

29
30 The Perpetual Defendants assert that there are no inconsistencies.

31
32 While we can debate whether there are inconsistencies, I find the Trustee is raising an
33 irrelevant point. I make this finding because the Perpetual Defendants are simply seeking
34 Security for Costs as a protective mechanism in the event they are successful. In my view,
35 that is a financing issue.

36
37 To the extent that there are any inconsistencies between affidavits, I will deal with that
38 issue when the substance of the outstanding issues come before me and are addressed in
39 this court.

40
41 As a final comment on the alleged inconsistencies between affidavits, I find that there are

1 inconsistencies and misunderstandings concerning a number of aspects in this litigation.
2 Some of those confusions arise because of legitimate (or understandable) confusions in the
3 law. I expect this Court will need to address some of those inconsistencies and
4 misunderstandings as this litigation continues. I expect that I may have more to say about
5 the alleged abuse of process in the event I prepare a written decision on this application.
6

7 Given the facts, findings, and analysis, I find that this application for Security for Costs is
8 not an abuse of process by the Perpetual Defendants.
9

10 C. Will the Sequoia Estate be able to pay costs in the event the Perpetual Defendants are
11 successful in this action?
12

13 I addressed this above, but for summary purposes, I will comment again. Based on the
14 evidence, findings, and analysis, I find that the Sequoia Estate will be unable to pay a costs
15 award concerning this litigation in the event the Perpetual Defendants are successful in
16 their defence of this action. That finding is premised on the comments of: (i) the Court of
17 Appeal; (ii) the Trustee; and (iii) the officers of the Perpetual Defendants that swore an
18 affidavit.
19

20 D. If the Sequoia Estate will not be able to pay costs in the event that the Perpetual
21 Defendants are successful, should Security of Costs be ordered under either *Section*
22 *4.22 of the Alberta Rules of Court* or section 254 of the *Alberta Business*
23 *Corporations Act*?
24

25 Based on the facts, findings, and analysis above under jurisdiction, I find that Security for
26 Costs should be ordered in favour of the applicants insofar as the prerequisite tests have
27 been met under both frameworks (i.e. *Rule 4.22* or section 254). I will leave it to counsel
28 to draft an order as they see fit.
29

30 E. If an order for Security for Costs is granted, should this Court direct PWC to advance
31 the security to the clerk of the Court of Queen's Bench of Alberta?
32

33 In response to that question, I direct PWC to advance the security to the clerk of the Court
34 of Queen's Bench of Alberta.
35

36 F. Quantum of Security for Costs
37

38 The fixing of quantum is a discretionary decision. There are no specific rules. A court
39 must decide quantum on a case-by-case basis: *Veldhuis Reasons* at para 47.
40

41 Based on the evidence, the Perpetual Defendants' legal fees to trial are likely to be an

1 additional \$2,000,000 or at least in that range. This estimate is based on the stage of the
2 current litigation. Based on my observations today within the courtroom, I infer that the
3 Perpetual Defendants will spare no expense to defend a claim seeking damages of
4 approximately \$220,000,000.

5
6 Security for Costs can be awarded on a solicitor-and-own-client basis where it appears that
7 the litigants' costs will likely be awarded: *Hamza v Hamza*, 1997 ABCA 263 at para 17.
8 The appropriateness of a solicitor and own-client costs in this action is set out in the
9 Perpetual Energy defendant's brief in support of its costs application and I touched on it in
10 my earlier decision today dealing with the Rose Costs Application.

11
12 I noted that the Trustee's Statement of Claim requests costs on a solicitor and own-client
13 full indemnity basis, also.

14
15 The Perpetual Energy Defendants have prepared a draft bill of costs in support of an
16 alternative quantum requested on the basis of five times Column 5, Schedule 'C', and that
17 amount is \$741,900.

18
19 I acknowledge that the Security for Costs in a multiple of Column 5 was awarded by Chief
20 Justice Wittmann, as he then was, in *Attila Dogan: Attila Dogan* at para 27, 31. He
21 reasoned that the amount of the security was justified by the claim's significance and
22 complexity and directed Security for Costs in the amount of 1.6 million. Other complex
23 or high-quantum claims have also attracted Security for Costs on a multiplier of Column
24 5: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at paras 45-48.

25
26 In making a costs award in the *Hill v. Hill* decision, the Court of Appeal commented that a
27 large claim may itself be the basis for a costs award in a multiple of Column 5, even where
28 the proceeding ran smoothly and without misconduct and was not unusually complex: *Hill*
29 *v Hill*, 2013 ABCA 39, 50.

30
31 Justice Veldhuis ordered the trustee to post an equivalent of approximately 7.5 times of
32 Column 5 in her decision earlier this year: *Veldhuis Reasons* at paras 46, 48.

33
34 The Perpetual Energy Defendants also anticipate disbursements and other charges, and
35 estimate the amount to be in the range of \$349,150. That consists of \$300,000 for three
36 experts on the following subjects: (a) fair market value of the consideration received and
37 given by PEOC under the Asset Transaction and the Aggregate Transaction; (b) ARO
38 associated with the Goodyear assets; and (c) PEOC solvency at the time of as a result of
39 the Asset Transaction, as well as the cause of Sequoia's ultimate insolvency and
40 bankruptcy.

1 Given the facts, inferences, and analysis, and noting the discretion that I have in respect of
2 these matters, I direct a quantum of Security for Costs be in the amount of 1.3 million, plus
3 the estimated disbursements in the amount of \$349,150 (collectively, I will refer to that as
4 the "Security Amount").

5
6 I calculated the Security Amount by reference to the \$2,000,000 at 60 percent, plus the
7 estimated disbursements of \$349,150. For the reference of all parties, the \$2,000,000
8 component reflects the estimated solicitor-client full indemnity balance the Perpetual
9 Defendants expect to incur in this action.

10 11 **Decision (Security for Costs Application)**

12 13 V. Conclusion

14
15 The conclusions below track the sequence of the issues as I framed them above.

16
17 First, given the facts and analysis, I find this Court has the jurisdiction to grant an order for
18 Security for Costs.

19
20 Second, given the facts and analysis, given the facts and analysis, I find this application for
21 Security for Costs is not an abuse of process by the Perpetual Defendants.

22
23 Third, given the facts and analysis, I find the Sequoia Estate will be unable to pay the costs
24 award concerning this litigation in the event the Perpetual Defendants are successful in
25 their defence of this action.

26
27 Fourth, given the facts and analysis, I find that the Security for Costs should be ordered in
28 favour of the applicants as stated above insofar as the prerequisite tests have been met for
29 both frameworks, i.e. *Rule 4.22* and section 254. I leave it to counsel to draft the order as
30 they see fit.

31
32 Fifth, I direct PWC Inc to advance the Security Amount to the clerk of the Court of Queen's
33 Bench of Alberta in respect of this action.

34
35 Sixth, I direct the quantum of the Security for Costs be the amount of 1.3 million, plus the
36 estimated disbursements in the amount of \$349,150, which I referred to above as the
37 Security Amount. I calculated the Security Amount by reference to the \$2,000,000 at 60
38 percent of the estimated disbursements, plus the estimated disbursements of \$349,000.

39
40 Finally, I direct the Security Amount be held by the clerk until further order of this Court
41 as security for any costs award in favour of the Perpetual Defendants in this action.

1
2 **Discussion**
3

4 I turn to other business. In respect of the Rose Costs Decision - and this is no longer part
5 of the judgment, just part of the narrative, the Rose Costs Decision, I ask Mr. Leidl to draft
6 the appropriate order and have his friends review it.
7

8 In respect of the Perpetual Costs Decision, I ask Mr. de Waal to draft, since he is the winner
9 in that case, the appropriate order and have his friends review the matter before it comes
10 before the Court.
11

12 And in respect of the Security for Costs, I ask Mr. McDonald to take the pen and draft the
13 appropriate order.
14

15 If the parties need to speak to costs of any of these three applications, they have leave to
16 bring it back before me. I acknowledge that I did not deal with two lines in the application
17 of the Security for Costs application which stated that if security is not posted within 30
18 days of the date of the resulting order, this action is to be dismissed without further order.
19 I did not address that only because it was not dealt with in either brief. That said, subject
20 to any comments from the parties, I would propose to adjourn that component of the
21 application *sine die* unless they have further requests.
22

23 And, finally, is there any other business that we need to deal with or address today?
24

25 MR. LEIDL: My Lord, if I may? It's Mr. Leidl. Thank you for
26 those decisions.
27

28 We had put in our application for costs that we would be seeking costs of the application
29 itself and you have just mentioned that. Is it fair to say, then, that the determination is that
30 Ms. Rose gets costs of the costs application, and if we can't agree on those with Mr. de
31 Waal, we'll come back?
32

33 THE COURT: Correct, sir.
34

35 MR. LEIDL: Thank you.
36

37 THE COURT: Any other business?
38

39 Hearing none, we will adjourn for the day. Thank you very much.
40

41 UNIDENTIFIED SPEAKER: Thank you, Sir.

1
2 UNIDENTIFIED SPEAKER: Thank you, My Lord.
3

4
5 _____

6
7 PROCEEDINGS CONCLUDED

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9 _____

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1 **Certificate of Record**

2

3 I, Presyana Petrova, certify that this recording is the record of the evidence in the proceedings
4 in the Court of Queen's Bench, held in courtroom number 1201, at Calgary, Alberta, on the
5 26th of August, 2020, and that I was the court official in charge -- in charge of the sound-
6 recording machine during the proceedings.

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1 **Certificate of Transcript**

2

3 I, Norma Lynn Gibbon, certify that

4

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

8

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

11

12

13 Norma Lynn Gibbon, Transcriber

14 Order Number: AL51

15 Dated: September 17, 2020

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| CLERK'S STAMP |
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| COURT FILE NUMBER | 1801-10960 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity |
| DEFENDANTS | PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE |
| DOCUMENT | <u>SUBMISSIONS OF THE RESPONDENT</u> <u>PRICEWATERHOUSECOOPERS INC. LIT</u> regarding the Order arising from the Reasons for Judgment of Mr. Justice D.B. Nixon |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT | DE WAAL LAW 1010, 505 – 3 RD Street SW Calgary, AB T2P 3E6 Phone: (403) 266-0012 Attention: Rinus de Waal/Luke Rasmussen Direct: (403) 266-0014 Facsimile: (403) 266-2632 E-mail: lrasmussen@dewaallaw.com Rinus de Waal/Luke Rasmussen Counsel for the Respondent |

INTRODUCTION

1. The parties have been unable to agree on a form of order to accurately reflect the results of the Defendants' applications to strike or summarily dismiss the Trustee's claims.
2. The disagreement relates to the Court's findings regarding what is referred to as the "BIA Claim" and the "Release Issue".
3. It is respectfully submitted that the Oral Reasons for Judgment and the Written Reasons for Judgment issued by the Court are determinative for purposes of finalizing the resulting Order. Further submissions by any of the parties regarding the nature of the claims, the pleadings, the evidence and what the Court could or should have found, are irrelevant.
4. The Order should state the result of the applications, not repeat specific findings of law or fact (and omit other findings).

THE DECISION

The "BIA Claim"

5. The Court defined the Trustee's claim pursuant to s. 96 of the *Bankruptcy and Insolvency Act* as the "BIA Claim".
6. As part of the BIA Claim, the Trustee claims the difference between the value of the consideration received and the value of the consideration given by Sequoia Resources Corp. on the basis that Ms. Rose is a "privy" within the meaning of s. 96 of the *BIA* because she benefited from the Asset Transaction, directly or indirectly, as a "beneficial shareholder in PEI".¹
7. In its oral reasons, the Court set out the questions for consideration as follows:

Concerning the BIA claim, I am required to assess whether the Defendants have established, with respect to the issues raised by the Trustee's claim, that the record makes it possible to resolve the dispute on a summary basis. In considering this claim, my sole focus is on the arm's length issue, and not on the value.

¹ Statement of Claim, at paras. 16.3.4, 22.2.3 and 22.2.4.

As part of this review, I must assess whether the Defendants have demonstrated on the balance of probabilities, that on the facts proven, there is no merit to the **Trustee's claim**.

Assuming the Defendants discharge this burden, I must then assess whether the Trustee has nonetheless shown that there is a genuine issue requiring a trial based on the nature of the issue or its merits.

Finally, I must determine whether I am sufficiently confident in a state of the record to exercise my discretion to summarily dismiss **some or all of the Trustee's claims in respect of the BIA matter**.²

8. The Court expressly recognized that the BIA Claim was comprised of various claims and expressly considered only the "arm's length issue" (whether s. 96 of the BIA applies to the Asset Transaction)³ relating to the BIA Claim.
9. The Court found that:

I find that the evidence does not permit me to determine, on the balance of probabilities, that the Purchaser Team established de jure control over the subject transactions. That being the case, I will **not summarily dismiss the BIA Claim**.

Given that the sole focus of the BIA Claim is on the arm's length issue, I cannot find that there is no reasonable claim. That being the case, I will **not strike the BIA Claim** either.

10. In its written reasons, the Court concluded that:

[107] Concerning the following determinations, I emphasize that they are made on the premise **that the sole focus of the BIA Claim is on the arm's length issue**. To underscore the point, the "arm's length" issue in respect of the BIA Claim relates to whether section 96 of the BIA applies to the Asset Transaction. Since the moving parties (the Perpetual Energy Defendants) framed the BIA Claim to focus on the arm's length issue, I have not touched on value. I am **constrained by the manner in which the issue was framed in the Summary Dismissal Application**, as reinforced by the Brief provided by the Perpetual Energy Defendants. That being the case, my only focus under the BIA Claim component of the decision is on whether section 96(1)(b) of the BIA is displaced because of the arm's length argument advanced by the Perpetual Energy Defendants.

[108] Given the above facts and analysis, I will not summarily dismiss the BIA Claim.

[109] Given the above facts and analysis, I will not strike the BIA Claim.

[110] In making these findings, I am bound to decide the BIA claim within the confines of the underlying application: *MNP (Next Friend of) v Bablitz*, 2006 ABCA 245 at para 9 leave to appeal to SCC refused, 31686 (12 April 2001) citing *Rodaro v Royal Bank* (2002), 59 OR (3d) 74 (ONCA) at para 60. I cannot make a decision on an issue that is not pleaded or argued: *Humphries v Lufkin Industries Canada Ltd*, 2011 ABCA 366 at para 49. To do so is an error of law: *Online Constructors* at para 15; see also *Stevenson & Cote* 2019, at page 13-23. While there were good practical reasons for the Perpetual Energy Defendants to confine the BIA Claim to the arm's length issue, I note for the record, without deciding the point, that my findings below in

² In all cases, the emphasis has been added as part of the submission.

³ Written Reasons, para. 107, quoted below.

respect of the Oppression Claim may have caused me to arrive at a different conclusion in respect of the BIA claim if I had not been restricted to addressing the arm's length issue.

11. The Court made it clear that the decision regarding the BIA Claim was limited to the only issue raised by the Defendants. There was no consideration of the claim generally, or of the specific nature of the BIA Claim against Ms. Rose.
12. The Court did not qualify its dismissal of the applications to strike or dismiss the BIA Claim in any way. The Court never referred to the BIA Claim against Ms. Rose as privy to the transfer in any way.
13. In the result, with respect to the BIA Claim, the Order should simply state that the applications to summarily dismiss or strike the BIA Claim, are dismissed.

The "Release Issue"

14. The Court defined the "Release Issue" as the question whether the release is a complete bar to the claims against Ms. Rose.
15. In the Oral Reasons, the Court held that:

I turn to my conclusions with respect to the Release. **The Trustee's claims against Ms. Rose are solely in relation to her having acted as a director** of PEOC. I find this to be directly contrary to the express terms in the Release.

...

Given the above facts and analysis, I find that the Release is a complete bar to the claim against Ms. Rose.

16. This confirms that the Court clearly considered the application of the release in the context of the "claims against Ms. Rose ... in relation to her having acted as a director".
17. This is consistent with the Written Reasons. The Court expressly rejects the Trustee's position with respect to alleged breaches of duties by Ms. Rose and the "Director Claim".

[285] The decision in *Redwater* nullifies the Trustee's assertions concerning the Release. Further, *Redwater* extinguishes any suggestion that Ms. Rose breached her duties, including her fiduciary duty and duty of care, because that case determine that ARO is not liability. As a consequence, the **Director Claim** embodies no reasonable cause of action.

18. The Court quoted the wording of the release, which expressly covers claims (a) as defined in the Purchase and Sale Agreement and (b) arising from her acting as director and officer of PEOC:

3. PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from **all Claims (as defined in the Purchase and Sale Agreement)**, which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose **by reason of, existing out of or in connection with Susan Riddell Rose having acted**, at the request of PEI, as a **director and officer** of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.

There has been no suggestion that the BIA Claim pursuant to s. 96 against Ms. Rose as “privity to the transfer” is a claim *as defined in the Purchase and Sale Agreement*. In fact, the Purchase and Sale Agreement⁴ does not have any definition of “Claims”. It certainly does not refer to potential claims under s. 96 of the BIA.

19. The Court discussed some specific claims against Ms. Rose “in relation to her having acted as a director of PEOC”. It referred to a claim for monetary damages from Ms. Rose on the theory that Ms. Rose caused Perpetual Energy to require 198Co to agree to the Release⁵ and a claim that Ms. Rose breached her duties to PEOC by acting contrary to section 122(3) of the ABCA.⁶ It concluded, as stated in the Oral Reasons, that:

[328] The Trustee’s claims against Ms. Rose are **solely in relation to her having acted as a director** of PEOC. I find **this** to be directly contrary to the express terms of the Release.⁷

20. The Court found that:

[327] Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee’s claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be *no damages* against Ms. Rose and she is shielded from financial exposure.⁸

21. The Court made no reference to the BIA Claim under s. 96 in discussing the claims against her, or in concluding that the release provides a complete defence. In the context of its discussion of the Release, the Court only considered claims relating to her having acted as a director of PEOC.

⁴ Exhibit J to the October 19, 2018 Affidavit of Ms. Rose

⁵ Para. 309

⁶ Para. 316

⁷ Para. 328

⁸ Para. 327

22. Conspicuously absent from Ms. Rose's lengthy submissions, both in support of her applications and more recently in relation to the form of Order, is some explanation of how the Trustee's claim that Ms. Rose benefited from the Asset Transaction *as a shareholder of Perpetual Energy* could be a claim "in relation to [her] having acted as a director of PEOC" covered by the release and confirmed by the decision of the Court.

Submissions on behalf of Ms. Rose

23. The position of the Trustee regarding the "Release Issue" is supported and reinforced by Ms. Rose's own understanding, namely that the Oral Reasons did not clearly apply the release to the BIA Claim.
24. Ms. Rose therefore filed a Notice of Appeal against the decision of the Court. Of course, there is no aspect of the decision she could appeal, except the finding on the BIA Claim, insofar as that relates to her.
25. On August 30, 2019, with the benefit of a transcript of the Oral Reasons, her counsel explained the decision to appeal to the Case Management Officer of the Court of Appeal, without copying counsel for the Trustee:

... (W)e filed an appeal jointly with counsel for Perpetual Energy Inc.

...

We do have the transcript of Justice Nixon's oral reasons; the difficulty our client has is that due to the complexity of the situation and the facts here it is not completely clear from the transcript whether Justice Nixon dismissed all or only some of the claims against our client. It is clear that some of the claims against the Perpetual Defendants have survived. To make a long story short, we are not completely sure whether we are properly appellants in this matter at all, but to the extent his Lordship did not dismiss all of the claims against Ms. Riddell Rose, our aim was to file the appeal to preserve our rights in that regard.

26. Contrary to what they represented to the Case Manager at the Court of Appeal, counsel for Ms. Rose wrote to counsel for the Trustee a few days later, on September 6, 2019, and stated that the Court had "struck and/or summarily dismissed each and every claim made in the Action against Susan Riddell Rose (Rose)".

27. Similarly, Ms. Rose obviously understands that, consistent with the Oral Reasons, the Written Reasons also do not state that the Court found that the release covered the BIA Claim.

27.1. Ms. Rose did not discontinue her appeal as soon as the Written Reasons became available; her appeal is still proceeding;⁹

27.2. Counsel for Ms. Rose confirmed in an email, however:

27.2.1. that the Written Reasons were consistent with the Oral Reasons; and

27.2.2. that, *only if the Court agrees with their form of Order*, Ms. Rose will not need to pursue an appeal.

27.3. Counsel for Ms. Rose has not responded to direct requests by counsel for the Trustee to advise which aspect or aspects of the decision she is appealing if, as they suggest in their form of Order, she was successful in all respects.¹⁰

28. In fact, the Court had held¹¹ that it could not make a decision on an issue that was not pleaded or argued and that doing so would constitute an error of law.

28.1. Ms. Rose never argued that the s. 96 claim against her could be dismissed on the basis of the release. With respect to the BIA Claim, she deliberately relied only on one argument, namely that the entire BIA Claim should be dismissed because the aggregate transaction was at arm's length.

28.2. Accordingly, Ms. Rose and the Court did not address how the release could apply to bar the BIA Claim that Ms. Rose benefited from the Asset Transaction as a beneficial shareholder in Perpetual Energy.

⁹ Counsel for Ms. Rose submitted to the Court of Appeal that the "only reason" Ms. Rose filed an appeal was to protect her interests "pending the receipt of" the Written Reasons (Transcript of the security for costs hearing, page 3, lines 21-24)

¹⁰ Counsel for Ms. Rose submitted to the Court of Appeal that the decision was "a one-sided and forceful win for Ms. Rose on all issues" (Transcript of the security for costs hearing, page 3, line 13).

¹¹ Written Reasons, para. 110

28.3. Ms. Rose now argues that the release covered the BIA Claim, because *the Trustee* never argued that the BIA Claim was *not* barred by the release.

28.4. In any event, the Court noted that the release was limited in scope, as it applied to claims by PEI and PEOC "relating to [Ms. Rose] having acted as a director and officer of PEOC."¹² There was no suggestion by counsel or in the Reasons that the release also applied to bar the BIA Claim against Ms. Rose.

CONCLUSION

29. The Order should simply state the results of the applications. The Trustee respectfully submits that its proposed form of Order, attached, accurately reflects that.

Calgary, Alberta
February 7, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per:



~~Rinus de Waal/Luke Rasmussen~~

Counsel for the Respondent, PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp.

¹² Ms. Rose's Submissions, at para. 9, citing Reasons for Judgment, at para. 293,

Clerk's Stamp

COURT FILE NUMBER 1801-10960

COURT Court of Queen's Bench of Alberta

JUDICIAL CENTRE Calgary

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

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

DOCUMENT **ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **Norton Rose Fulbright Canada LLP**
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 File No.: 59140-43

Counsel for Perpetual Energy Inc., Perpetual Operating Trust,
 Perpetual Operating Corp.

DATE ON WHICH ORDER WAS PRONOUNCED: August 15, 2019

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon

LOCATION OF HEARING: Calgary, Alberta

UPON the applications of the Defendants; AND UPON having reviewed the pleadings and evidence filed by the Defendants and the Plaintiff, PricewaterhouseCoopers Inc., LIT in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. ("SRC"), and not in its personal capacity (the "Trustee"); AND UPON having considered the oral and written submissions on behalf of the parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Defendants' applications to summarily dismiss the Trustee's claim pursuant to s.96(1) of the *Bankruptcy and Insolvency Act* (the "*BIA*") are dismissed;
2. The Defendants' applications to strike the Trustee's claim pursuant to s.96(1) of the *BIA*, are dismissed;
3. The Trustee's claim pursuant to s.242 of Alberta's *Business Corporations Act* is struck under to Rule 3.68;
4. The Trustee's claim on the grounds of public policy, statutory illegality and equitable rescission is struck under Rule 3.68;
5. The Trustee's claims that Ms. Rose breached her fiduciary duty and duty of care owed to SRC are dismissed under Rule 7.3 and struck under Rule 3.68; and
6. The parties may speak to costs at their convenience.

J.C.C.Q.B.A.

Approved as to form and content this
 ___ day of February, 2020

**BURNET, DUCKWORTH &
 PALMER LLP**

Approved as to form and content this
 ___ day of February, 2020

**NORTON ROSE FULBRIGHT CANADA
 LLP**

Per: D.J. McDonald, Q.C./Paul Chiswell,
 Counsel for the Perpetual Energy Inc.,
 Perpetual Operating Corp. and
 Perpetual Operating Trust

Per: Steven Leitl Counsel for Susan
 Riddell Rose

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February 7, 2020

The Honourable Mr. Justice D.B. Nixon
Court of Queen's Bench of Alberta
Calgary Courts Centre
601-5 Street SW
Calgary, AB T2P 5P7

My Lord:

Re: Re: PricewaterhouseCoopers Inc., LIT v. Perpetual Energy Inc., et al
Court File No. 1801-10960

Please find enclosed the Trustee's submissions regarding the form of Order arising from the Court's Reasons for Judgment.

Sincerely,

DE WAAL LAW



Rinus de Waal

Enclosure

cc: *Daniel J. McDonald, Q.C.*
Steve Leil

Action No.: 1801-10960
E-File Name: CVQ20PRICEWATERHOUSECOOPERS
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

Plaintiffs

and

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

Defendants

PROCEEDINGS
(Excerpt)

Calgary, Alberta
July 28, 2020
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2

3 July 28, 2020

Morning Session

4

5 The Honourable Mr. Justice Nixon

Court of Queen's Bench of Alberta

6

7 L. Rasmussen (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

8

9 P. Darby (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

10

11 R. Osuna (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

12

13 R. de Waal (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

14

15 S.H. Leidl, QC (remote appearance)

For S. Rose

16 G. Benediktsson (remote appearance)

For S. Rose

17 D.J. McDonald, QC (remote appearance)

For Perpetual Energy Inc.

18 P.G. Chiswell (remote appearance)

For Perpetual Energy Inc.

19 S. Ko (remote appearance)

Industry Intervener for Parlee McLaws

20 C. Graham (remote appearance)

Industry Intervener

21 D. Marion

Court Clerk

22

23

24 THE COURT:

Good morning. Just for the record, if I could have
the parties identify themselves and maybe where appropriate during the submissions, if
you could identify yourselves again just because we're on video here; otherwise, I'll turn it
over to counsel. Thank you.

28

29 MR. LEITL:

My Lord, it's Stephen Leidl here with my
colleague Gunnar Benediktsson, both for Ms. Rose.

31

32 THE COURT:

Thank you.

33

34 MR. LEITL:

Good morning.

35

36 THE COURT:

Good morning.

37

38 MR. DE WAAL:

Good morning, My Lord. Rinus de Waal and

39 Luke Rasmussen for (INDISCERNIBLE).

40

41 THE COURT:

Thank you.

1
2 MR. MCDONALD: Good morning, My Lord. Dan McDonald and
3 Paul Chiswell for the Perpetual Energy defendants.

4
5 THE COURT: Thank you.

6
7 Counsel, proceed as you think appropriate. And as mentioned the other day --

8
9 MR. LEITL: Thank you, My Lord --

10
11 THE COURT: Thank you. As mentioned the other day, I didn't
12 have any preconceived order. I thought I would just leave it to counsel. Just to reconfirm
13 that?

14
15 MR. LEITL: Yes. It's Mr. Leidl, My Lord. My understanding
16 that I'll proceed now with our costs application.

17
18 THE COURT: Okay. Sir, just using you as a reference point, can
19 you see me okay? I'm just going to turn this monitor a bit.

20
21 MR. LEITL: I can see you fine, My Lord.

22
23 THE COURT: Thank you. At your convenience, Counsel.

24
25 **Submissions by Mr. Leidl**

26
27 MR. LEITL: Thank you. Can you hear me all right? Just to
28 check that?

29
30 THE COURT: I can certainly hear you. Thank you.

31
32 MR. LEITL: Thank you. For the record, Leidl, initial S,
33 counsel for Ms. Rose, and I'm assisted by Mr. Benediktsson. And I'm here this morning to
34 make submissions in support of a request for two orders, one that costs be ordered payable.
35 We are asking for costs on a full indemnity basis. And, secondly, that the costs be payable
36 against PricewaterhouseCoopers, Inc.

37
38 The Court has our -- our brief filed June 3rd, Sir. We stand by it. I don't -- I don't intend to
39 repeat it, subject to your directions or any questions -- sorry?

40
41 THE COURT: You can -- just to put it in perspective for my

1 side, I have reviewed the materials. I likely will have questions, may have questions
2 occasionally while you're proceeding, but will likely hold them until I hear from your
3 friends.

4
5 MR. LEITL: Understood. Thank you.

6
7 So how I intend to proceed, My Lord, is to briefly address the evidence that's before the
8 Court in terms of costs. Give -- highlight certain aspects of the submissions made in our
9 brief. I will in that sequence note the very few instances where the trustee actually engaged
10 our brief in its brief, and at the end I will reply to a new argument made by the trustee.

11
12 An overarching comment, Sir, from a hundred thousand feet as it were, is that it's quite
13 remarkable that numerous fundamental points made in our brief received no answer from
14 the trustee, and I submit, Sir, that is because they have no answer. One example of that is
15 that we make extensive submissions on the personal liability of PWC in this case, and you
16 will not see one word of that in the trustee's responding brief. It's simply not opposed.

17
18 Now, starting with the evidence, Your Lordship, I hope, has seen the affidavit of Ms. Rose
19 sworn on May 1st of this year, and I'll -- I'll overview that in a minute, but at the outset I
20 wanted to highlight that the trustee saw no reason whatsoever to cross-examine. The trustee
21 saw no reason to tender any responding evidence, and the trustee's brief says not one word
22 about Ms. Rose's affidavit. It is entirely unchallenged. And when I say unchallenged, that
23 includes the two very detailed briefs -- sorry, bills of costs that were attached to her
24 affidavit which set out as much detail as is possible but for waiving privilege about the
25 Perpetual defendants' costs and Ms. Rose's costs. And you will not see one -- you will not
26 see one word in the trustee's brief that suggests one-time entry is unreasonable.

27
28 Now, at paragraph 4 of the affidavit, I'm just going to highlight it, I don't -- I'm not going
29 to read it to you, just to remind the Court, Ms. Rose, to put this costs application in context,
30 talks about the blitzkrieg approach that the trustee took with this lawsuit in August of two
31 years ago and how that's taken a toll on her, obviously, and again, that evidence is entirely
32 unchallenged.

33
34 And it goes without saying, My Lord, that their blitzkrieg approach on the Friday before
35 the August long weekend of 2018 dumping this lawsuit on Ms. Rose required an incredibly
36 intensive amount of short-term work in that the trustee's application for judgment against
37 Ms. Rose for a quarter of a billion dollars was returnable a couple of weeks later.

38
39 Ms. Rose, at paragraph 7 of her affidavit, explained how as between Norton Rose and BDP,
40 we did our best to allocate work so that work was not repeated by each firm and but for
41 that the bills of costs would have been higher. And, again, at Exhibits A and B to the

1 affidavit, My Lord, are the detailed bills of costs which the trustee has chosen not to
2 challenge.

3

4 Now, we note, and this is addressed at paragraph 7 of our -- our brief -- I will be referring
5 to our brief from time to time. If you want to have that handy, it may help you, Sir.

6

7 THE COURT: Certainly. I have it here.

8

9 MR. LEITL: But at paragraph --

10

11 THE COURT: Thank you.

12

13 MR. LEITL: Thank you. At paragraph 7, we -- we talk about
14 how in this proceeding, and at various occasions, we have asked the trustee to disclose
15 their -- its legal fees, and it has refused every time, although never explaining why it should
16 refuse. We do have Mr. Darby's admission from his first cross-examination that when they
17 planned this lawsuit, the trustee expected it to be expensive, and we have his admission
18 that, albeit not disclosing the amounts, that it has been expensive.

19

20 The only thing we could find in the evidence that, again, the trustee says nothing about in
21 response to its brief is a partially redacted statement of some of the trustee's expenses which
22 shows that between the commencement, or just prior to the commencement of this lawsuit
23 in March 2018, and through to September 2019, the trustee's legal spend was \$223,000 per
24 month. All of this, I submit, My Lord, goes to the point that the bills of costs before the
25 Court are, subject to any questions or concerns that the Court has, are eminently reasonable
26 as a matter of evidence.

27

28 Now, the trustee's brief at paragraph 2 finally concedes that some amount of costs should
29 be payable to Ms. Rose. I don't believe they concede that any costs should be payable to
30 the Perpetual defendants, surprisingly. But they don't say the scale of costs that should be
31 payable, and they simply offer the throwaway line that let's just tax these accounts in the
32 normal course. And, My Lord, in my submission, in the context that I have just laid out for
33 you, there is no basis to allow the trustee to further delay the determination of costs payable
34 in this case. There is no need for taxation when they haven't questioned a semicolon or
35 comma in the bills of costs. Your Lordship can take them as reasonable, and you can use
36 those as a foundation to determine the amount of costs payable in this case. There is no
37 more need for more process costs and delay.

38

39 So with that, I'll turn to the submissions on costs, and I'll follow the order of the themes
40 that we set out in our brief. And, again, the first one was that Rose was completely
41 successful, and when I say completely successful, the pleadings were struck. There were

1 positive findings in favour of her conduct, and wrapped around all of that, there was a
2 finding about the release. It was a win on every front. So that's why we submit, My Lord,
3 that there needs to be a meaningful award of costs.
4

5 As Your Lordship noted last week, I think it was last week, I'm losing track of time when
6 we dealt with the interveners, you made the -- the comment or the obvious point that in
7 Alberta, we have a loser pays pay-as-you-go system. So in my submission, the only issue
8 that we need to determine today is how much should be paid and who is going to pay it.
9

10 Now, as a starting point, and -- and I'm aware, My Lord, that you have written decisions
11 on costs. I'm not going to belabour the law, which I'm sure is very well known to you.
12 One case that would be well known to you is the *Trizec* decision, and which has been cited
13 repeatedly in other cases, for the basic proposition that in -- in Alberta, a successful party
14 in a milk toast kind of case gets traditionally 40 to 50 percent of her reasonable costs. That,
15 in other words, is the bare minimum that a successful party should obtain. And in my
16 respectful submission, My Lord, this case cries out for something much higher than the
17 bare minimum.
18

19 The next section of our brief we talk about the nature of the allegations made by the trustee
20 and the complete absence of any meaningful investigation. That begins -- that's dealt
21 with -- I'm not going to read them all, but just for reference at paragraphs 11 through 38 of
22 our brief.
23

24 One of the points, and Your Lordship has ruled on this, that was -- should have been evident
25 to the trustee from the outset was that Ms. Rose was a director of a public corporation that
26 had public filings, that had a big board of directors and a lot of shareholders.
27

28 Another thing that should have been obvious to the trustee from the outset was that there
29 was only -- and this is highly ironic in my submission, but there was one document from
30 the aggregate transaction, as Your Lordship defined it, to which Ms. Rose was a party, and
31 that was the release. All of the other parties to the transactions were corporations.
32

33 And despite the obvious conclusion from public information and from a single question of
34 Ms. Rose, if they had bothered to ask, it was obvious that PEOC was a special purpose
35 holding company owned by PEI and controlled by PEI, and Your Lordship may recall you
36 found just that in your reasons, yet, as I will come to, the trustee in its responding brief
37 says that's wrong. And this is a theme you will hear from me this morning, My Lord, is that
38 the trustee's brief is replete with submissions which are contemptuous of Your Lordship's
39 findings, calling them wrong, resiling from allegations it made and resiling from positions
40 it took previously, and ironically, then, they say that my client's request for costs and the
41 Perpetual request for costs is an abuse of process.

1
2 Now, as Your Lordship may recall, the trustee had ample opportunity to gather the facts
3 that it needed before suing the defendants, including Ms. Rose. It asked for documents. It
4 met with them. It issued a preliminary report, which did not mention Ms. Rose. And in
5 June 2018, the trustee sent to Perpetual, its preliminary reviews it so-called, but on cross-
6 examination, of course, we found out that they were its final reviews. And by that time the
7 trustee had hired Mr. de Waal's firm, a litigation boutique, and they intended to sue Ms.
8 Rose. Yet, when they sent the preliminary reviews to Ms. Rose, they never told her that.
9 We have asked why, and we have never got an answer. There is no justification for that
10 sandbagging.

11
12 The trustee obviously knew about the state of the accounts of the Sequoia bankrupt estate.
13 It knew, as our Court of Appeal has found and Mr. Darby has admitted, that unsecured
14 creditors have no prospects of getting paid, and it knew that if it sued and a costs award
15 was made against the estate that that cost award would be worthless, but it proceeded
16 nonetheless.

17
18 In terms of the merits of the allegations made against Ms. Rose, which we know there were
19 no merits, there was no merit, the trustee did not read the Sequoia records. It only relied on
20 selective records obtained from Perpetual. It did not interview the management of Sequoia
21 about the allegations it would make. One allegation, for example, and I'll come to more
22 detail, My Lord, is the allegation in respect of the release in which the trustee pleaded that
23 Ms. Rose caused PEI, the public company, to require 198, the arm's length third party, to
24 enter the release. But they never asked Sequoia did that happen, and they never asked Ms.
25 Rose did that happen. They put -- pleaded a quarter-of-a-billion-dollar oppression claim on
26 the basis of two alleged contingent creditors, the municipalities and the AER, who they
27 never spoke to.

28
29 They ignored publicly available information about the share price history of PEI and,
30 nonetheless, proceeded to allege that Ms. Rose personally benefitted from the asset
31 transactions, and we'll come to that in more detail, even though the share price of PEI was
32 dropping. They never asked her a single question about any alleged personal benefit before
33 Mr. Darby swore under oath, an Officer of the Court, that she had personally benefitted.

34
35 Now, Your Lordship may recall in the course of -- in the argument of the main proceeding,
36 and this is by -- if you want to turn to it, I will just give you the reference, at Tab 14 of our
37 materials is our extracts from the proceedings, and at pages 76 to 77, just says an example,
38 you had a long back and forth with Mr. de Waal grilling him on how there could be a
39 personal benefit, and at first he said there was a direct financial benefit. And you grilled
40 him, and he said, okay, there is not. It's indirect. And then -- of course, I'm paraphrasing,
41 My Lord -- you said, You're only challenging the asset transaction. How could Ms. Rose

1 as a shareholder of PEI, which is not a party on the asset transaction, benefit from that
2 transaction, and he had no answer.

3
4 And at page 77 he finally admitted, "It's not a financial benefit, Mr Lord." Yet, in the
5 trustee's brief, I have to again read arguments about her having financially benefitted, and
6 I'll come to that.

7
8 And you'll see at -- and that -- those -- it is in the trustee's brief, paragraphs 54 to 60, My
9 Lord, where they repeat these arguments that have failed before you.

10
11 THE COURT: I'm there. Thank you.

12
13 MR. LEITL: Yeah, they refuse to accept the obvious
14 conclusions of this Court. There was not a scintilla of evidence of personal benefit even
15 from the aggregate transaction, you'll recall that the share price went down, and it's
16 logically absurd to assert that if you only look at asset transactions that Ms. Rose could
17 have personally benefitted from that.

18
19 At paragraph 27 of our -- sorry. Do you -- paragraph 27 of our brief, My Lord, we quote
20 from Mr. Darby's cross-examination where he surprisingly conceded that not only did they
21 not investigate, they never thought about whether they should investigate the allegations
22 against Ms. Rose. Now, that's why paragraph 18 of the trustee's brief struck me as
23 surprising where the trustee argues that there is no basis for any suggestion that the trustee
24 pursued claims against the defendants that it did not believe were supported by the facts
25 and the law. Really? They didn't investigate, and they didn't think about whether they
26 should investigate, so where did this belief come from in an Officer of the Court?

27
28 And when Ms. Rose and the Perpetual defendants tendered contrary evidence, the trustee
29 in a very nonneutral way fought it, fought the evidence, fought it hard.

30
31 Paragraph 31 of our brief, My Lord, is another illustration about the trustee's thinking at
32 the time, and I put that in quotation marks. You'll recall that Mr. Darby in his affidavit, a
33 bankruptcy trustee, purported to opine that Ms. Rose had acted oppressively in relation to
34 the interests of contingent creditors that he had not interviewed. And at paragraph 31 you'll
35 see an extract from his cross-examination. He didn't ask her about her business judgment.
36 And you can see over on to page 8 of our brief, the singular basis on which he opined that
37 she had acted oppressively was that she signed for PEOC and signed for POT. And on that
38 basis, he thought there was no need to explore any other facts.

39
40 Now, there -- and Mr. Darby also opined in his affidavit that Ms. Rose was the directing
41 mind of PEOC, although he never gave the basis for that. And you may recall at the

1 November 8th hearing before Your Lordship, Mr. de Waal, in his words, said, This is PEI
2 doing a transaction through PEOC. Yet, again today, you see in the trustee's brief the
3 argument that Ms. Rose was the directing mind of PEOC, ignoring the Court's findings,
4 ignoring the evidence.

5
6 The next section of our brief we talk about the release, and that's at paragraphs 39 through
7 48, My Lord.

8
9 THE COURT: I'm there, sir.

10
11 MR. LEITL: And as you may recall -- I mean, let me back up.
12 A release is supposed to mean something. In Your Lordship's words in the reasons, it's
13 meant to create a clean slate. Yet, in this proceeding, we had to litigate it twice. We had to
14 litigate it to win, and then we had to litigate to persuade the trustee that we had won in
15 February.

16
17 You'll see at paragraph 40 of our brief, and we have tried to emphasize the actual pleading
18 that was before the Court about the release. Remember, they did not seek to set the release
19 aside. They made this bizarre allegation with no facts that Ms. Rose had caused PEI to
20 require an arm's length third party to enter the release.

21
22 And you'll see the brief goes on, despite that allegation, they didn't ask Ms. Rose for her
23 thoughts on that. Mr. de Waal submitted to Your Lordship that there was nothing to ask.
24 And, remarkably, they didn't ask the Sequoia management about that. Yet, in the trustee's
25 brief, and I'll come to this in more detail, you'll see the trustee maintaining that it was
26 entirely appropriate to sue Ms. Rose for a quarter of a billion dollars on the face of the
27 release, and, in so doing, to draft the Statement of Claim that has -- does not disclose a
28 cause of action.

29
30 So if I could turn briefly to some of the submissions made in the trustee's brief about the
31 release now. And for reference, My Lord, the trustee's brief at paragraphs 32 through 53
32 deal with this.

33
34 THE COURT: I'm there.

35
36 MR. LEITL: You'll see that it -- the trustee argues that it was
37 somehow inappropriate for me to make the observation that the only document from the
38 aggregate transaction that -- to which Ms. Rose is a party personally was the release. They
39 then go on to point to documents Ms. Rose signed and -- and I'm paraphrasing -- and say,
40 aha, look, Ms. Rose is involved. But as we all know, My Lord, the other documents signed
41 by Ms. Rose were either on behalf of PEI or on behalf of PEOC. She was not signing

1 personally.

2
3 At paragraph 34 of the trustee's brief, they again fight the obvious conclusion that Ms. Rose
4 could not have caused PEI to do anything. They maintain that argument, My Lord, after
5 you said this in the reasons at paragraph 310: (as read)

6
7 There is no evidence that Ms. Rose caused Perpetual Energy to do
8 anything. Indeed, the evidence is to the contrary. Perpetual Energy
9 is a public company. It has its own board of directors. Further,
10 there is no evidence that Ms. Rose controlled Perpetual Energy.
11 Given that context, I find that Ms. Rose did not control Perpetual
12 Energy.

13
14 And then at paragraph 313 you found, the Court found, that legal control of PEOC flowed
15 from the parent, PEI. So it's amazing to see in the trustee's brief in response to a costs
16 application that they are arguing that you are wrong, and that somehow should be relevant
17 to a determination of costs. With the greatest of respect, My Lord, the issue of costs is
18 determined on the basis that you were right, and they can make that argument in the Court
19 of Appeal.

20
21 You'll see, for example, at paragraph 35 of the trustee's brief, despite the findings of
22 the -- of the Court and the evidence and the publicly available information, the trustee
23 asserts Ms. Rose did, in fact, cause PEI to enter into the share purchase agreement. There
24 was no reasonable basis to suggest otherwise. Well, here is one reasonable basis, My Lord,
25 and that is the ruling of this Court. And that is why I alluded to the point earlier, My Lord,
26 of the irony of the trustee's submission in its briefs that the defendants are abusing the
27 process of this Court by allegedly relitigating issues that have been determined.

28
29 At paragraph 63 of the trustee's brief, you'll see the new argument that Ms. Rose caused
30 PEOC to enter into the asset transaction. That entirely contradicts and is contemptuous of
31 the findings of this Court. It's tough to reconcile that with the -- the new concession at
32 paragraph 38 of the trustee's brief, My Lord, with the trustee now backpedalling saying, Of
33 course the share purchase agreement was negotiated. And then at paragraph 41 conceding
34 that 198 and its principals entered into the share purchase agreement of their own free will.
35 If that is obvious, as the trustee asserts now, then the allegation against Ms. Rose regarding
36 the release was completely absurd. The release was the product of that negotiated share
37 purchase agreement, and it was reciprocal.

38
39 This was news to me, My Lord, for example, in the -- you may recall prior to your oral
40 decision, you had given us some written questions when we appeared before you, and
41 question number 34 asked about the share purchase agreement. And on that date the trustee

1 said, "The trustee does not concur that the share purchase agreement was an arm's length
2 transaction." But I was pleased to see that they now concede that it is.

3
4 We're still on the release, My Lord, but I'm about to -- one last point. Despite the allegation
5 in the Statement of Claim that I have already covered about Ms. Rose causing PEI to
6 require a third party to enter it, the trustee argues, come on, our real argument was under
7 Section 122(3) of the *ABCA*. And at paragraph 52 of the trustee's brief, they submit that
8 Ms. Rose still has not provided this Court with any authority supporting her interpretation
9 of Section 122(3). Well, here we go again, My Lord. How is this for authority: Your
10 Lordship's decision at paragraphs 316 through 327 where Your Lordship expressly
11 accepted our submissions on the meaning of Section 122(3). So here we see, again, the
12 trustee thumbing its nose at findings of the Court in an attempt to minimize its cost
13 exposure. They can argue that on appeal, but it's not an answer to costs.

14
15 The next section of our brief, My Lord, deals with the stand -- the standing of the trustee
16 to sue for oppression, and I -- and that's at paragraphs 49 through 52 of our brief.

17
18 THE COURT: Thank you. I'm there, sir. Thank you.

19
20 MR. LEITL: And how do I know I'm right, sir, that the trustee
21 never, ever had standing to sue for oppression, and -- and bear in mind the oppression claim
22 was against all defendants, because Your Lordship at paragraph 236 through 241 found
23 expressly that. Indeed, the allegation that the trustee had standing to sue for oppression was
24 struck. What that means is the trustee never had lawful authority to sue for oppression.
25 Now, that would be a significant point in an oppression case on the issue of costs, especially
26 an oppression case based on the alleged interest of contingent creditors, but it's doubly
27 significant, I submit, when it's an Officer of the Court who has limited authority under the
28 *BIA*.

29
30 Now, is there a word in answer to that in the trustee's brief? No. Silence. Instead, at
31 paragraphs 66 through 75, the trustee fixates on a sub sub issue that was in our brief. And
32 as Your Lordship may recall, we had made the point in our submission that as a matter of
33 process it's preferable that a trustee seeking standing to sue for oppression would have that
34 threshold issue determined on a preliminary basis. That issue, of course, is entirely moot
35 because we ended up arguing it all at once. Yet, in the trustee's brief they spend three pages,
36 pages 18 through 20, arguing how they were right on that moot issue. And then, the old
37 strawman game, they say that is the basis of Ms. Rose's request for costs, so obviously
38 the -- her costs have no basis, but that's not the basis. The basis of -- part of the basis of the
39 request for costs in respect of the oppression claim was that the trustee never had the
40 authority to make it in the first place. No standing under the *BIA*. No standing under the
41 *ABCA*.

1
2 The next section of our brief, My Lord, talks about the allegations unreasonably impugning
3 the conduct and character of Ms. Rose, and this is at paragraphs 53 to 56 of our brief. And
4 this entire section, by the way, My Lord, is unanswered in the trustee's brief. They
5 impugned her character. They impugned her conduct. They made a public filing of a claim
6 which sought, with interest and costs, a quarter of a billion dollars. Any reasonable
7 bystander, in my submission, My Lord, who saw that would think, oh, my God. This is a
8 serious claim. And you'll see at paragraph 55 of our brief, on which there is no comment
9 by the trustee, in the course of the proceeding, and in the face of absolutely contrary
10 evidence, an Officer of the Court submitted to Your Lordship that Ms. Rose acted
11 dishonestly in bad faith. She deliberately abandoned her role as a director of PEOC. She
12 pushed around PEOC, whatever that means. She was disloyal. She exercised no degree of
13 prudence or diligence. She disregarded PEOC creditors who could not help themselves.
14 Apparently the municipalities and the AER, which by the way were not creditors, are
15 entirely helpless. She exercised no business judgment. She did not even consider that she
16 had a duty of care. She gave effect to internal -- sorry, internal -- improper internal
17 corporate maneuvers. She exploited her duty of trust for immediate financial advantage to
18 herself, and that she engaged in conduct analogous to criminal conduct.

19
20 Those assertions made by a person on the street are highly relevant to costs. Those
21 assertions made by an Officer of the Court are doubly relevant to costs, in my submission.
22 The one possible spot in the trustee's brief where they may have been attempting to answer
23 this is at paragraph 18 where they generically refer to the claims against all defendants as
24 being of significant importance to the community. How is it that ad hominem attacks
25 against an individual in the face of a release with no standing to make those attacks, and
26 on the basis of a claim that does not even show a cause of action, how is that important to
27 the community? What might be important to the community is that the Court says
28 something about an Officer of the Court engaging in such tactics and making such
29 allegations.

30
31 The next section of our brief, which is at paragraphs 57 through 62.

32
33 THE COURT:

I'm there, sir. Thank you.

34
35 MR. LEITL:

Is -- addresses the adversarial litigation tactics
36 employed by the trustee, a trustee that is required to be neutral. And, again, I'll remember
37 this day for a very long time, the Friday before the long weekend, where this sandbagged
38 lawsuit is dumped on the parties seeking, in effect, summary judgment in the same month
39 a quarter of a billion dollars.

40
41 When we first appeared before Justice Jeffrey, I think it was, the trustee said they had to

1 file the claim because they hadn't received some information from Perpetual that they
2 needed. Yet they never exercised their powers under the *BIA* to compel that information
3 and, of course, that has nothing to do with the need to sue Ms. Rose.

4
5 And as I have mentioned, it goes without saying that in the face of a quarter-of-a-billion-
6 dollar lawsuit that has a return date in one month, you need to do some intensive work.

7
8 The trustee showed interest in trying to take our time and space away trying to get a rushed
9 judgment on its claim, and since that time has shown no interest in moving the case along.
10 To the extent any claims survive in this matter, the trustee has done nothing to move it
11 along, not even an Affidavit of Records.

12
13 The next section of our brief talks about the trustee's public reaction to Your Lordship's
14 decision. Remarkably, My Lord, despite every claim against Ms. Rose having been struck
15 or dismissed, and the Court finding that all claims were barred by the release, the trustee
16 told the public that it had won, substantially succeeded. Not only that, My Lord, the trustee
17 told the public, and until the trustee's brief was served that had not been resiled from, the
18 trustee told the public that it intended to seek costs against the defendants, including Ms.
19 Rose, arising from Your Lordship's decision. Imagine that.

20
21 Not only that, My Lord, it intended to seek costs against Ms. Rose and the defendants on a
22 full indemnity basis. The trustee's Statement of Claim expressly pleads that it is entitled to
23 costs against the defendants on a full indemnity basis. And my rhetorical question, then, is
24 if that's appropriate for the trustee's claim, why is it not appropriate for the utter destruction
25 of the trustee's claim?

26
27 The next section, My Lord, reverts back to the release. I'll be brief on this. But I have never
28 seen a party commence a lawsuit in the face of a clearly applicable release. I have never
29 seen them do that by pleading a claim that has no cause of action, and then I have never
30 seen that party, after losing the claim, refuse to admit that it had lost. And, thus, our
31 attendance before Your Lordship in February where we had to file another brief explaining
32 why we had won, explaining again why there had been no personal benefit, and as Your
33 Lordship will recall, you didn't just approve the form of order that we had proposed and
34 disapprove the form of order proposed by the trustee, you adopted our brief as part of your
35 reasons.

36
37 The next point I would like to address, My Lord, is how a costs award against the trustee
38 only in its capacity of trustee via the estate of Sequoia and not as against -- not personally
39 will be a worthless piece of paper. The trustee's brief is silent on this point, and not
40 surprisingly, because you'll see, for example, at paragraph 83 we have Justice Veldhuis of
41 the Court of Appeal having found just that, in part based on the admission of Mr. Darby to

1 that effect. That is one important reason why if the Court intends to give a meaningful
2 award of costs, it has to attach to Pricewaterhouse personally, and that is consistent with
3 the law on costs, which I'll come to.

4
5 I'm turning to the law now. And, again, I'm -- I'm cognizant of Your Lordship's familiarity
6 with the costs regime. I'm not going to belabour it, My Lord. Just to reiterate the basic
7 proposition that 40 to 50 percent of the reasonable costs should be the bare minimum.
8 Obviously, there is clear precedent, including decisions made by Your Lordship, to go
9 higher. For example, in cases which I submit are not as severe as this, the courts have
10 ordered 75 percent of reasonable costs.

11
12 The issue of solicitor and own client costs, My Lord, is dealt with at paragraphs 92 through
13 94 of our brief. There was one decision I wanted to highlight, and I -- I apologize if I'm
14 mispronouncing it, but *Paniccia* or *Paniccia*, I'm not Italian, which is at Tab 28. It's a
15 decision of our Court of Appeal. And I'll just give you the reference, My Lord, at paragraph
16 135.

17
18 THE COURT: Thank you.

19
20 MR. LEITL: The Court said: (as read)

21
22 It may be that in principle solicitor-client costs should not be
23 commonly awarded. But in Alberta (and elsewhere) there is a very
24 well-settled rule which gives a judge to -- sorry -- gives a judge
25 discretion to award larger-than-usual, even solicitor-client, costs
26 for significant misconduct during the litigation.

27
28 They talk about the broad categories of dozens and how the category -- in the dozens, and
29 they -- and they emphasize that the categories are not closed.

30
31 In this case, we have an Officer of the Court with duties of neutrality and candor filing an
32 admittedly extraordinary lawsuit seeking over 220 million dollars, seeking full indemnity
33 costs, proceeding without investigating the facts, ignoring the obvious implications of the
34 release, ignoring the evidence filed in response, pursuing a highly adversarial litigation
35 strategy, losing the lawsuit and telling the public it won, losing on the release and forcing
36 relitigation of the issue. And, remarkably, one of the trustee's responses to that is that the
37 defendants have abused the process of this Court. Unbelievable.

38
39 One -- one decision that was cited by the trustee, My Lord, caught my eye. It's called
40 *Manson*. They cite it at paragraph 9 of their brief. I think it's *Manson* or is it *Mason*?
41 *Manson*, I believe. They cite that case for the proposition, which does not hold water, in

1 my submission, that in order to get full indemnity costs, there has to be a contractual basis.
2 But first let's assume for the sake of argument that that's correct, My Lord. I have a contract
3 that gives me a basis in this case, and it's called the release. At paragraph 294 of your
4 decision, you wrote, "A release is an agreement." In other words, a release is a contract.
5 You found that by that contract all claims against Ms. Rose were barred. You noted that
6 the obvious intention of releases is to create what -- to use your words, a clean slate. You
7 can't get more absolute than that. The intention was to create a clean slate. Yet every dollar
8 short of full indemnity costs that this Court may order, and this assumes it's as against
9 PWC, every dollar short dirties the slate for Ms. Rose.

10
11 And the irony, My Lord, in my submission, here, is just astounding when you consider that
12 the trustee is using a contractual law argument in defence of costs when it entirely ignored
13 the release contract which should have prevented the lawsuit in the first place.

14
15 So do you have -- I'll wait.

16
17 THE COURT: Go ahead.

18
19 MR. LEITL: Do you have the trustee's brief handy, My Lord?

20
21 THE COURT: I do. Thank you.

22
23 MR. LEITL: At paragraph 12 where they --

24
25 THE COURT: I'm there.

26
27 MR. LEITL: -- quote from Justice Wakeling's dissent in
28 *Primewest*, and you'll see in the quotation there where the Court says that, "Where a party":
29 (as read)

30
31 Where there is no serious issue of fact or law which required these
32 lengthy, expensive proceedings.

33
34 That's a factor. Well, that directly applies to our case. And he goes on to note: (as read)

35
36 It may be noteworthy where the aggrieved party was forced to
37 exhaust legal proceedings to obtain that which was obviously his.

38
39 Well, imagine -- well, you don't have to imagine. You have lived it -- recall what Ms. Rose
40 has had to go through to obtain that which was most obviously hers: the benefits of that
41 release.

1
2 The trustee also cites the *Manson* decision at paragraph 550, My Lord, for the proposition
3 that you must find intentional misconduct on the part of the trustee to justify an award of
4 solicitor-client costs, but that's not correct. It's not what the Court said. Rather, at that
5 paragraph, the Court noted the nonclosed list of categories that is open for you to consider
6 including blameliness -- blameworthiness of the conduct in the litigation, a consideration
7 as to whether that order of costs is required for justice to be done, and on -- on and on.

8
9 And -- and one -- one final point on the *Manson* decision, which I would ask you to -- to
10 note because it's more than a point of nomenclature where the Court in *Manson* there talks
11 about what it calls full indemnity costs in requiring a contract. If you back up to paragraph
12 549, you will see that that Court's conception of full indemnity costs was costs that includes
13 what the Court called frills and extras. And the bills of costs before you, My Lord, do not
14 contain any frills or extras.

15
16 So if I can turn, My Lord, to the issue of the personal liability of PWC. And, again,
17 remarkably not one word in the trustee's brief. You'll recall -- you may recall, but I'll remind
18 you, that our brief filed in February -- on February 4th concluded by alerting all the parties
19 in the court that we will be applying for costs against PWC personally. At paragraphs 98
20 through 100, just for some procedural context, we just point out that outside of the context
21 of a trustee lawsuit in civil court, in any lawsuit, the Court has jurisdiction to award costs
22 against nonparties, the real actors behind the lawsuit.

23
24 And then turning to the nature of the trustee, a trustee, we talk at paragraphs 101 through
25 103 about some of the duties and obligations of a trustee -- neutrality, honesty,
26 nonadversarial, a duty to do what is morally right and honest, a duty not to assume an
27 adversarial or hostile role. That -- those duties are relevant to the determination of costs as
28 against an Officer of the Court, My Lord, specifically on the issue of the personal liability
29 of a trustee in bankruptcy. We address that at paragraphs 104 through 112, and the
30 follow -- and the -- and the basic points are these, My Lord: it is true that Section 197 of
31 the *BIA* makes costs awards against a bankruptcy trustee exceptional, but only in
32 bankruptcy proceedings, not where the trustee ventures into the civil courts. When a trustee
33 does that, the Rules apply, and I haven't seen the trustee argue otherwise.

34
35 And at paragraph 107 you'll see, My Lord, another fundamental proposition that a trustee
36 has no immunity from a costs order when it ventures into civil court. As between a trustee
37 and the successful party, the trustee personally is liable for the costs. It has protection in
38 that it may claim indemnity from the estate, but as the courts have noted where the estate
39 has no value, as in the case here, if it pursues a lawsuit in the civil courts, it does so at its
40 peril.

41

1 You'll see at paragraph 108 over onto page 24, there is a quotation of Justice Newbould in
2 Ontario: (as read)

3
4 The general rule is that a receiver or trustee litigates at its peril if
5 there is no source of indemnity available to it, with the two
6 standard sources of indemnity riding -- residing in the assets of the
7 estate or a contract of indemnity from one or more creditors.

8
9 And let me pause there, My Lord. You have seen the height -- heightened interest taken by
10 parties like CNRL and Cenovus, Torxen, the OWA, they could have provided indemnity
11 to the trustee. There is no evidence that they have. And Justice Newbould went on: (as
12 read)

13
14 The discipline imposed by a "loser pays" costs rule applies equally
15 to decisions to commence proceedings by a receiver or trustee.

16
17 And one of the reasons for that, one of many reasons, My Lord, obviously is that a trustee
18 has no duty to sue in the civil courts. If it does sue, it has to decide whether that's in the
19 best interests of the estates, but it's not -- of the estate, but it's not obligated to sue.

20
21 And you'll see at paragraph 110, I'll just leave it with you, My Lord, that courts do consider
22 the conduct of trustees when -- in -- in determining the scale of costs. They consider
23 whether the trustee made proper investigations and whether there was a basis for the
24 allegations.

25
26 And you'll see at paragraph 112 a list of examples illustrating that the Court has full
27 discretion to order costs against the trustee on any -- on any scale that it sees fit. You'll see
28 one example in paragraph sub (b) there where the Court found that the trustee had adopted
29 an adversarial stance in the litigation with no justifiable reason.

30
31 Now, again subject to questions now or later, My Lord, I'm just going to move on to one -- a
32 couple of points specifically made in the trustee's brief, and then I'll be done, and then I
33 think Mr. Chiswell intends to make submissions for Perpetual.

34
35 THE COURT: Thank you.

36
37 MR. LEITL: Now, you'll see there is a section beginning at
38 page 5 of the trustee's brief where the trustee submits that Ms. Rose's position on costs is
39 diametrically opposed to her previous position before this Court, and I'm still scratching
40 my head over this one, but I'm going to try and respond to this as much as I can make sense
41 of it.

1
2 And you'll see this leads at paragraph 30 to the trustee submitting that Ms. Rose's request
3 for costs is an abuse of process. Insofar as I can make sense of the trustee's position, Ms.
4 Rose has maintained in this Court and in the Court of Appeal that a costs award against the
5 estate is worthless. We maintain that position today. We're not changing any positions. So
6 I'm still unclear, My Lord, as to what the trustee says we're being inconsistent on. I don't
7 see it that way at all.

8
9 In that same area of the brief, they move on to a very confusing section beginning at page
10 7 regarding ARO. And as a threshold point, My Lord, you have ruled on the ARO. You
11 have ruled on the implication of *Redwater*. And the Supreme Court has ruled on ARO. It's
12 not an issue that's relevant to the determination of costs today. None -- nonetheless, you
13 see at paragraph 29 of the trustee's brief that they argue that Your Lordship's finding on
14 ARO is wrong. You don't get to argue to the justice who made the substantive ruling in
15 response to costs that the substantive ruling is wrong. You may get to make that argument
16 to the Court of Appeal. This Court's determination of costs is premised on the fundamental
17 premise that the decision was right.

18
19 So in conclusion, My Lord, on the evidence that existed before the Court ruled and on the
20 rulings of this Court, it is clear that the trustee could not have ever sued and should not
21 have ever sued. It made no investigation to determine the merits of the extraordinary
22 allegations it made. And even then deciding to file a Statement of Claim, it filed a Statement
23 of Claim that on its face pleaded no cause of action and which is now struck. And yet even
24 today after all that, we see a trustee's brief in which it refuses to accept the evidence and
25 refuses to accept the rulings of this Court. And all of that goes to say, My Lord, if this is
26 not a case for full indemnity costs or something that comes very close to that, then I can't
27 imagine the kind of case that it will take to get one -- get there.

28
29 And those are my submissions, My Lord.

30
31 THE COURT: Thank you, sir.

32
33 Mr. Chiswell?

34
35 **Submissions by Mr. Chiswell**

36
37 MR. LEITL: I'm sorry. I apologize. I'll go on mute here.

38
39 THE COURT: That's fine. At your -- at your convenience, or did
40 you want to take a break for a minute? I'm in your hands.

41

1 MR. CHISWELL: I'm -- I'm good to proceed, My Lord, if you are.

2

3 THE COURT: I am, indeed. Thank you.

4

5 MR. CHISWELL: Sir, it's Paul Chiswell on behalf of the Perpetual
6 defendants with Mr. McDonald. We also are applying for full indemnity costs of two-thirds
7 of our summary dismissal application, specifically with regards to the oppression claim
8 and the public policy claims, which were both struck. For the most part, we adopt the
9 submissions that Mr. Leidl made, and for the most part, they apply equally for the Perpetual
10 defendant. I don't think it's necessary for me to repeat them. There are a couple of items
11 where I'll suggest where there are differences or if I can supplement or -- or add to anything
12 Mr. Leidl said. We're also seeking costs against PWC personally in accordance with the
13 general rule of the cases set out in Mr. Leidl's brief for Ms. Rose. And, thirdly, we're asking
14 the Court to submit the costs of the *BIA* claim for the application to dismiss the *BIA* claim
15 be in the costs.

16

17 So, Sir, the starting point is always Rule 10.29. I know you know it well, but a successful
18 party is entitled to costs and are entitled to costs forthwith. Now, the Perpetual defendants
19 were substantially successful in their application for summary dismissal and to strike. The
20 oppression claim was struck, and it was specifically struck against PEI and POT, two of
21 the Perpetual defendants. The trustee's Statement of Claim makes that allegation against
22 those two entities in paragraph 19.2 in the Statement of Claim and, of course, Sir, you
23 struck that at paragraph 241 of your written reasons.

24

25 The app -- your reasons also, Sir, struck the public policy claim which was, in effect, three
26 claims itself. It was that the asset transaction was contrary to public policy, that it was
27 contrary to statute, that it was illegal, and also that it was contrary to equitable grounds or
28 equitable rescission and, Sir, your reasons found that none of those three were causes of
29 action.

30

31 Now, the trustee's brief admits at paragraph 2.2 that the Perpetual defendants were partially
32 successful. It points out, though, that we were unsuccessful in having the *BIA* claim
33 dismissed. Of course, it's important to point out when the trustee's brief states that the
34 trustee was successful on its main *BIA* claim, it wasn't successful on its claim itself. It
35 merely just didn't have the *BIA* claim dismissed. So it merely lives to die another day, and
36 the trustee must still prove the *BIA* claim at trial.

37

38 Now, while the trustee calls the *BIA* claim its main claim now, maybe that's convenient in
39 hindsight after its other claims have been struck, you know, the *BIA* claim shows up third
40 in the Statement of Claim, and I certainly don't recall the trustee previously saying that it
41 took a back seat -- or, pardon me, that the oppression claim or its public policy claims took

1 a back seat to the *BIA* claim.

2
3 So, Sir, your friend put the question, then, what to do when an applicant has substantial
4 success on an application for summary dismissal for an application to strike but is not
5 wholly successful, and you have three cases before you, Sir. The first one is put forward
6 by the trustee, and it's the *Pocklington* case, and it's at -- I don't need to bring you there,
7 Sir, but it's at Tab 45 of the trustee's brief. And Justice Mason in that case, there was an
8 application for summary judgment for the whole claim which was 4 million dollars on -- on
9 two different agreements, and the Court granted summary judgment for 2 million after they
10 refused to grant -- or were denied summary judgment for the other 2 million.

11
12 I do want to point out, I guess, two distinguishing factors in that case where Justice Mason
13 ordered costs in the cause. In that time, of course, there wasn't the default rule that you now
14 see in Rule 10.29 that costs are forthwith. A second distinguishing feature is at paragraph
15 43. You'll see Justice Rooke says, well, costs should only be in the cause if success was
16 truly divided. And, of course, I submit that wasn't truly divided in this case. And then you
17 also see at paragraph 51 of that decision, Sir, where the Court says, well, in this case it
18 would be helpful for the trial judge to assess costs because they would have the opportunity
19 to consider all of the provisions of the agreements in -- in that case.

20
21 The two cases we submit, Sir, are useful are in our brief. The first one is *Murphy Oil v.*
22 *Predator*. It's at Tab 5 of our brief. In that case the plaintiff sought summary dismissal of
23 a counterclaim and only parts of the counterclaim were dismissed. The Court found about
24 50 percent of the claims had been dismissed and 50 percent survived. And I submit the
25 important part in that case is even though it was divided success on the summary judgment
26 or summary dismissal application, the Court held that the plaintiff was primarily successful
27 and granted the plaintiff costs and merely reduced the quantum of costs as a result.

28
29 Now, the trustee (INDISCERNIBLE) that the value of the claims in that case differed
30 between the amounts that were dismissed or -- or not and, therefore, it makes it a
31 complicated case, which is why I suggest that the *King v. O'Toole* decision, which is at Tab
32 7 of our materials, is especially helpful. Now, that case, it's very brief, and we -- we -- it's
33 three paragraphs long on the costs, and I have summarized that or we -- we quote from it
34 directly in our brief. But the facts, Sir, may be helpful and why it's similar to this case, in
35 that decision, the plaintiff, Sir, King, he was a lawyer in Ontario. He was sued for a
36 transaction that went wrong, and he was sued for 2 million dollars. He sought legal
37 assistance from another lawyer, the defendant O'Toole, who was also in Ontario, who
38 advised the defendant -- or Mr. King not to attorn to Italy and not to report the Italian claim
39 to his insurer in Ontario until he was sued in Ontario. The accompanying judgment in turn
40 was entered against him for 2 million dollars, and it was subsequently enforced in Ontario
41 successfully. The insurer denied coverage. And so then Mr. King sued both Mr. O'Toole

1 for the negligent advice in not attorning and the negligent advice in -- separately for telling
2 him not to report it to his insurer.

3
4 And then you'll see there is a reference to a third claim and that was Mr. King also sued his
5 partnership at the time, which was Gowlings, claiming that he should have been
6 indemnified. The Court summarily dismissed two of the claims. It dismissed the one
7 against Gowlings on the basis that he wasn't a partner when the cause of action arose. He
8 dismissed the claim against Mr. O'Toole that he -- that he not report to the insurer because
9 it was limitations barred, but the Court held for the third claim against Mr. O'Toole that
10 he -- that O'Toole didn't quite -- that there was a triable issue whether the limitation period
11 precluded the claim for negligent advice on the action, so the claim -- that claim still had
12 to go to trial.

13
14 And, Sir, I won't bring you to the decision, but you'll see it had three paragraphs. The first
15 one says that the defendants were substantially successful, even though not entirely so. The
16 second paragraph says that the plaintiffs wanted costs in the cause, but that wasn't fair. That
17 two-thirds of the claim were dismissed outright, and the third claim remains for trial. And
18 then the third point from that decision is that the defendants received two-thirds of what
19 they would otherwise recover if they had been wholly successful.

20
21 The trustee attempts in their brief to distinguish the case on the fact that there was two
22 defendants in that case, but I don't see how it should distinguish the case. All three claims
23 appear to have been for the same amount of damages, and so I don't see any principle
24 distinction as to whether the Court should grant a percentage based on the substantial
25 success in having claims dismissed or struck.

26
27 And so just like, Sir, in the *King v. O'Toole*, the Perpetual defendants were substantially
28 successful in having two-thirds of the claims against them struck. And I'll get to the -- the
29 quantum for these two-thirds of the claim or for the two-thirds success in a moment. I just
30 want to turn to what to do with the balance of the application for summary dismissal dealing
31 with the *BIA* claim, and I submit it's one of those rare cases, Sir, where you should submit
32 that portion to be dealt with in the cause to have a trial judge determine whether there
33 should be costs for it one way or the other or for one party or the other.

34
35 The -- the principled basis for that, Sir, is there were lots in costs incurred, presumably for
36 both parties, and -- and there was also lots of cost savings for later on in trial when the
37 plaintiff will have to attempt to prove their case. So as in *King v. O'Toole*, that -- the trustee
38 still has to prove that claim later. We provide a case, it's *Sofina Foods*, at Tab 8. It's a recent
39 case of the Ontario Superior Court from 2018. And I don't need to bring you there, Sir, but
40 the Court says it's a complicated issue that will eventually be determined at trial, but where
41 the motion was reasonably brought, even if unsuccessful, and at paragraph 20, Sir, much

1 of the -- the Court said: (as read)

2
3 Much of the work to date has not been wasted and will benefit the
4 parties at trial.
5

6 And at paragraph 21, the Court says in its view only the trial judge can determine what
7 amount was useful at trial. Sir, you provided detailed reasons in regards to the *BIA* claim
8 that the parties will be able to use to either guide them at trial or to help them argue their
9 case at trial.
10

11 And so, Sir, at paragraph 100, you suggested that -- or you stated that there was some
12 support in evidence for the Perpetual defendants' argument that the control was exercised
13 by the Kailas group and the purchaser group. At paragraph 97, you said there was
14 inferences, but they were not sufficiently robust or not robust enough for you to be able to
15 grant the Perpetual defendants their summary dismissal. And then you provided also the
16 track -- the framework that the parties will be able to use for the issue of arm's length.
17

18 At paragraph 98 of your reasons, Sir, you said the determination of the arm's length issue
19 will turn on the credibility of the witnesses who were directly involved in negotiating the
20 asset transaction which will provide guidance to the parties.
21

22 At paragraph 111 of your reasons, Sir, you also disagreed with the argument of the trustee
23 that the presumption that related parties are not arm's length can only be rebutted by proof
24 that the transaction was at market value. So you provided that guidance. It was something
25 that took the parties a lot of work to get to that point, and that issue was already debated,
26 and it's helpful that you have settled it. It was a little surprising to see the trustee still make
27 that argument at paragraph 99 of its current brief, that market value would still impact
28 whether there was arm's length, notwithstanding your -- your reasons, Sir, at paragraph
29 111.
30

31 There is also some symmetry to the proposal, Sir. So putting costs in the cause for the *BIA*
32 claim would help either party if at the end of trial they're successful, they will be able to
33 ask the Court for costs of the application that was before you, and that's better than -- than
34 an order from you, Sir, that says that there will be no costs for the application for the *BIA*
35 claim.
36

37 Sir, unless you have any questions on that point, I do want to turn to quantum.
38

39 THE COURT: Again, Sir, I may have questions at the
40 conclusion after your friends have spoken, but continue. Thank you.
41

1 MR. CHISWELL:

Thank you, My Lord.

2

3 Mr. Leidl did point out that the starting point or default rule for costs was 40 or 50 percent
4 of the fee incurred. Sir, my understanding is the trustee suggested at least that if there is
5 any costs award it would be Schedule C, but that's for -- with respect, for taxing officers,
6 not judges, and it's inappropriate, especially in complex expensive litigation like the one
7 before you.

8

9 I did want to specifically point out the *Remington v. Crystal Creek* decision that's in Ms.
10 Rose's brief at Tab 34. Justice Jones, in my submission, Sir, sets out a detailed and
11 principled reason why costs should be at 40 or 50 percent as a default rule, and one of the
12 principled reasons why that would happen was especially when parties are equally armed,
13 sophisticated, and don't lack financial resources to deploy those, and there is no economic
14 imbalance. That's certainly the case before you, Sir.

15

16 More importantly, it's at paragraph 36 of the reasons where Justice Jones quotes Justice
17 Shelley in *Weatherford* where he talks about the general rule or the default rule. At
18 paragraph 37 how Schedule C is purely an optional rubber stamp for a judge as
19 opposed -- and at paragraph 38 that Schedule C doesn't bind a judge. Actual legal bills are
20 relevant. And at paragraph 39 a number of cases discuss the suitability and the percentage
21 of fees approach in specific reference to instances of complex and protracted litigation.
22 And then at paragraphs 40 to 41 how the rule committee attempted to achieve 40 to 50
23 percent indemnity in a typical case. And of course, Sir, this isn't your typical case where,
24 you know, an application under -- with a brief under item 8.1 column 5 would be a couple
25 of thousand dollars. That wouldn't be 40 to 50 percent indemnity in this case.

26

27 So, Sir, Mr. Leidl set out a detailed explanation for why enhanced costs in addition to the
28 default rule of 40 to 50 percent are appropriate in this case. I don't want to repeat any of
29 the arguments he made. I adopt his submissions. I do want to highlight a few things that
30 were specific to the Perpetual defendants. One is many of the allegations that were made
31 against Ms. Rose were also effectively made against the Perpetual defendants. She is, in
32 effect, you know, the company -- she is this company's CEO. She was at the time and still
33 is, and her actions were done on behalf of the corporation. And these were allegations that
34 are made against a -- a public company, and they're made, as Mr. Leidl said, by a trustee in
35 bankruptcy, and so they're -- it's an Officer of the Court, and so those allegations are given
36 special credence by the public.

37

38 One of the items in the *Manson* case cited by the trustee is whether allegations were
39 scandalous or untrue, and the trustee made specific allegations against the Perpetual
40 defendants for oppression, that they oppressed its -- that Perpetual oppressed its creditors,
41 which is harmful for a public company. There is two decisions in our -- in our brief

1 that -- that corporations have reputations that are -- can be harmed by allegations that are
2 untrue. That's the *Colborne Capital* decision at Tab 1 and the *BMO* case in Tab 2.

3
4 One of the other allegations was of statutory legality, which of course is a scandalous and
5 untrue allegation, which was especially shocking when the trustee couldn't point out which
6 specific provision of the statute it alleged had been breached.

7
8 And then, Sir, you'll see at paragraph 261 of your reasons, you remarked that the trustee
9 had accused Perpetual of having engaged in a scheme as part of its public policy claim and
10 that also was a scandalous allegation against a public company by a trustee in bankruptcy.

11
12 There were two claims, the two claims that were struck, the oppression claim and the public
13 policy claim. Sir, you held that neither claim was a reasonable claim. They weren't just
14 unreasonable, Sir. They -- they didn't -- they weren't a cause of action. They were -- they
15 were badly pleaded and made no sense. As you found in your reasons, Sir, there were no
16 particulars for the public policy claim, notwithstanding Rule 13.6(3)(e) and it's at your
17 reasons at paragraph 270. When you plead an illegality, you have to provide specific
18 particulars of that.

19
20 The -- at your reasons, Sir, at paragraph 265 in regards to the public policy claim, you set
21 out that the trustee is fishing, but it has neither a hook nor a net.

22
23 The Statement of Claim, Sir, alleges, and I might have touched on this already, that
24 the -- the statutory legality claim pleads that it was -- it was expressly prohibited by the
25 statute, but there was no specific provision mentioned. The trustee in -- in its brief wasn't
26 able to point to one. You had asked the trustee's counsel about it, and it still wasn't able to
27 point to a specific provision in -- in the regulatory scheme it cited that specifically
28 prohibited it be asked the transaction.

29
30 In regards to the oppression claim, Mr. Leidl touched a lot on that. I would only add, Sir,
31 two points. Your reasons at paragraph 240 suggest that -- or state that the cause of action
32 was extremely remote, and in the same vein that the claim was brought on behalf of the
33 municipalities, and the trustee didn't do its due diligence. Mr. Darby's affidavit set out that
34 the liabilities in regards to the municipalities were 10 million, and you have found, Sir, at
35 your reasons at paragraph 334 that that was from 2015, not 2016, even though the trustee
36 would have been expected to have all of Sequoia's records and certainly could have figured
37 out what the tax bill was in 2016 or 2017, and it could have figured out what had been paid
38 or not paid, and, Sir, it was left to the Perpetual defendants to show what had been paid and
39 not paid, and you found 1.5 million in 2016 had been unpaid, Sir, or at least.

40
41 The other item about -- or another item or another reason for enhanced costs is the -- from

1 *Manson* is that the trustee has required the Perpetual defendants also to exhaust the legal
2 proceedings. At first, Sir, in early -- or in August, the Perpetual defendants had to apply to
3 the Court, and appeared in the commercial list to argue about scheduling, about it -- to have
4 its application for summary dismissal heard before the trustee's application for its
5 judgment. As Mr. Leidl has gone over with you, Sir, the trustee then subsequently refused
6 an order. It refused to admit costs. And Mr. Leidl brought you to one instance in the
7 evidence where the trustee refused to admit that it had lost.

8
9 Sir, Mr. Darby has sworn an affidavit before the Court of Appeal on February 26th, 2020,
10 where he says that you had dismissed the Perpetual defendants' application for summary
11 dismissal, and he had to be cross-examined on that point.

12
13 The only two additional points, Sir, that I'll make on in terms of enhanced cost is -- is the
14 Perpetual defendants, through their counsel, assisted Ms. Rose in making many of the
15 submissions that she would have had to have otherwise make in regards to the public policy
16 claim but also the oppression claim, and it, Sir, would appear to be -- there shouldn't be
17 some sort of discount for Perpetual having shared that work with Ms. Rose's counsel. So if
18 Ms. Rose's counsel would get a hundred percent indemnity for having the claims against
19 her dismissed, the Perpetual defendants should -- should get that too because they incurred
20 that work thereby preventing Ms. Rose from having to incur that -- those costs at the outset.
21 It makes sense that a cost award would be on the same basis for that reason.

22
23 And then, of course, Sir, the trustee's claim itself sought full indemnity costs against
24 Perpetual -- the Perpetual defendants at paragraph 6 under its relief sought section of its
25 Statement of Claim.

26
27 The amounts that are being sought, Sir, are set out in Ms. Rose's affidavit. Specifically for
28 the Perpetual defendants, she attaches a separate itemized bill of costs that includes all the
29 steps taken from the receipt of the Statement of Claim on August 2nd, with the application
30 that was also filed by the trustee on August 2nd. The trustee had since March of 2018 to
31 August to prepare its materials. The Perpetual defendants had to catch up right from the
32 get-go, and from August 2nd to filing of its defence and application for summary dismissal
33 on August 27th, so within a month, it had lots of work to do.

34
35 It had (INDISCERNIBLE) in court, but numerous counsel behind the scenes helping with
36 research and -- and background. There were numerous complicated issues, numerous
37 hearing days before you, and before you, prior to your involvement, Sir, also for
38 scheduling. There were numerous written submissions before you, Sir, not only the briefs
39 for the summary dismissal application as well as to provide follow -- your answers to your
40 follow-up questions that you provided in writing to the parties, and the parties provided
41 written responses, and then, of course, we had *Redwater* and *Hryniak* that came out during

1 the hearing that we also addressed in writing. The amount of the claim is significant at 217
2 million dollars. And, of course, there has been no criticism of that bill of costs either, and
3 the trustee hasn't put forward their own costs to which to compare.

4
5 So, sir, if you adopt the *King v. O'Toole* approach for two-thirds indemnity, that would be
6 by my math \$515,000. As a check, Sir, I ran it through Schedule C with the various items
7 that I thought the Perpetual defendants would be able to seek, and at 7.5 times column 5,
8 and I use 7.5 because that's what Justice Veldhuis used in her security for costs application,
9 I come up with 230,000 as a -- as a check, just Schedule C. If you were to apply the Court
10 of Appeal amounts for the hearings in front of you because they were, in fact, complex and
11 required significant briefs, with questioning, also at 7.5 times column 5, I get 370,000,
12 which is close to a 50% indemnity at 386,000. So to -- to the extent that it helps you, Sir,
13 with the gut check, you have got the support there as well.

14
15 The last thing I would like to address, Sir, subject to your questions, is against whom should
16 the amounts be awarded. I agree with Mr. Leidl's submissions that it should be the trustee,
17 that it should be PWC personally rather than the estate. And for two reasons, one, that's the
18 law. Mr. Leidl brought you to a few cases. I just want to highlight three for you that I
19 thought were especially helpful. There is the *Touche and Ross* case at Tab 43 of Ms. Rose's
20 brief. And I wanted to specifically highlight paragraphs 4 through 10 that I don't think were
21 highlighted originally.

22
23 And then to the extent, Sir, that you wanted specific Alberta authority, Ms. Rose provides
24 that at Tab 45 in the *Carter Oil* case from the Court of Appeal. And the Court said in that
25 case that it was appropriate to award costs against the trustee where the estate has no value.
26 And in that case, Sir, there was a question as to what the secured creditor claims would be
27 at the end of the day, which is one of the trustee's arguments in this case, so that is
28 specifically a reason why to order costs against PWC.

29
30 Another Alberta case, Sir, is a 2004 decision from this Court in -- in *Crossing Co.*, and it's
31 at Ms. Rose's brief at paragraph -- or at Tab 51. PWC was the trustee in bankruptcy in that
32 case, and it's an Alberta case, so it's -- it's instructive to the Court.

33
34 And, of course, the second reason that PWC should -- should be the one to pay the costs is
35 because the estate is worthless. The exigible assets are less than secured claims. And it
36 prevents the trustee from engaging in a -- in a heads-I-win, tails-you-lose style litigation.

37
38 As Mr. Leidl pointed out, not only could PWC, and it probably did, secure an indemnity
39 from the estate, it could have sought an indemnity from creditors as well, and we know
40 there are well-bankrolled creditors who have sought to intervene and so have an interest in
41 this case.

1
2 And the third thing, and you'll see in some of the cases cited by Ms. Rose that the trustee
3 could have done was it could have permitted a creditor to bring a lawsuit under Section 38
4 of the *BIA* rather than having the trustee bring it itself. And, of course, in that case, the
5 creditor would be liable for costs in the normal course. And so it makes sense that the
6 trustee or that PWC would also be liable in the claim.

7
8 Unless you have any questions, My Lord, those are my submissions on costs.

9
10 THE COURT: Thank you, Sir. Again, I will reserve my
11 questions until I have heard from your friends. Thank you.

12
13 Mr. de Waal, do you want to take a break, or do you want to proceed? It's in your hands.

14
15 MR. DE WAAL: No, Mr. Rasmussen is going to address costs
16 on -- on our behalf. Perhaps it is time just for the morning break, My Lord. We don't need
17 a long break, but it may make sense to do it now.

18
19 THE COURT: That makes sense to me, Sir. Shall we take 15
20 minutes for a mid morning break?

21
22 MR. DE WAAL: Thank you, My Lord.

23
24 THE COURT: Thank you.

25
26 Master clerk, thank you.

27
28 (ADJOURNMENT)

29
30 THE COURT: Counsel. Mr. de Waal, at your convenience. Just
31 one administrative matter. We normally break at 12:30. I suspect you're going to go more
32 than half an hour, so I just ask you to break at your convenience, and then we will reconvene
33 at 2:00.

34
35 At your convenience, sir.

36
37 **Submissions by Mr. Rasmussen**

38
39 MR. RASMUSSEN: Thank you, My Lord. Luke Rasmussen for the
40 trustee in bankruptcy, not PWC in its personal capacity.

41

1 THE COURT: Thank you.

2

3 MR. RASMUSSEN: I think perhaps if -- if I forget, if the Court needs
4 a break, perhaps just if the Court could interject and I'll try to -- I'll try to keep that in mind,
5 My Lord.

6

7 I propose briefly to deal with the law on -- on the general issues, and then deal with the
8 Perpetual defendant submissions and then the Rose submissions, and then finally the issue
9 from the trustee's perspective of personal liability relating to this, those aren't even of the
10 estate. The assets in the estate are worthless. I'll try to deal with those issues for both Ms.
11 Rose and Perpetual defendants at the same time rather than repeating them for each -- for
12 each set of parties.

13

14 First, My Lord, with the law, what we have said in our brief at paragraph 8 is
15 (INDISCERNIBLE) is, and my friend referred to that as well in -- in response to our brief.
16 Essentially, what Justice Thomas is doing is he -- His Lordship has assembled the -- the
17 latest Court of Appeal cases on -- on enhanced costs and assembled them into -- in -- in
18 one place, and -- and that's why we're citing this decision. And as Justice Thomas noted,
19 the Court of Appeal had recently clarified the law on this point. Now, one -- I don't think
20 there is a lot of disagreement here, but one of the points that I believe Mr. Leidl made was
21 that there does not have to be a positive finding of misconduct because the -- the categories
22 are open, and I think if -- if the Court looks at paragraph 550, what -- what -- what Justice
23 Thomas does is cite the *Weatherford* case from the Court of Appeal and say that -- and I'm
24 quoting from paragraph 550: (as read)

25

26 Solicitor and client costs awards are also rare and -- this is
27 quoting -- must be based on a finding of positive -- finding of
28 intentional misconduct during the litigation.

29

30 And then there are -- the important concepts are -- are -- just supporting that kind of
31 misconduct are reprehensible, egregious, scandalous or outrageous, again, qualifying that
32 intentional misconduct and then we go to the factors that are described further down in
33 paragraph 550.

34

35 So, again, the important thing is that it has to be intentional misconduct, reprehensible,
36 egregious, scandalous or outrageous, and that's what we -- we have to do -- that's the test
37 to be met. So it's a -- it's a high bar. And then as -- as the Court notes in 548, full indemnity
38 costs are not usually available through litigation and virtually unheard of except where
39 there is a contract. So that's -- I don't think there is really any dispute about the basic law
40 here.

41

1 And that (INDISCERNIBLE) we do identify as one issue in our brief where it's submitted
2 on behalf of Ms. Rose that -- and this is cited in paragraph 10, My Lord, of our brief, we're
3 citing the Rose cost submission, and one of the sub points cited in Ms. Rose's cost
4 submission is that full indemnity costs are available, and it's the italicized part of that
5 blocked quote, where there was an (INDISCERNIBLE) issue of fact or law which requires
6 (INDISCERNIBLE). And that's -- and that's of fundamental importance here because if
7 that were true, then if her claim is struck or dismissed, meaning the Court found there was
8 no issue of fact or law which required the proceedings, then full indemnity costs would be
9 payable, and that's not correct, and it's directly consistent with the -- the test that I have just
10 cited from the *Manson* case.

11
12 So what we -- what we did is we went to this -- the *PrimeWest* decision, Justice Wakeling's
13 very comprehensive review of the law in enhanced costs, and what he -- what His Lordship
14 does is cite a number of instances all under the heading that "a departure from party and
15 party costs," and I'm quoting from paragraph 12 of our brief, My Lord: (as read)

16
17 A departure from party and party costs should only occur in rare
18 and exceptional circumstances.

19
20 And one of those rare and exceptional circumstances is -- and this is citing from the classic
21 *Trimac* decision on enhanced costs. That's what this -- this paragraph refers to. And I -- and
22 I don't think it's fair to characterize it as disjunctive in the sense that it has to be all of those
23 things. So it's not simply that there was no issue of fact or law taken on its own. It's that
24 there was no issue of fact or law, and then you caused the party to litigate, go through an
25 entire litigation process when you know there is no issue of fact or law, you know you're
26 wrong, and you do it anyway. And that's exactly what happened in *Trimac*, which is why
27 that case supports this proposition. And that was a -- I believe it was a wrongful dismissal
28 case, and the Court found, and it's -- it's cited in our brief that (INDISCERNIBLE) the
29 particular individual defendant knew that this person was treated badly and knew they had
30 no real defence to his claim, but made him go all the way to trial anyway knowing they
31 were wrong, and that's -- that's when the Court said, well, that -- that supports a finding of
32 enhanced costs. That's -- that's not right. And -- and that's what Justice Wakeling cites from
33 *Primewest*, and that's the real principle. It's not simply that it turns out in the end that your
34 claim was without merit because that happens all the time. People lose lawsuits. Summary
35 dismissal is granted all the time. Striking is granted all the time. It's not -- you don't get
36 enhanced costs because you end up being wrong. It -- because it turned out you were wrong.
37 You get enhanced costs potentially awarded against you when you knew you were wrong.
38 You knew there was no merit to what you were doing, and you did it anyway. You alleged
39 it anyway.

40
41 And I think that takes us into the factual submissions made on behalf of the defendants

1 where we get into this -- the argument, and I think it's very important, My Lord, to note the
2 way that it is -- it is put to the Court, it's not that -- it's not that the trustee made allegations,
3 and then it turned out to be without merit. The Court found that we were wrong on certain
4 issues, and with respect to Ms. Rose, the key issues. That doesn't justify an award of
5 enhanced costs. (INDISCERNIBLE) justifies an award of Schedule C costs, which we're
6 willing to pay Ms. -- Ms. Rose. The argument made is that, and I'm quoting from Mr. -- my
7 friend, Mr. Leidl, he puts it as the trustee could not have ever sued and should not have ever
8 sued, could not have ever and should not have ever, which is fundamental to the argument
9 on enhanced costs, which the trustee ought to have known all along or maybe did know all
10 along, depending on how we interpret the submissions, that its claims are without merit
11 and proceeded anyway. And I think that's inconsistent with the evidence, and in a lot
12 of -- and we'll get into the detail in more -- we will get into the issues in more detail further
13 on, but in a lot of cases it simply doesn't work logically. A particular example being the
14 release issue and the standing issue where the authority for the proposition that we ought
15 to have known all along that these claims are without merit is Your Lordship's decision,
16 which obviously was not granted until after, right, it assessed the claims. So we could not
17 have known that that would be the result because that decision hadn't been made when the
18 claim was brought. It's simply logically impossible.

19
20 And so when we say that there -- they cite no authority, for example, on the Section 122(3)
21 issue, it's certainly not contemptuous, to quote my friend, of Your Lordship's decision. It's
22 simply that obviously Your Lordship's decision was not known before we began because
23 it -- your -- Your Lordship was deciding the outcome of the litigation. It could not have
24 been known at that point. So we're simply referring to an incident that would have allowed
25 the trustee to determine that -- that that interpretation -- that its interpretation of Section
26 122.3 was wrong. It simply -- it's simply logically impossible to rely on Your Lordship's
27 decision for that conversation.

28
29 I propose to go into more detail on the Perpetual defendant submissions first, and then the
30 Rose submissions on -- submissions made on behalf of Ms. Rose after that, and again then
31 deal with the -- the question of whether the assets in the estate are worthless as the -- and
32 I'll refer to them as the defendants. Ms. Rose is not a defendant anymore, but if -- if that's
33 all right, I'll just refer to them collectively as the defendants -- the position advanced on
34 their behalf that the estate has no -- the assets in the estate are worthless. So
35 beginning -- focusing on the Perpetual defendants' costs application, as a general comment
36 I would say that -- and this is true of the written submissions as well, they have more or
37 less -- aside from the *BIA* issue, they have more or less adopted Ms. Rose's submissions.
38 And Ms. Rose's submissions are -- deal with the claims against Ms. Rose primarily. They
39 briefly touch on the Perpetual defendants, but the focus is on the claims against Ms. Rose.
40 So simply for the Perpetual defendants to adopt those submissions as a basis to conclude
41 that they are also entitled to enhanced costs, I think there is quite a gap there in terms of

1 the factual argument. There just -- they have quite a bit -- we certainly don't acknowledge
2 that Ms. Rose should be entitled to enhanced costs, but the -- the amount of lifting that has
3 to be done by the Perpetual defendants is much greater because among other things claims
4 (INDISCERNIBLE) were not completely dismissed, and that takes me into the -- to the
5 first issue which is that the factual allegations against the Perpetual defendants have not
6 changed as a result of this Court 's dismissal of the public policy equitable rescission claim
7 and the oppression claim.

8
9 The underlying factual allegations are the same, which is that this would be -- the asset
10 transaction was improper, and it should be set aside. And that is a live issue. The intention
11 of the Perpetual defendants' Section 96 -- pardon me, summary dismissal application, the
12 first one, filed in August 2018, was to dispose of all the claimers. It was not their intention
13 to leave any standing. And the reason for that is that the trustee's claims are -- they
14 have -- the trustee makes different claims but on the same factual basis, which is that this
15 (INDISCERNIBLE) asset transaction should be set aside. This asset transaction was
16 improper and should be set aside. Whether you -- whether the Court gets there by the
17 oppression remedy, Section 96, statutory illegality, (INDISCERNIBLE) decision, the
18 factual allegation remains the same and the relief sought remains the same, setting aside
19 that transaction with a judgment in the alternative.

20
21 So when -- when the trust -- when the trustee says that it was substantially successful
22 against the Perpetual defendants, that's what it's saying, that the basic claim hasn't changed.
23 We can attach different -- different legal conclusions to the same factual allegations, but
24 the core of the claim remains, at -- at least for the moment, I think. My friend says that we
25 live to die another day, and presumably the Perpetual defendants would like the claim to
26 die sometime in September, but that has not been determined. And there is evidence before
27 the Court from the trustee and from other interested parties that this asset transaction was
28 not done properly. It remains an open issue. Obviously, the Court hasn't determined that
29 one way on the other. So I think that it's important to emphasize that point when considering
30 the arguments from the Perpetual defendants are on enhanced costs, that it may be the
31 position they have been vindicated, but like this Court found that what they did was all
32 right, that there was no crime here. That the -- the asset transaction was -- was fine for the
33 purposes of oppression or these other claims. But I -- but I think that -- I think that puts it
34 too strongly.

35
36 The Court struck a number of claims, that it doesn't -- it's not an endorsement of the
37 Perpetual defendants' conduct. It's not a criticism either, but they -- they certainly have an
38 advantage here. What we say, and perhaps I should have said that at the outset, what we
39 say in our -- in our brief is that the costs should be on the cause for all the claims for
40 summary dismissal, the first summary dismissal application.

41

1 And if we die -- if we die another day, and that day is in September, then, as presumably
2 the Perpetual defendants suspect it will be, then costs in the cause should suit them.
3 That's -- that's not much of a delay, in my submission.
4

5 With respect to the -- so, again, and we make the point that the factual submissions -- the
6 factual allegations haven't really changed, and there certainly did not -- there is no
7 finding -- if there were, we 'd know that there were findings in favour of Ms. Rose, that she
8 exercised her business judgment properly and didn't do anything wrong. In my submission,
9 there is -- there is no equivalent finding that the Perpetual defendants can rely on. They're
10 in a different situation. They -- they are still in this lawsuit, and the propriety of the asset
11 transaction is still an issue to be determined.
12

13 And then the same problem arises with the argument that the Perpetual defendants echo
14 Ms. Rose's -- the submission made on behalf of Ms. Rose that -- that the trustee made
15 allegations against them with, quoting, "without having done any meaningful investigation
16 or analysis." And we certainly disagree with Ms. -- the submissions made on behalf of Ms.
17 Rose on that point, but I think that's an even more difficult argument for the Perpetual
18 defendants to make.
19

20 Mr. Darby's August 2nd affidavit details the investigation that went into the trustee's claim
21 that this transaction was -- the asset transaction was improper. I think it's a very difficult
22 argument to make, viewing the Perpetual defendants alone, that the trustee did this without
23 any investigation, so -- so they -- they echo Ms. Rose's submission, but if we apply it to
24 them, is there really any -- does it -- does it really hold any water? And in my submission,
25 it doesn't.
26

27 With respect to the -- the other argument, now the relief wouldn't apply to the Perpetual
28 defendants, but they also echo Ms. Rose's argument on oppression. I think I -- I identified
29 this problem at the outset when Ms. Rose's counsel says we ought to have known that we
30 had no standing because Your Lordship determined that we had no standing. It's the same
31 logical problem. Your Lordship ultimately determined that, but the trustee could not know
32 the outcome of an application that hadn't even been filed at that point. So
33 when -- when -- and I -- and I'm dealing with this in relation to both groups, Perpetual
34 defendants and Ms. Rose, when we point out that the -- the six cases that have been cited
35 for the proposition that we were required to obtain a -- the term was a standing order, that
36 was the argument made before this Court in -- in 2018, that without a standing order, we
37 had no legal authority to bring an oppression claim, and these six cases were cited as strong
38 authority for that proposition. The reason we devote three pages to that in the brief is that
39 none of those cases support that proposition, and the reason that I think those -- that
40 argument was dismissed as a sub sub procedural issue, paraphrasing, the reason it's not is
41 that if -- if the -- the existing case law is if the trustee isn't entitled to base its claims on the

1 existing case law, then -- then what guidance does it have? And, again, the argument made
2 is that, well, this Court said we had no standing. Therefore, we've always had no standing.
3 And there is a logical impossibility there because it's -- it's -- it's a form of hindsight by us.
4 To suggest that because we ultimately lost, we were going to -- we always ought to have
5 known we would lose and, therefore, we had no standing to begin with. I think that's -- there
6 is -- there is no basis for that, and -- and as we cite in the brief, this Court actually did its
7 own research and -- and did not accept that submission at the let's see where we are prior
8 to the stand -- the standing order.

9
10 I'll take the Court to that citation in our -- pardon me, My Lord. It's at paragraph 71 in our
11 brief where (INDISCERNIBLE).

12
13 THE COURT: I'm there.

14
15 MR. RASMUSSEN: And this is a citation that the reasons -- what the
16 Court -- what Your Lordship found is that generally and -- and that was fairly argued all
17 along that -- that standing is usually dealt with in conjunction with the merits. There is
18 (INDISCERNIBLE) standing order in most cases. The most that the cases cited by -- on
19 behalf of Ms. Rose, the most those cases support is that if the defendants bring an
20 application to strike, that can go with it as a -- it can be dealt with as a threshold issue. And
21 that's what happened in this case.

22
23 There is nothing improper about the trustee seeking relief from oppression, pleading that it
24 was entitled to status as a complainant, and then the Court dealing with that later on. And
25 that's consistent with the general practice. And the reason that it's important is that going
26 all the way back to the basic principle just (INDISCERNIBLE) Schedule C costs from
27 enhanced costs, it's the difference between you ultimately lost on your allegations, and you
28 knew all along that your allegation was without merit and -- and you forced the other side
29 to litigate that. That's a fundamental distinction. And a standing issue is an example of the
30 way the argument is made that -- that the trustee knew all along it had no standing because
31 Your Lordship's reasons say we didn't. And that simply doesn't work logically.

32
33 And then as that applies to the Perpetual defendants, that's their -- their -- the main
34 basis -- that's, I think, as far as the Court went in endorsing their conduct. It's -- the Court
35 struck the oppression claim. It didn't -- the Court did not find that there was no oppression,
36 right, so the -- so the Perpetual defendants argue that we allege they're (INDISCERNIBLE)
37 that harm to reputation, therefore, we should pay enhanced costs. The Court did not find
38 that there was no oppression, that the municipalities got paid, that they were treated
39 properly. I don't think there -- there would be any basis for that finding. The Court struck
40 the oppression claim on -- on various grounds, and it certainly wasn't an endorsement of
41 the Perpetual defendants' conduct. So to say that their reputation is damaged because they

1 were alleged to have oppressed a creditor, I don't think the factual allegation was proven
2 to be untrue. It's the legal effect. And I'll return to that theme a number of times, that there
3 is a distinction between unproven factual allegations and striking a legal claim, right?
4 And -- and that -- that comes up in relation to the issue of Ms. Rose causing -- and I'm
5 interrupting myself -- that comes up in relation to this issue of Ms. Rose causing
6 the -- causing Perpetual Inc. -- or PEI, let's call it, to do something.

7
8 My friend says that we're -- we're contemptuous of the decision because we say that she
9 did by executing that (INDISCERNIBLE) agreement. That's the factual element. The
10 (INDISCERNIBLE) legal finding is that Ms. Rose didn't control PEI and didn't have the
11 legal capacity to cause it to do anything. But the factual allegation in my submission hasn't
12 been disproven. It has no legal effect. So it -- it is fundamentally different from accusing
13 someone of doing something, and then it's determined that they didn't actually do what is
14 factually alleged. The -- the decision was based on legal conclusions flowing from those
15 factual findings, and there are obviously issues of mixed fact and law as well.

16
17 With respect to the -- and then -- and then the next submission on behalf of the Perpetual
18 defendants, again echoing Ms. Rose's submission, is that the trustee made baseless
19 allegations which -- which then reasonably impugned their conduct and character. So,
20 again, that's -- that's read out of the Ms. Rose submit -- Ms. Rose's submission, and I don't
21 think that fits. Obviously, we disagree with it on behalf of Ms. Rose as well, but it certainly
22 did not fit with the Perpetual defendants' decision where the -- their conduct certainly was
23 not endorsed by the Court and -- not to say that it was criticized, but that's an open issue.

24
25 They argue that there was no evidence -- we didn't plead what was allegedly improper
26 about this transaction when we made the statutory illegality claim. We pled that it was
27 inconsistent with Directive 006, the (INDISCERNIBLE), and the LLR licencing scheme
28 and that this Court found that that did not support a claim on a striking standard, but it's
29 not an endorsement from this Court to say that, yes, what you did was fine, as it would
30 have been if all the claims had been dismissed. They -- they weren't, and it remains a live
31 issue whether that transaction was proper or improper, and I think that's another reason
32 why costs should be in the cause. If this Court in September dismisses the claim, accepts
33 the Perpetual defendants' arguments there, they may have a strong case to say, well, we
34 have been vindicated and -- and we should get enhanced costs. At this point it's a live issue,
35 and it shouldn't be determined at the (INDISCERNIBLE).

36
37 With respect to the -- this idea that the trustee employed adversarial litigation tactics, again,
38 that's more of an argument for Ms. Rose to make. That's the argument Ms. Rose makes.
39 The Perpetual defendants argue that that applies to them as well because she -- Ms. Rose
40 represents them. I'll deal with it in more detail in relation to the -- the application for costs
41 by Ms. Rose.

1
2 Briefly on behalf of the Perpetual defendants, the trustee brought a Section 96 claim. It was
3 entitled to seek summary judgment on that claim. Those timelines were not rushed by
4 commercial list standards. They were actually -- the timeline of the proposal, as you'll see
5 we're -- we're clearly not rushed by commercial list standards, whether it would apply to a
6 Section 96 claim. And the idea that -- that the trustee expected -- insisted that this proceed
7 in August, a quick review of the transcript of that hearing before Justice Jeffrey which
8 showed that that's not correct. The trustee certainly was -- that was a -- that was a scheduled
9 come back day where we would agree on deadlines for further steps. There was obviously
10 no suggestion that the summary judgment was going to proceed on August 3rd.

11
12 And then with respect to the -- this argument that, and again echoed -- the Perpetual
13 defendants echo Ms. Rose's submission on this, the argument that the trustee claimed that
14 it succeeded on all -- on all the issues. That -- that was an issue that had to be
15 clarified -- until February 2020.

16
17 And, I mean, we discuss the Perpetual defendants' appeal in -- in our materials, but I'll deal
18 with this in more detail in relation to Ms. Rose, but Ms. Rose appealed this decision as
19 well, and -- Your -- Your Lordship's decision because there was no clarity on the Section
20 9.6 issue. So to suggest that the trustee was unreasonable because it believed that it
21 succeeded on that issue, Ms. Rose certainly wasn't sure either or she would not have
22 appealed, and that appeal was not discontinued until after the clarification error in February
23 2020.

24
25 With respect to the -- the *BIA* claim, dealing with that briefly, this is at -- beginning at
26 paragraph -- pardon me, My Lord. Beginning at paragraph 88 of our brief.

27
28 THE COURT:

I'm there, Sir.

29
30 MR. RASMUSSEN:

Thank you, My Lord.

31
32 So we have -- we have dealt with -- I have -- I have made submissions on this via our
33 argument, and this applies to the *BIA* claim as well that the -- the trustee -- certainly, there
34 is divided success, looking at this in aggregate with Perpetual -- with the Perpetual
35 defendants, the factual -- the factual allegations remain the same, and the point that we
36 make in this section is that the -- the liability remains the same. So that the *Predator* case
37 is -- is an example of the opposite situation where there is a partial summary dismissal and
38 that chops down the extent of liability that the -- the defendant is -- in this case defendant
39 by counterclaim is facing. That doesn't happen here.

40
41 The extent of the dollar liability remains the same, and the reason for that is that the factual

1 allegations remain the same. We say that the asset transaction was improper and should be
2 set aside (INDISCERNIBLE). And that relief hasn't been affected at all by the partial
3 success, certainly we acknowledge partial success on the summary dismissal application
4 (INDISCERNIBLE). So that's -- that's the argument there generally.

5
6 With respect to the specific issues raised in relation to the *BIA* claim, I wanted to address
7 one key submission made on behalf of the Perpetual defendants on this issue related to fair
8 market value, and I -- I can confess my notes on that are not great, but certainly my
9 understanding is that the -- the argument -- and this relates to paragraph 99 in our brief, My
10 Lord.

11
12 THE COURT: I'm there, sir.

13
14 MR. RASMUSSEN: The argument we make there is that -- that
15 dealing with the *BIA* claim, the Perpetual defendants' argument is that, well, ultimately, we
16 will be successful because there is strong evidence to support this, the idea that the parties
17 were at arm's length because there is some evidence of de facto control made by the
18 Court -- this Court. Certainly, we don't take issue with that. But what we say is that de facto
19 control is only one of the factors, and what we say is, quoting ourselves: (as read)

20
21 As significant factors whether the transaction was at fair market
22 value.

23
24 That's quoting page -- on page 27. And then we start with reasons, where paragraphs 89
25 and 90 of this -- of the reasons, the Court says that the -- the Perpetual defendants have
26 been careful not to address (INDISCERNIBLE) of value. And I think the -- the argument
27 made that somehow that submission was inconsistent with the Court's findings, and
28 my -- Mr. Chiswell took you to paragraph 111 of the -- of the Court's reasons. And what
29 the Court says in 111 is not that fair market value is not relevant to determining whether
30 the parties are at arm's length. The Court finds that it's not -- it's not the only way to rebut
31 the presumption that the parties are at arm's length. So the Court isn't saying it's a factor,
32 and we would say a significant factor. The Court is simply saying that it's not the only
33 factor. And that is a long way from saying that -- that it's not a factor.

34
35 So we would say that at the end of the day, value still has to be addressed as part of the
36 arm's length analysis. (INDISCERNIBLE) the *Legge* decision, which is referred to in the
37 reasons. It's not -- it's not criticized. It's -- I might be putting it strongly to say that it's citing
38 (INDISCERNIBLE), but fairly cited for the proposition that fair market value is a factor.

39
40 And then the -- the other argument made on behalf of the -- the Perpetual defendants is
41 that -- and this is quoted at paragraph 100 of our brief -- that the first, let's call it the first

1 application to strike, dismiss, on the *BIA* claim created a record, narrowed the issues that
2 resulted in findings of fact that will benefit the parties. And what we -- what we point out
3 in -- in the following paragraphs is that -- that the new argument, the new case for striking
4 summary dismissal is actually inconsistent with the first argument striking summary
5 dismissal. So the -- the -- and the decision, like this -- like the Court's decision last week,
6 begins with the proposition that, and this is argued by the Perpetual defendants in the first
7 place, that POT transferred these assets to PEOC, and the question is where does that step
8 fit in this bigger context. The Court found that that was part of the aggregate transaction.
9

10 The problem, and what illustrates this that there may be a flaw in this argument with the
11 Perpetual defendants is that they now argue the opposite now, that PEOC was really the
12 only company with the asset transaction not POT. And that's just the -- the tip of the
13 iceberg, and I won't get into it in too much detail, but the argument that they should get any
14 costs for the *BIA* claim should be taken into account the fact that we're essentially starting
15 over on the Section 96 application to strike/dismiss. This is version 2.0 to be heard in
16 September, and it doesn't build off of the existing Section 96 argument. It essentially starts
17 from scratch. And that's -- that's a problem, but it's certainly relevant to costs as well, we
18 submit.
19

20 I will deal -- as I said, I'll deal with the question of the estate being worth -- and a cost
21 award against the estate being worthless at the end dealing with both defendants because
22 if -- if the argument is the same -- pardon me. Both groups of parties, the Perpetual
23 defendants and Ms. Rose, the arguments made on behalf of both of them were the same,
24 so I'll deal with those at the same time.
25

26 It is 12:30. I'm certainly good to go on if Your Lordship is as well.
27

28 THE COURT: How long do you think you're going to be for the
29 rest of your submissions, sir?
30

31 MR. RASMUSSEN: It's probably 45 minutes.
32

33 THE COURT: Okay. Let --
34

35 MR. RASMUSSEN: And not less than a half hour.
36

37 THE COURT: Yeah. I think it's appropriate for us to break now
38 and certainly come back at 2:00 and hear the rest of your submissions, see if there is any
39 reply, and then I'll have some questions for both parties. Does that work for all counsel?
40 Mr. Rasmussen?
41

1 MR. RASMUSSEN:

It works for us, My Lord.

2

3 THE COURT:

Thank you.

4

5 Mr. Leidl?

6

7 MR. LEITL:

Yes. Yes, My Lord. Thank you.

8

9 THE COURT:

Thank you. That being the case --

10

11 UNIDENTIFIED SPEAKER:

Yes, My Lord.

12

13 THE COURT:

-- we'll adjourn until 2:00, and Master Clerk?

14

15 Thank you.

16

17

18 PROCEEDINGS ADJOURNED UNTIL 2:00 PM

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1 **Certificate of Transcript**

2

3 I, Cindy Teruya, certify that

4

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

8

9 (b) The Certificate of Record for these proceedings was not included orally on the record.

10

11 Cindy Teruya, Transcriber

12 Order Number: AL-OR-1005-9294

13 Dated: August 24, 2020

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2

3 July 28, 2020

Afternoon Session

4

5 The Honourable Mr. Justice

Nixon Court of Queen's Bench of Alberta

6

7 L. Rasmussen (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

8

9 P. Darby (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

10

11 R. Osuna (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

12

13 R. de Waal (remote appearance)

For PricewaterhouseCoopers Inc., Trustee in
Bankruptcy of Sequoia Resources, Corp.

14

15 S.H. Leidl, QC (remote appearance)

For S. Rose

16 G. Benediktsson (remote appearance)

For S. Rose

17 D.J. McDonald, QC (remote appearance)

For Perpetual Energy Inc.

18 P.G. Chiswell (remote appearance)

For Perpetual Energy Inc.

19 S. Ko (remote appearance)

Industry Intervener for Parlee McLaws

20 C. Graham (remote appearance)

Industry Intervener

21 D. Marion

Court Clerk

22

23

24 THE COURT:

Good afternoon. Before we turn the podium over

25 to Mr. Rasmussen, any business that we need to address? Hearing none, Mr. Rasmussen,

26 at your convenience.

27

28 **Submissions by Mr. Rasmussen**

29

30 MR. RASMUSSEN:

Thank you, My Lord. Before the break, I dealt

31 with the application for (INDISCERNIBLE) for the Perpetual defendants, leaving aside

32 the issue of personal liability. As I said, I'll deal with that for both Ms. Rose and Perpetual

33 defendants at the -- at the end of my submissions on this.

34

35 Briefly moving to the -- the application for costs of Ms. -- made -- made of behalf of Ms.

36 Rose, I pause just briefly to deal with the relevant legal principles that have been raised

37 very briefly and some -- some minor points on the -- specifically on the law raised by Ms.

38 Rose.

39

40 So recapping, we say, and this is based on the, again, the *Manson* case, requires full

41 indemnity costs are rare, are virtually unheard of, and the quote is "except where provided

1 for -- virtually unheard of" and then "except where provided for in a contract." And then
2 they must be based on a finding of intentional misconduct and that must be reprehensible
3 and egregious, scandalous, or outrageous conduct in -- and, again, and qualify as intentional
4 conduct.

5
6 Now, the -- the -- dealing with the issue of my friend, Mr. Leitl's, submission, that, well,
7 there is a contract here, the release is a contract, the relevant distinction is at paragraph 548,
8 and that's at -- that's at paragraph 8 of our brief, the block quote. And I'll draw your attention
9 to the italicized portion at the fifth line of the -- of paragraph 548 is -- and this is quoting
10 from the *Luft v. Taylor* decision from the Court of Appeal: (as read)

11
12 Virtually unheard of except where provided for by contract.

13
14 So, again, it's not simply that there was a contract. People sue each other all the time in
15 contract law. It's that the contract has to provide for full indemnity costs, and that's the
16 distinction. So the mere fact that there is a release and a release of the contract, nobody
17 disputes that, but that doesn't mean that this exception is true.

18
19 So -- and then the other legal point that I would make on behalf of Ms. Rose is in reference
20 to Justice Jones's decisions in *Athabasca and Stahouse* (*phonetic*). I think the -- the
21 submission was made that 40 or 50 percent indemnity is the "bare minimum" that the -- that
22 the Court is seeking to provide in awarding costs, and I -- and I don't think that that's what
23 Justice Jones said. So the idea that that's the bare minimum, I don't think that that's accurate.

24
25 So I think -- I think what that -- what was referred to there is that that would be a reference
26 point for the level of indemnification. That doesn't mean it's the bare minimum. There is a
27 difference between the middle of the curve, let's say, and the minimum. That's obviously
28 (INDISCERNIBLE).

29
30 So I'll -- I'll deal with the legal issues raised by the -- by the specific arguments made by
31 Ms. Rose as I go through them, but those are the general points on the law, again leaving
32 aside the personal liability issue.

33
34 As I indicated earlier, the overarching narrative presented on behalf of Ms. Rose is
35 that -- and this is again quoting:

36
37 That the trustee could not have ever sued Ms. Rose and should not
38 have ever sued Ms. Rose.

39
40 So, again, the argument is not that the trustee made allegations and advanced claims against
41 Ms. Rose, and this Court ultimately determined that they should be (INDISCERNIBLE)

1 or dismissed. That's an argument for Schedule C costs. It's not an argument for enhanced
2 costs. What they argue is that the trustee knew all along that its claims were without merit,
3 and then -- and sued Ms. Rose anyway. And in my submission, there was really no basis
4 for that in the law or the evidence. And the -- the logical problem, and I -- I just
5 (INDISCERNIBLE) this morning was that the reliance -- the reliance on that is placed on
6 Your Lordship's reasons, which puts the cart well before the horse in that the -- the trustee
7 didn't have either the benefit of Your Lordship's reasons when it began the lawsuit, which
8 Your Lordship granted had made the reasons. So -- so logically it simply doesn't work to
9 say that the trustee always ought to have known there was no merit to its claim simply
10 because the claims were struck or dismissed. It's -- it's hindsight by us, and that's why we
11 keep referring to authority other than Your Lordship's reasons. It's not contemptuous of
12 Your Lordship's reasons. It's not -- it's not disrespectful of your reasons. It's simply that
13 there has to have been something in existence at the time the suit was brought to support
14 the argument that the trustee somehow disregarded relevant authority in bringing these
15 claims, and the same problem exists with *Redwater*.

16
17 *Redwater* was decided in January 2019. It wasn't decided before the trustee brought its
18 claims. And that's one of the reasons we cited the Court of Appeal's reasons, not its primary
19 reasons in *Redwater*, but the reasons in the stay application where, I believe it's Justice
20 Wakeling, I may be wrong on that, says that we cannot stop the law simply because you're
21 appealing a decision. The *Redwater* decision of the Court of Appeal was the law in 2018,
22 and subsequently, the *Redwater* decision of the Supreme Court became the law. But that
23 did not mean that the Supreme Court decision was always the law necessarily. So that's an
24 example of the logical problem here with relying on Your Lordship's reasons ex post facto
25 to say, well, then there was never any merit to begin with.

26
27 Now, dealing with the factual narrative presented on behalf of Ms. Rose, the -- one of the
28 core arguments on the facts presented in the -- now, we have cited this in our brief. The
29 submission is that the trustee's allegations against Ms. Rose were, quoting, "preposterous,
30 contrived," that the trustee plotted to sue Ms. Rose, that the -- that the allegations were
31 reckless and vexatious, and this all goes to the argument that the trustee wasn't simply
32 wrong, ultimately, as this Court found, that the trustee was -- always knew that it had no
33 claim and sued anyway. And that -- there is a fundamental distinction there.

34
35 One of the core factual arguments made on behalf of Ms. Rose is that the only document
36 that related -- that concerned Ms. Rose -- this is -- this is what's presented in the brief. I'm
37 just finding the citation for it. The citation in the brief is that -- or the submission in the
38 brief is that the only document that concerned, the word is, is concerned Ms. Rose, was the
39 release. This -- that's at paragraph 14 of the submission on behalf of Ms. Rose on costs.
40 And -- and that's critical to this argument that, again, Ms. Rose really had nothing to do
41 with it. There was nothing -- there is no basis for a claim against Ms. Rose to begin with.

1 Now, the submissions today on behalf of Ms. Rose are that the trustee -- that counsel stand
2 by those submissions made -- made in the brief, but there is a critical -- a critical variation
3 in the language used, which is that the submission now is that -- and this was made
4 repeatedly, is that the only document to which Ms. Rose is a party is the release, and
5 obviously that's true.

6
7 The argument that the trustee makes in its submission on costs is that there are a number
8 of documents that concern Ms. Rose. There is the share purchase agreement that Ms. Rose
9 executed on behalf of Perpetual Energy Inc. There is the resolution approving the entry of
10 PEOC into the asset transactions. So there are -- and then there is Ms. Rose's execution of
11 the asset transaction on behalf of PEOC and POT by its trustee PEOC. So I think that's
12 a -- that's a significant, I won't call it a concession, but we'll say scaling back of the
13 submission on Ms. -- on Ms. Rose's role in all this. That -- that there were
14 documents -- effectively, there were documents that concerned Ms. Rose, even if it was
15 not -- even if she was not a party to that in her personal capacity. And I think that's -- that's
16 an important distinction.

17
18 The other argument -- the other argument that's made repeatedly on behalf of Ms. Rose is
19 that the trustee recklessly sued Ms. Rose in the face of the release. So the release was there,
20 the trustee always ought to have known that it was a complete defence, and recklessly and
21 vexatiously sued Ms. Rose notwithstanding the (INDISCERNIBLE), and this is where we
22 get the allegations that the trustee plotted against her, sought to "punish Ms. Rose," that's
23 at paragraph 35, that Mr. Darby (INDISCERNIBLE) perjured himself as part of this. That's
24 at paragraph 26 of -- of the Rose submission. So it's all the -- the allegations made are part
25 of this narrative in which the trustee knew it had no claim and proceeded against Ms. Rose
26 anyway.

27
28 And it's -- it's obviously regrettable to have to address allegations that the trustee plotted to
29 sue Ms. Rose and was trying to be cruel and punish her, but I think that the best way to
30 deal with that as a factual allegation is to have regard to the Court's reasons themselves
31 relating to the release, and I'll take the Court -- referring to paragraphs 293 and 294 in the
32 reasons, and that's dealing with the release and the exclusions in the release.

33
34 So in paragraph 293 of the decision, Your Lordship excerpts the release, and then we have
35 the exclusion in there that says, the release, and then quoting: (as read)

36
37 But which shall exclude any Claim based on the fraud, criminal
38 conduct, or deceitful conduct of Susan Riddell Rose.

39
40 And then the Court goes on to find, paragraph 294: (as read)

41

1 As is evident from the above text in clause 3 of the Release, the
2 Release excludes -- it includes an exclusion that provides that the
3 Release does not apply if the Claim is based on the fraud, criminal
4 conduct or deceit. None of the claims or particulars in the Trustee
5 SOC allege fraud, criminal conduct or deceitful conduct in respect
6 of Ms. Rose.

7
8 And that's at paragraph 294 of the decision. So it's fundamental to the decision, Your
9 Lordship's decision, that exclusions in the release do not apply because there is no
10 allegation of fraud, criminal conduct or deceitful conduct in respect of Ms. Rose. So the
11 reason that's important is that on the one hand, it shows that there was no attempt to
12 engineer claims, plot -- plot, contrive, or seek to punish Ms. Rose. If that had been the
13 intention, she obviously wasn't -- if that had been the intention, those allegations would
14 have been made to close off the exclusion and abilities which this Court found didn't apply.

15
16 The other reason that it's important is that it's a finding by this Court that there were no
17 allegations of deceitful conduct or fraud against Ms. Rose. So later on I'll get to those
18 submissions that there were allegations, and we heard those again this morning, that there
19 were allegations of deceitful conduct or criminal conduct on -- or conduct analogous to
20 criminal conduct laid against Ms. Rose, and that's directly inconsistent with the Court's
21 finding because, again, if those allegations had been made, there would have -- exclusion
22 in the release would have applied, and that would have fundamentally changed the outcome
23 of the Court's decision.

24
25 So it's -- it's a significant finding, and in my submission it applies in two ways. Again, one
26 essentially to show that there is -- there is really no merit to this idea that there is a -- any
27 sort of attempt to target Ms. Rose or punish her. The -- and there was a reasonable basis to
28 make certainly allegations. There was no reasonable basis to make allegations of fraud or
29 deceitful conduct, and they weren't made. And on that basis, the Court found that the
30 exclusion in the release didn't apply. So we would argue that it's -- it's not fair, and it's
31 certainly inconsistent with the decision for it to be argued on behalf of Ms. Rose now that
32 there were allegations of fraud or deceitful conduct or conduct analogous to criminal
33 conduct when this -- the decision found the opposite.

34
35 And then moving on to the -- specifically dealing with the release issue, we heard this
36 morning the argument made that when we say there was no authority supporting their
37 interpretation of Section 122(3) which provides that a release isn't valid if it purports to
38 relieve a director from liability for breaches of their duties or -- or absolve them of their
39 duty to comply with their obligations under the Act, under the *Business Corporations Act*,
40 what we say in the brief is that we still haven't seen an authority, obviously other than the
41 Court's reasons, to say -- to support that conclusion from -- from Ms. Rose, and that's why

1 we go through those cases.

2
3 We have the -- the *McMurdo* (*phonetic*) case. We have the *Tongue* case and the *Tongue*
4 Court of Appeal case. And those are the cases that were available before the Court made
5 its reasons in this case, and that's what would have informed the trustee's decision to bring
6 a suit. Does Section 122(3) apply or not? And so it's difficult for, again, the argument to be
7 made that we ought to have known that this Court would interpret Section 122(3) a certain
8 way and, therefore, we were suing in the face of the release. There is no -- no basis to
9 suggest that the trustee didn't have a good faith basis to believe that Section 122(3) had
10 the -- should be interpreted the way the trustee believed it should be interpreted. Ultimately,
11 this Court found that was wrong, but that was ultimately decided. That doesn't mean that
12 that had been decided already. So every time there has been a submission made that the
13 trustee was suing in the face of the release, it ignores the fact that Section 122(3) was
14 pleaded and the trustee believed that its interpretation of Section 122(3) was correct. And
15 the fact that this Court ultimately disagreed doesn't mean that the trustee was being reckless
16 or vexatious or trying to target Ms. Rose.

17
18 And, again, the trustee doesn't dispute that Ms. Rose -- that it got it wrong. That's what this
19 Court found. We aren't going to suggest that the -- it would not be honest to suggest that
20 we agree with that because there is an appeal pending, but this Court found that we were
21 wrong and, therefore, the trustee should pay Schedule C costs. That does not mean that the
22 trustee should pay enhanced costs on the basis that it always knew it was wrong and sued
23 anyways.

24
25 So -- and then with respect to the other important factual issue that was discussed this
26 morning was the alleged benefit that Ms. Rose obtained from the transaction. And the
27 argument, then, essentially made was that our submissions on that were inconsistent with
28 Your Lordship's decision, and we're somehow not giving you deference to that and trying
29 to reargue the issue. That is certainly not what we're trying to do. Although, I would say
30 that the trustee -- or, pardon me, the Court did not find that Ms. Rose didn't obtain a benefit.
31 The claim was dismissed on another basis, which was the release. So there wasn't a finding
32 that -- that there was no benefit.

33
34 But we -- we would -- what we were discussing in the brief as a response to the allegation
35 that Mr. Darby gave "false evidence under oath" to support the baseless allegation that Ms.
36 Rose benefitted from the transaction, what we point out in -- and I think the submission
37 made this morning was that it was "logically absurd" to suggest that Ms. Rose benefitted
38 personally from the transaction. What we cited in the brief is Mr. Darby's evidence in cross-
39 examination on this point where it's put to him that the PEI share price did not go up
40 immediately after the transaction, and Mr. Darby provides his response to that, which is
41 three -- three different things. One that's based on -- and this is all in the transcripts. Pardon

1 me, My Lord. The November -- pardon me, the November transcripts of Mr. Darby's cross-
2 examination, page 96 and 97. That's from back in 2018.

3

4 THE COURT: What -- what tab is that, sir?

5

6 MR. RASMUSSEN: I think that was filed separately as a -- a separate
7 document.

8

9 THE COURT: So it's not in the book --

10

11 MR. RASMUSSEN: -- I don't think that's in --

12

13 THE COURT: Okay. Not in the book of authorities, you mean?

14

15 MR. RASMUSSEN: I don't believe it is.

16

17 THE COURT: Okay.

18

19 MR. RASMUSSEN: It's certainly not in our book of authorities, My
20 Lord. Apologies for that. But the -- it's at page 96 and 97, and we have our -- we have
21 quoted the relevant portions in paragraph 59 of our brief in response to the submission
22 that -- the submission made in the brief -- in this -- the submission on behalf of Ms. Rose
23 is the unchallenged evidence that Ms. Rose clearly did not benefit. And that, we're -- we're
24 addressing -- and this is why Mr. Darby apparently lied under oath, and we're -- we're
25 responding to that by saying that Mr. Darby is cross-examined on this point, and the -- the
26 evidence referred to as unchallenged evidence was their evidence that the share price didn't
27 go up immediately after the transaction, and what Mr. Darby says in response to that is
28 that, one, the assumption is, and this is at paragraph 59.1, the assumption -- the built-in
29 assumption is that the shares were not over valued to begin with. And then the -- the second
30 (INDISCERNIBLE) with regard to paragraph 59.2 is that if there was an
31 (INDISCERNIBLE) it would be the bill itself over a short-term window. So
32 (INDISCERNIBLE) as well. And then there is somewhat more of a nuanced point Mr.
33 Darby makes, which is that markets aren't necessarily efficient. Right? So the idea
34 that -- the fallacy that the minute something changes, that's automatically perfectly priced
35 until the market automatically adjusts the price of a -- of a share to match that information.
36 So that was part of what he was saying as well that the assumption that this would
37 automatically be reflected immediately in the share price change is a -- is a big assumption.

38

39 So, again, this is -- this is the evidence cited as unchallenged evidence that Ms. Rose clearly
40 did not benefit. The point the trustee made -- makes is that the alleged benefit has nothing
41 to do with short-term share pricing (INDISCERNIBLE). It has to do with the various things

1 that are cited in Mr. Darby's affidavit, which is unloading liabilities and improving the
2 balance sheet of the Perpetual entities (INDISCERNIBLE). Ms. Rose was a shareholder, a
3 significant shareholder, and a director and president of Perpetual Energy. So the -- the point
4 is not that Ms. Rose really did benefit from the -- from the asset transaction. The point is
5 simply to address the submission that it was logically impossible for her to have benefitted
6 (INDISCERNIBLE) reckless or vexatious or -- logically absurd, I apologize. The subject
7 was reckless or vexatious for the trustee to make that allegation.

8
9 The trustee isn't trying to argue that it was right and the Court was wrong to dismiss or
10 strike its claims. The trustee is arguing that they couldn't have known that in advance, and
11 there was a reasonable basis for the -- the allegations in contrast with an allegation that Ms.
12 Rose engaged in deceitful conduct or fraud, which there was no applicable basis for, and
13 that's why the allegation wasn't made.

14
15 And then moving on to the argument that another one of the factual issues discussed this
16 morning was that the argument was made that they were contemptuous of the Court's
17 decision because we assert that Ms. Rose caused PEI to enter into the share purchase
18 transaction, and I -- and I tried to make the point this morning that what we're referring to
19 is the factual allegation that Ms. Rose signed the documents. This Court found that Ms.
20 Rose is not the directing mind of PEOC and that Perpetual Energy was controlling PEOC
21 and that -- the finding was that could PEOC -- Perpetual -- Ms. Rose could not cause
22 Perpetual Energy to do anything.

23
24 (INDISCERNIBLE) what we -- what we're pointing out as the factual allegation is that Ms.
25 Rose signed the document. And this relates to this argument that none of these documents
26 relate to Ms. Rose or concern Ms. Rose other than the release. We're saying Ms. Rose
27 signed that document. She -- Ms. Rose signed the share purchase agreement. Ms. Rose
28 signed the asset purchase agreement and the resolution authorizing PEOC to enter into the
29 transaction. Those are factual allegations. They're not in dispute. They can't really be
30 denied because there is -- there is no dispute that Ms. Rose did sign those documents. So
31 for clarity that's -- that's all we're saying. We're not trying to reargue the issue of whether
32 Ms. Rose is a directing mind or not. As my friend says, that's an issue for the Court of
33 Appeal, that's not an issue for us today.

34
35 And then with respect to the oppression issue, I dealt with this earlier in relation to the
36 Perpetual defendants. They -- they echo Ms. Rose's submissions. My friend, on behalf of
37 Ms. Rose, described the issue we raised in the brief that the standing issue as a sub sub
38 issue is a -- that was dealt with as a matter of process whether we were required to obtain
39 a standing order or not as was argued before Your Lordship in November 2018. The
40 authorities cited by Ms. -- on behalf of Ms. Rose, those six cases say the opposite. This
41 Court reviewed the law and -- and found that generally standing is dealt with along with

1 the substantive issues, as we said it should be, so there is no basis to suggest that the trustee
2 acted improperly by not obtaining a standing order before seeking relief from oppression.
3 And the -- the argument appears that -- that -- that's a -- that's a technical issue, that's a
4 procedural issue, but in my submission, every time the argument is made that the trustee
5 acted without legal authority in bringing an oppression claim, what they're really saying is
6 that the trustee should have obtained leave to grant a claim for oppression, and that's not
7 the law that's -- that can -- the most the law says, and this is what the Court found in the
8 reasons, is that it can be dealt with as a threshold issue in certain circumstances. That does
9 not mean that there is a requirement that the trustee should have obtained leave before
10 bringing a claim for oppression. It's fundamentally different from a claim where a party
11 seeks to bring a derivative action, and they have to get leave from the Court before filing a
12 derivative claim. That's a LEAP requirement. It's absolutely a two-step process. That's what
13 the *Business Corporations Act* says. It doesn't say that about oppression. And, again, this
14 Court found that generally standing is dealt with at the same time as the merits, as occurred
15 in this -- in this case. And that's -- there is -- if the Court needs it, that's at paragraphs 175
16 and 176 (INDISCERNIBLE).

17
18 So then we say that it's -- it's not a simply a (INDISCERNIBLE) issue or a sub sub issue.
19 It underlies the whole argument for enhanced costs in the oppression claim, which is that
20 the trustee was acting without legal authority, somehow improperly in seeking
21 (INDISCERNIBLE). And that's not the case. Ultimately, the Court found that standing
22 shouldn't be conferred on the trustee, but that was the ultimate result. That couldn't have
23 been known in advance. So it's *ex po facto* reasoning to apply that and say that the trustee
24 ought to have known in August 2018 that the (INDISCERNIBLE) would be struck.

25
26 THE COURT: Thank you.

27
28 MR. RASMUSSEN: And then given the similar -- a variation of the
29 same argument was made that the trustee ought to have known that if it had -- the argument
30 was made that if the trustee had considered *Redwater*, then it would never have brought
31 this claim for oppression because obviously *Redwater* says that the AER is not a creditor.
32 The problem is that *Redwater* was decided in January 2019, and the claim was brought in
33 August 2018. And the law before the Supreme Court made its decision in *Redwater* was
34 that the AER was a creditor based on the Court of Appeal's decision in *Redwater*. And
35 that's -- that's what the Court of Appeal said in declining to stay its reasons in *Redwater*,
36 which is that we can't stay the precedential effect of a Court of Appeal decision. The law
37 is the law. We can't stay that. And that's -- and that's why we cite that. We cite that at
38 paragraph 83 of our -- our brief. 83.2 I believe it is, Sir. So the law at the time -- the law
39 continues to change, evolve, and the trustee can't be faulted for not anticipating what would
40 happen in the Supreme Court after it filed its claim.

41

1 And then paragraph 80 to 81 deals with the argument that the trustee somehow didn't
2 investigate and -- and was -- acted improperly in making the assertions it did about the
3 municipal taxes. That's dealt with in paragraphs eighty -- 81.9 and 81.2 that figures cited
4 by the trustee came from the actual advance on disclosure. It's from their own record. The
5 trustee did investigate. It turned out the number was wrong, as -- as cited in paragraph 81.2,
6 but there still was an amount outstanding, as there isn't any suggestion that the trustee
7 simply didn't investigate. It -- it just based its number on the Perpetual 2015 number, not
8 the number that came out in 2016.

9
10 And then -- and then the argument made in -- that's dealt with by the trustee in paragraph
11 82 is the submission that if the trustee had looked at the balance sheet, it would have seen
12 that the ADR was not accredited. That's a part of the narrative that the trustee had to have
13 known all along that its clients were without merit and proceeded anyway. And what we
14 have done is cited -- cited the balance sheet from the share purchase agreement that
15 excludes ARO. So the -- the AR1 creditor wouldn't have appeared on that balance sheet
16 anyway.

17
18 Your Honour, I have dealt with the *Redwater* -- the (INDISCERNIBLE) fallacy with
19 *Redwater* which is to say that we ought to have known how *Redwater* would be decided
20 ultimately when we made our decision -- or when we filed our claim, which simply isn't
21 consistent with the reality that the Supreme Court agreed with the Court of Appeal on
22 *Redwater*, and they then -- the trust -- the trustee (INDISCERNIBLE) the opposite
23 argument, that it acted properly by not buying what (INDISCERNIBLE) in *Redwater*.

24
25 And then the -- the overarching issue vis-à-vis the presentation of the facts is that the trustee
26 wasn't -- didn't simply get it wrong and -- and make a claim and then have our claim struck
27 (INDISCERNIBLE). We don't just think that that's happened and that we should pay
28 Schedule C costs because we lost. The argument is made that the trustee ought to have
29 known that all along, that what it was doing was really reprehensible, egregious, scandalous
30 or outrageous in a way that would justify an award of enhanced costs, and there is simply
31 no evidence to suggest it. A good example of that is the argument made that the trustee
32 was, I think, trying to use his (INDISCERNIBLE) making -- engaging in blitzkrieg tactics
33 and the -- there were a few -- two specific examples, at least two specific examples, but the
34 one was the August 30 hearing that we heard about this morning that the trustee acted
35 improperly and tried to launch a blitzkrieg attack on Ms. Rose and the Perpetual defendants
36 and that this was reflected in the August 30 hearing. Now, I don't expect the Court has that
37 available. It's in -- (INDISCERNIBLE) in her first brief that I think -- so it's at Tab 59 on
38 the November 2018 authorities.

39
40 THE COURT:

Yeah, I --

41

1 MR. RASMUSSEN: If I can just --

2

3 THE COURT: I did not bring that brief in. Give me that cite,
4 that reference again?

5

6 MR. RASMUSSEN: It's at Tab 59 of the book of authorities of Ms.
7 Rose filed November 1, 2018, volume 2 of 2. And there are a few -- a few relevant points
8 to make very briefly. But, yes, so this is the transcript of the August 30 hearing before
9 Justice Jeffrey, and I'm simply referring to this to address the idea that this was blitzkrieg
10 litigation. What happened was the trustee filed its application and scheduled it for a half
11 hour hearing to deal with scheduling, and the trustee is not opposed to (INDISCERNIBLE).
12 The purpose of that hearing was to schedule the next steps. And then Mr. de Waal advised
13 Justice Jeffrey, this is at line 19 of the transcript: (as read)

14

15 When we served the application, we said that we only have a half
16 hour slot today, and we anticipate this will be adjourned through
17 the course of discussion with opposing counsel.

18

19 And then at line 35, again Mr. de Waal confirms: (as read)

20

21 So for today, My Lord, the good news is that we seem to agree that
22 all these applications should be adjourned. The question, as I
23 understand it, is whether our application, the trustee's application,
24 should not proceed until the other applications, et cetera, until this
25 application has been heard.

26

27 So the purpose of the August 30 hearing, which was scheduled for half an hour, was not to
28 apply for summary judgment on a 200 million dollar claim and engage in blitzkrieg tactics.
29 It was to deal with scheduling, and that's what happened. And then -- then it was decided
30 that the defendants' application would go first and that's what happened.

31

32 So, again, this is part of the narrative that takes us all the way back to the law, to the *Trimac*
33 case. The narrative is that the trustee acted improperly and forced the defendants to exhaust
34 the legal proceedings to get what was rightfully theirs all along to make this fit with the
35 *Trimac* fact pattern. It simply doesn't. The trustee scheduled this from the outset
36 (INDISCERNIBLE) so that it could go as scheduled. And the defendants' applications to
37 strike and dismiss were dealt with first, and that was the quickest way that could be done.
38 There was no way that the proceedings could be more expeditious in terms of resolving the
39 issues than if the trustee simply discontinued its own claim. There was not this dragged out
40 fight to the death that these -- these -- that the *Trimac* case indicates. That's not what
41 happened here. The trustee filed its application and then allowed scheduling the next steps

1 and that's what happened. So there was an application brought, and it was dealt with, and
2 some of the claims were dismissed against the Perpetual defendants. All of the claims were
3 dismissed against Ms. Rose. It's -- it's not consistent with any kind of allegation of
4 blitzkrieg tactics or forcing someone to exhaust legal proceedings. That's -- that's simply
5 not what happened in this case.

6
7 The other example cited is that -- well, the example cited this morning was that -- was this
8 issue of the clarification hearing in February 2020 and the -- the idea that the trustee acted
9 improperly because it believed that it was successful on the Section 96 claim. Mr. Darby
10 acted improperly by saying in an affidavit that he believed that the trustee was successful
11 on it. (INDISCERNIBLE) the -- the counterpoint to that is that, as Ms. Rose acknowledges
12 in her brief, that she filed an appeal from the August 2019 decision because -- although a
13 submission is made on her behalf that it was -- the reasons were clear, Ms. Rose filed an
14 appeal because they weren't clear because, you know, that -- that -- it wasn't sufficiently
15 clear to eliminate the need for an appeal which was discontinued after the February
16 2018 -- February 2020 clarification hearing. So I think it's something of a double standard
17 to say that it should have been clear enough for the trustee when it wasn't clear enough for
18 Ms. Rose. It's not a criticism of Ms. Rose. It's simply that both sides were unclear as to the
19 effect of Your Lordship's decision on a Section 96 claim and that was subsequently
20 clarified.

21
22 Now, the submission made of behalf of Ms. Rose is that the trustee "has not resiled from
23 its stated position," quoting "that it will seek costs against Ms. Rose." And the citation for
24 that is Mr. Darby's November 2019 transcript. Now, that was before the clarification
25 hearing, so -- and we certainly tried to make it clear that we don't dispute that Ms. Rose is
26 entitled to costs, Schedule C costs, and I think it's somewhat unfair to cite the trustee's
27 position from November 2019 when this Court -- this Court clarified the ruling in February
28 2020.

29
30 And -- and then just jumping back to the issue of blitzkrieg tactics, the timelines proposed
31 by the trustee were lengthy by commercial list standards. They were expedited by the
32 standards of normal civil litigation, but this -- this is a Section 96 claim at its -- certainly at
33 its -- well, it's only a Section (INDISCERNIBLE) claim now, but at the time one of the
34 central claims was the Section 96 claim. That's -- there is a reason that this was scheduled
35 on the commercial list, so I think -- I think it's somewhat unfair to suggest that the trustee
36 should have been complying with normal litigation standards when it was bringing a
37 Section 96 claim that it believed was (INDISCERNIBLE) the issues outstanding. So, again,
38 I think that is consistent with an argument that there were any blitzkrieg tactics employed
39 there.

40
41 And then something was made of the fact that the trustee sought full indemnity costs, that

1 somehow when all the trustee reference points is stayed, it -- (INDISCERNIBLE) seek to
2 recover all of its costs and not impose those on the estate, so I don't think there is anything
3 unusual or improper about the trustee seeking full indemnity costs in a -- in a Section 96
4 claim among others. So, again, I would say that that -- that that does not support an
5 allegation that there was any kind of improper conduct in the litigation.

6
7 The argument that referred to the August long weekend and the surprise, that all is
8 predicated on the assumption that the trustee insisted this proceed immediately, and that's
9 not what happened. That was filed for a scheduling hearing to determine how next steps
10 would go. There was no immediate insistence that the trustee's application would proceed
11 in August 2018. It's -- there is no basis for it.

12
13 Unless there are any questions, I propose to deal with the claim against the argument that
14 there are no -- there were no exigible assets of the estate, therefore, the trustee -- therefore
15 PWC should be personally liable instead of the estate. So I think the -- addressing that from
16 the trustee's perspective, the problem with that, and this is identified in our brief, we have
17 described it as an -- as an abuse of process problem is that the argument made on that point
18 to say that the assets are worthless, the estate has no exigible assets, those are -- those aren't
19 (INDISCERNIBLE) directly consistent with the position taken before Your Lordship in
20 our arguing the substantive application. They are consistent with the pleadings upon which
21 this case was decided by Your Lordship. So the -- it's -- and we think it's an -- it's an issue
22 of fundamental fairness for the -- (INDISCERNIBLE) costs of a decision to seek that on a
23 basis -- on a basis consistent with the decision. So a party is not entitled to succeed on one
24 basis and then argue the opposite basis in seeking enhanced costs, and -- and we say that's
25 exactly what happened here with the argument that the estate -- the assets in the estate are
26 worthless because of the liabilities associated with them. That's -- that was obviously a
27 significant issue before the -- before Your Lordship. The argument was that the ARO are
28 not liabilities. That was accepted. And the reasons referred to the value of the assets being
29 north of 4 million dollars. That is cited by the Perpetual defendants in seeking summary
30 dismissal. So in that -- in that context, the -- the Perpetual defendants cite Your Lordship's
31 reasons for the proposition, and they have an affidavit to go with that, to say the assets were
32 really worth more than 4 million dollars (INDISCERNIBLE). However, does the ARO
33 have a value of nil. They're not -- they're not liabilities.

34
35 However, in seeking costs and in seeking security for costs, the opposite argument is made,
36 and it's the same argument that was presented in the Court of Appeal, which is that
37 the -- because of the ARO described as the liabilities associated with the assets, they're
38 worthless and, therefore, the trustee should face adjudicator costs and, therefore, the
39 argument is made today that the estate can't pay and PWA should be liable, not the trustee.
40 So the problem we have with that is, again, that it's directly inconsistent with the application
41 for summary dismissal which argues a diametrically opposed position which is that ARO

1 are not liabilities. We can ignore them in determining value. Therefore, the assets in the
2 estate are worth over 4 million dollars. We would you say that as a matter of fairness and
3 in order to avoid an abuse of process, the defendants and Ms. Rose need to maintain a
4 consistent argument on the facts. They aren't entitled to argue alternative facts depending
5 on what application is before the Court on a given day. I think that's certainly consistent
6 with the case law we cited, and we would say that the difficulty presented, one of the things,
7 by these kind of -- by these arguments is that (INDISCERNIBLE) yourself, and this is cited
8 in the -- pardon me, My Lord, it's the *City of Calgary* decision at paragraph 2 in our
9 authorities. It's dealing with the basic principles of abuse of process, and one of them is
10 that the goal is to avoid inconsistent decisions. And that --

11
12 THE COURT: Sorry, give me that -- sorry. Give me that
13 reference again, sir.

14
15 MR. RASMUSSEN: Pardon me, My Lord. It's at Tab 2 of our
16 authorities. And it's the *City of Calgary* --

17
18 THE COURT: The *City of Calgary*. I'm there. Thank you.

19
20 MR. RASMUSSEN: -- v. *The Alberta Human Rights Commission*.

21
22 THE COURT: M-hm. By Justice Hawco. Go ahead.

23
24 MR. RASMUSSEN: Yeah. So the -- among other concerns is that we
25 have -- the result of this approach is that we have inconsistent decisions
26 (INDISCERNIBLE). And if we argue -- if people are allowed to argue one set of facts on
27 a certain application and then argue the opposite set of facts on another application, the
28 factual findings of the Court are going to be inconsistent, assuming the Court agrees with
29 both -- both sets of arguments. And an example of that is the decision from Justice Veldhuis
30 that's cited by both Ms. Rose in her brief, it's also relied on by the Perpetual defendants
31 seeking security for costs, and it's cited at paragraph 21 of our brief on costs.

32
33 THE COURT: I'm there, sir.

34
35 MR. RASMUSSEN: The -- the argument and -- and Justice Veldhuis
36 refers to the trustee's submission that -- that if the trustee is ultimately unsuccessful in -- in
37 (INDISCERNIBLE) of the litigation, these wells -- or these 2500 (INDISCERNIBLE)
38 wells will be available for sale, and therefore the Court, given that costs are only payable
39 if the trustee loses, the trustee says those assets are potentially available. And Justice
40 Veldhuis rejects that argument and what Her Ladyship says is that: (as read)

41

1 The respondent has given no indication as to their value --

2
3 Referring to the 2500 (INDISCERNIBLE) wells (INDISCERNIBLE). (as read)

4
5 -- or any of the liabilities associated with these assets.

6
7 And then jumping to the end: (as read)

8
9 In Alberta's current economic climate, 2500 wells with nothing
10 more, may well be equivalent to a \$3 bill.

11
12 So this is -- this is a decision that's out there, and as we point out in the brief at paragraph
13 22, this (INDISCERNIBLE) was not made by the Court to respond to (INDISCERNIBLE)
14 in the sense that it came up with this. This was the result of an argument that was made by
15 both the Perpetual defendants and Ms. Rose that, as cited in -- the (INDISCERNIBLE) for
16 Ms. Rose's argument is cited at paragraph 22 on our brief where there is a reference to the
17 ostensibly mounting passive retirement obligations, and that even if the trustee is
18 successful, the result will be (INDISCERNIBLE) and their associate liability to the Sequoia
19 (INDISCERNIBLE).

20
21 So, again, the problem we have, and I submit that it's an abuse of process issue, is that the
22 argument on the merits is inconsistent with the argument on costs, the argument on security
23 for costs, which is that in the one hand -- on the one hand ARO are a liability and may
24 affect the value of assets such that the estate can't pay a costs award, meaning that PWC
25 should be liable instead of the trustee in bankruptcy. And then the argument on the merits
26 is that ARO are not liabilities. They can be disregarded for the purposes of value, and
27 therefore, the claim should be struck or dismissed. And that's the application that will be
28 heard before Your Lordship in September. And we say that on the issues of fundamental
29 importance, a party cannot rely on alternative evidence and advance inconsistent facts
30 depending on what application is being argued on a given day or the risk is, beyond a
31 fairness concern, that it affects the administration of justice because we have -- effectively
32 we have one court saying 'X' and another court saying not 'X' in the same proceeding. And
33 that's obviously a major problem, and it's magnified in my submission in this case
34 where -- given the level of importance this has for the -- for the community and the law.
35 This isn't -- it's not to suggest that this is less of a problem where less attention is being
36 paid to these decisions, but it's a particularly significant problem where precedent is
37 potentially significant (INDISCERNIBLE) decisions and potentially more than two
38 inconsistent decisions.

39
40 And the point we make beginning at paragraph 24 is that this is also inconsistent with the
41 pleadings which have to be the basis for any decision, and the pleading -- the pleading

1 made on behalf of -- and this is cited at paragraph 25. The pleading on behalf of the
2 Perpetual defendants, which is the Court made the right reference by (INDISCERNIBLE),
3 and this (INDISCERNIBLE) August 2018 is that the value of (INDISCERNIBLE)
4 Sequoia's liabilities at the time of the transaction is approximately equivalent to the value
5 of its assets. So this is the argument that we're pleading that the Perpetual defendants and
6 Ms. Rose relied on before this Court in getting the judgment, the cost of which we're
7 dealing with today. And in my submission, they can't simply, having obtained the
8 dismissal, change the argument to say that, well, the assets are worthless, so we should get
9 costs against PWC and not the trustee.

10
11 And one of the cases we cite in support of this argument, there is the -- the use of
12 (INDISCERNIBLE) cost submissions and summary dismissal submissions, one of the
13 cases we cite is at Tab 1 of the trustee's authorities. That's the *Mystar* case, Justice Brooker.
14 And His Lordship reviews the law in abuse of process, a number of cases on it, and
15 comments on the impropriety of pleading inconsistent (INDISCERNIBLE). And
16 that's -- that's at paragraph 62 in that -- in that case.

17
18 So a party is not allowed to plead inconsistent facts in different proceedings if it has full
19 knowledge of the facts. And we would say here that we have gone well beyond pleading
20 because we have parties that are making arguments directly inconsistent with their
21 pleadings in the same proceeding and, in fact, attempting to obtain enhanced costs resulting
22 from a decision of this Court on the basis of arguments inconsistent with what was argued
23 in that (INDISCERNIBLE) and that's fundamentally problematic in our submission.

24
25 Perhaps I'll just -- unless the Court has any immediate questions, I'll conclude just by
26 summarizing the position on behalf of the trustee on the -- both of the costs submissions.
27 The submission on the law, I think, is clear that full indemnity costs of the type being
28 sought here are virtually unheard of unless they're provided for in a contract. And that
29 doesn't mean that simply there is a contract at issue. That means there is a contract that says
30 if you sue me, you will pay, or if I have to sue you, I will get full indemnity costs. It's not
31 unusual to have that in a contract, but that's not the case here.

32
33 The other -- the other basic legal proposition is that, as in the *Manson* case, is that we
34 needed to -- there has to be a finding of intentional misconduct that is reprehensible,
35 egregious, scandalous or outrageous. Simply having your claim dismissed or struck, that
36 does not give rise to a claim for enhanced costs. It gives rise to a claim for Schedule C
37 costs, and we don't dispute that Ms. Rose is entitled to Schedule C costs. What we take
38 issue with is the narrative that the trustee was engaging in vexatious litigation, making
39 allegations that were cruel, were intended to punish Ms. Rose. I have -- I have made the
40 point, and I'll briefly repeat it, which is that this Court found that the exclusion in the release
41 didn't apply because, and this is at paragraph 294 of the reasons, because there was no

1 indication of fraud, criminal conduct, or deceitful conduct with respect to Ms. Rose. That's
2 the finding on which the Court says, well, the release doesn't apply. The release is a
3 defence.

4
5 Again, if there was a scintilla of evidence to support the allegation that-- pardon me. If
6 there was a scintilla of merit to the accusation that the trustee was doing this in bad faith to
7 hurt Ms. Rose, then there would have been an allegation of deceitful conduct, but there
8 wasn't because there was no reasonable basis for it. And -- and that is a fundamental fact,
9 in my submission, which is inconsistent with this narrative that the trustee was out to get
10 Ms. Rose. The other -- the other --

11
12 THE COURT: Mr. Rasmussen.

13
14 MR. RASMUSSEN: -- (INDISCERNIBLE).

15
16 THE COURT: If I can just pause you there, sir.

17
18 MR. RASMUSSEN: Yes.

19
20 THE COURT: I -- you broke up a little bit on that last comment.
21 You said if there was a scintilla of evidence. I didn't hear the balance of that, sir.

22
23 MR. RASMUSSEN: What I would -- I corrected myself to say if there
24 was a -- if there was a scintilla of merit to the argument that the trustee was out to punish
25 or hurt or make cruel allegations against Ms. Rose, then there would have been an
26 allegation of deceitful conduct or fraud, and this Court found that there was no such
27 allegation, and on that basis found that the release was a defence because the exclusion
28 didn't apply. That's paragraph 294 in your reasons. And, again, the -- what the facts are
29 consistent with is that the trustee believed that there was merit to its claims. The fact that
30 this Court ultimately found that the claims against Ms. Rose should be struck or dismissed
31 does not really mean that there was no basis to bring those claims in the first place, that the
32 trustee couldn't have had a good faith basis to believe that it was right. The fact that it was
33 ultimately wrong did not -- does not mean that it had no good faith basis for any claims in
34 the first place. Otherwise, and I made this point before, every time a claim was struck or
35 dismissed, there would be a claim for enhanced costs, and that's simply not the way it works
36 unless, again, there is reprehensible, egregious, scandalous or outrageous conduct, it's
37 intentional, there isn't a basis to award those -- the types of costs that my friends are seeking
38 on behalf of their clients.

39
40 And then briefly with respect to the Perpetual defendants, we would say that the underlying
41 factual allegations have not been dismissed. The fact remains that the trustee is seeking to

1 set aside the asset transaction on the basis that it is improper and that remains -- the -- that
2 claim remains extant at this point. The Perpetual defendants say that we live to die another
3 day and that day is in September, but in my submission that supports the trustee's argument
4 that costs should be in the cause. If (INDISCERNIBLE) are successful, they will get their
5 costs in September. There isn't a great deal of prejudice there that would -- that would
6 require the trustee -- pardon me, the Court to make findings in their favour that weren't
7 made in recency. So there is -- there is a fundamental difference between striking some of
8 the claims against the Perpetual defendants and the reasons vindicating what they did,
9 finding that the asset transaction was -- was fine. That was good. There was no oppression.
10 That isn't what the Court found. The Court struck some of the claims, but the factual
11 allegations weren't dismissed on the basis they had no merit. Again, they basically remain
12 the same, and the potential liability of the Perpetual defendants has not changed. They were
13 potentially liable for the consequences of the asset transaction.

14
15 With respect to Ms. Rose, just as a quick summary, on the release, the argument made is
16 that we ought to have known that the reasons would disagree with our interpretation of
17 Section 122(3), and we say that we couldn't have known that. We don't have a crystal ball
18 that would allow us to predict either what this Court will rule or what the Supreme Court
19 would rule in *Redwater*. Those are future events. Those can't be known at that time. And
20 that's why we look to the precedents that were available at the time and say that none of
21 them support this interpretation. How could we have known that -- that this would
22 ultimately be found to be without merit? There was a reasonable basis to make the
23 allegation.

24
25 And then similarly with standing, we -- again, the argument is made on the oppression
26 issue that we ought to have known what this Court would do. We ought to have known
27 what the Supreme Court would do in *Redwater*, and we simply could not have known. You
28 look to the cases cited by Ms. Rose, and they support the idea that you (INDISCERNIBLE)
29 for oppression and deal with standing with the merits. And that's what happened here.
30 There was nothing improper. The trustee didn't act improperly in seeking relief from
31 oppression.

32
33 And then finally, briefly, dealing with argument that essentially the only document that had
34 anything to do Ms. Rose was the release. We say, well, look at all the other documents.
35 And, again, we're not taking issue with the Court's findings. We're just simply saying that
36 Ms. Rose signed those documents. That's all we're saying. There was a basis to make the
37 allegation, and that's really the only issue for the Court to determine. Was there a reasonable
38 basis, or were these really reckless or vexatious allegations?

39
40 And then finally on the -- this argument that the trustee engaged in blitzkrieg tactics. If the
41 Court goes to that transcript that they cited in Ms. Rose's materials, reads that transcript,

1 there is no merit to the argument that -- that this was being rushed or that there was some
2 sort of lightning strike plan (INDISCERNIBLE) simply to schedule -- to schedule this
3 matter and not that the trustee wants to deal with this claim expeditiously. It's a Section 96
4 claim involving thousands of wells. The trustee was entitled to seek summary judgment on
5 that. There was no -- there was nothing improper about it.

6
7 And then the issue of clarification, the -- or the issue of the clarification hearing, I
8 mentioned that Ms. Rose appealed as well because it wasn't really clear whether it -- what
9 happened with the Section 96 claim. We would say that there can't be a double standard.
10 If -- if it was not clear enough for Ms. Rose not to have to appeal to be covered potentially
11 had (INDISCERNIBLE), then why was it crystal clear to the trustee as is said on her
12 (INDISCERNIBLE). The same standards should apply to both sides.

13
14 And then just to conclude on this issue of -- of the argument that the costs award should be
15 against PWC personally instead of the trustee. From the trustee's perspective, the problem
16 we have is that we have an abuse of process (INDISCERNIBLE). We have an abuse of
17 process concern where we have essentially diametrically opposed arguments on the facts
18 and the law being advanced in two -- in the merits issue and the costs issue, and we say
19 that, particularly the applicant, should have to -- can't argue inconsistent -- make
20 inconsistent arguments and certainly can't rely on alternative evidence where its arguing a
21 version of the facts, a different version of the facts depending on the application of the day
22 because particularly where decisions are reported, we have inconsistent decisions where
23 the facts are 'X' in one application and not 'X' in another hearing decision. And that -- and
24 as indicated in the *City of Calgary* decision raises serious questions about the integrity of
25 the system where essentially two plus two might equal four in one decision and five in
26 another or six in another decision, and that's -- it doesn't give credibility to the system. So
27 we would say that that's a major problem here. It's dealt with in more detail in our security
28 for costs submissions and in our summary dismissal submissions.

29
30 Unless there are any questions, those are our submissions in response to the application for
31 costs. Thank you.

32
33 THE COURT: Okay. Thank you, sir.

34
35 Any reply?

36
37 MR. LEITL: My Lord, if I may -- I have some --

38
39 THE COURT: Sorry.

40
41 MR. LEITL: I have some points in reply.

1
2 THE COURT: Yes, certainly, sir.

3
4 **Submissions by Mr. Leidl**

5
6 MR. LEIDL: I don't know whether Mr. Chiswell has, I think
7 he might, but I have some points in reply.

8
9 Quickly on the blitzkrieg point, you know, one of the -- one of the more frustrating things
10 as counsel, My Lord, is when someone tells the Court what your argument is and then
11 misstates it. And obviously our blitzkrieg argument had nothing to do with the -- it was not
12 primarily founded on what happened before Justice Jeffrey. What it was founded upon was
13 that Ms. Rose had been cooperating with the trustee throughout its investigation. It issued
14 its preliminary reports when -- not telling her its final finding, and it never told her that it
15 was secretly planning to sue her for a quarter of a billion dollars. And then it dumped this
16 lawsuit on her over the -- on the August long weekend. That was the facts that are not in
17 dispute that I referred to, Sir.

18
19 Now, on -- on the test for full indemnity costs and my friend attempting to raise the bar
20 saying that the Court has to find intentional misconduct, that is simply not the case -- and
21 perhaps Mr. Rasmussen can go on mute. Certainly you don't get to cross-examine witnesses
22 in support of a cost application so you can't put that to them on the stand. What the Court
23 has to do is draw inferences from the conduct of the parties, and here we had a multi-
24 billion-dollar corporation, a very experienced trustee in bankruptcy engaging in a lawsuit
25 in a vacuum of investigation, and the Court can infer what it wants in that regard, but there
26 is no mens rea test for a finding of full indemnity costs.

27
28 My friend says that they could not have known that they would have lost the release
29 argument. Well, what does that mean then? What does the release do? Is it just a piece of
30 paper and anybody can sue on it, and if they lose, they say, well, I couldn't have known
31 until you granted your judgment. I just couldn't have known. Except that, as Your Lordship
32 said in the reasons, it's meant to be -- provide a clean slate.

33
34 My friend, again attempting to raise the bar, is arguing that we -- we accused Mr. Darby of
35 perjury. You'll never find that word in our brief. He cited paragraph 26 of our brief which
36 does not allege perjury. It says that without a moment of investigation, Mr. Darby falsely
37 swore that Ms. Rose had personally benefitted, when he admitted on cross-examination
38 that he had not asked her about it, and he had not looked at the PEI share price and done
39 no investigation.

40
41 Now, my friend says that the Court had made no finding of a personal -- that there was no

1 personal benefit. What my friend forgets is that we set out the evidence on personal benefit
2 in detail in our two briefs of February 2020, and the Court accepted our brief or adopted
3 our brief as part of its reasons. And in that brief, just by way of example, we noted that
4 there was no allegation -- sorry, that the only pleading in the case of a personal benefit was
5 that Ms. Rose personally benefitted from the asset transaction. And I took you in my main
6 submissions through when you grilled Mr. de Waal at the hearing where that fell apart,
7 where you said to him, how can you show a personal benefit from the asset transaction
8 when you look at it alone. And Mr. de Waal's answer was there was no -- "it's not a financial
9 benefit, My Lord." That was Mr. de Waal's judicial admission before this Court.

10
11 On the issue of the release, obviously the allegations were much broader than Section 122,
12 but your -- you did find -- you did say there are all kinds of books written on releases, you
13 know, and that maybe the trustee might have read some of those. I'm par -- I'm adding that.
14 And we made the obvious argument at the time that if the trustee's position was correct,
15 then you could never, ever settle a claim against directors, and directors could never obtain
16 DNO insurance. I mean, that was how absurd the logical extension of their position was,
17 and the Court accepted that.

18
19 Now my friend, now that they're in retreat says we didn't allege anything akin to fraud or
20 dishonesty. But let's look at what they actually pleaded, and this is at paragraph 30 of my
21 brief, My Lord. This is from the Statement of Claim.

22
23 THE COURT: Just two --

24
25 MR. LEITL: Rose --

26
27 THE COURT: -- seconds here.

28
29 MR. LEITL: I'm sorry. I apologize.

30
31 THE COURT: That's fine. I'm there, sir. Thank you.

32
33 MR. LEITL: "Rose breached her duties to PEOC." And what
34 are those duties? The duty of loyalty and the duty of care. And how did she do that? Failing
35 to act honestly. Now what is that? That's acting dishonestly. Failing to act in good faith.
36 And what does that mean? Acting in bad faith. And then if you go down to 16.3 and 16.5,
37 they say in the pleading -- they allege in the pleading that Ms. Rose is causing PEOC to
38 enter the asset transaction and causing PEI to require 198 to enter the release. Those are
39 breaches of her duty of loyalty and duty of care. Yet today, I almost fell off my chair, Mr.
40 Rasmussen says, All we're saying is that she signed the documents. That's all we meant to
41 say. That's not what they pled. They pled that her signing of those documents was a breach

1 of her duty of loyalty, was an act of dishonesty, and was an act of bad faith. That's
2 something more than just putting pen to paper.

3
4 Now we get to *Redwater*. And my friend says that it wasn't clear before the Supreme Court
5 of Canada decision that, to use his words, the AER is a creditor. It was absolutely clear in
6 the sense that both the Alberta Court of Appeal and the Supreme Court of Canada said for
7 the AER to become a creditor, you have to satisfy the *Abitibi* test. You're not a creditor
8 simply by virtue of the fact that you have these putative regulatory powers that may be
9 exercised one day. And moreover, as you'll recall in this case, My Lord, the question was
10 not whether the AER might become a creditor. The question was whether the AER was a
11 creditor in October 2016 at the time of the transaction. And if my friend is sincere that
12 when the Supreme Court of Canada released its decision in *Redwater* that was a revelation
13 for them, they now understood that the AER would not become a creditor, why did they
14 not drop the oppression claim right then and there. Your Lordship may recall that you asked
15 us to make submissions on the impact of *Weir-Jones* and the impact of *Redwater* before
16 you issued a written decision, and the trustee didn't drop its claim now that it understood
17 that the AER was not a creditor; the trustee doubled down.

18
19 Two more -- two more points, My Lord. I realize I'm going quickly. My friend again raises
20 the fact that Ms. Rose filed a notice of appeal. I can't believe we're arguing this again. We
21 argued before this -- you on February, and Your Lordship made the comment that it's the
22 prudent thing to do, but let me remind the Court in case you have forgotten what happened.
23 The oral reasons came out. We took the position that all claims against Ms. Rose had been
24 dismissed. The trustee communicated to us its position that the Section 96 claim survived,
25 notwithstanding the release. We had not yet received your written reasons. Therefore, we
26 filed an appeal to protect our client's interests until that was clear. That does not mean that
27 we had any doubt about the scope of the decision. We -- what we had to do was face the
28 fact that the trustee would not accept it.

29
30 And -- and the final point, My Lord, on the only answer from my friends in terms of
31 whether PWC should be personally liable, ignoring all the law and focusing only on this
32 claim of abuse of process, let me add some clarity to the issue, the facts around their -- their
33 submission.

34
35 Our position in respect of the ability to claim -- to enforce a costs award against the estate
36 of Sequoia has got nothing to do with the ARO. It's a simple mathematical equation, as
37 admitted by Mr. Darby, that the secured claims on the books of Sequoia are much greater,
38 multiples, of the cash on hand that the trustee has while the trustee continues to burn that
39 cash with litigation like this. It's that simple. And that's what Mr. Darby admitted on cross-
40 examination. That's what Justice Veldhuis found when I quoted that in submissions, and
41 the -- and the panel of the Court of Appeal dismissed the trustee's attempt to -- to undo that

1 decision.

2

3 So we're not arguing anything inconsistent at all. There is no abuse of process at all. We're
4 simply relying on the admission of Mr. Darby and the findings of the Court of Appeal. It's
5 absolutely a matter of fact, which you didn't hear my friend disagree with and that's why
6 he's falling back on this abuse of argument -- abuse of process argument, that a costs award
7 against the estate is not worth the paper it's written on.

8

9 So I understand you may have some questions, but I'll -- I'll -- subject to that, I'll turn it
10 over to Mr. Chiswell, Sir.

11

12 THE COURT: Thank you, Sir.

13

14 **Discussion**

15

16 MR. CHISWELL: My Lord --

17

18 THE COURT: Mr. Chiswell, at your convenience.

19

20 MR. RASMUSSEN: My Lord, it's (INDISCERNIBLE) is it possible
21 to address -- for us to address Mr. Leidl's response, then Mr. Chiswell's response? I'm
22 certainly in the Court's hands, but that would be our preference if it is possible, My Lord.

23

24 THE COURT: Sorry, you broke up again. You're asking for the
25 ability to respond?

26

27 MR. RASMUSSEN: Just to deal with -- to reply to Mr. Leidl's
28 submissions in reply, and then Mr. Chiswell's submissions in reply, if it pleases the Court,
29 obviously. It's certainly the Court's direction on -- on that point. That would be our
30 preference if it's possible.

31

32 THE COURT: I'll seek input from Mr. Leidl and Mr. Chiswell
33 on that.

34

35 Gentlemen, comments on the request by Mr. Rasmussen?

36

37 MR. LEIDL: Whatever you find most helpful, My Lord. I'm
38 comfortable so long as Mr. Rasmussen limits his submission to pure surrebuttal.

39

40 THE COURT: Yeah.

41

1 Mr. Chiswell?

2

3 **Submissions by Mr. Chiswell**

4

5 MR. CHISWELL:

Also, My Lord, I'm surprised that Mr.

6 Rasmussen wants to respond to my reply before he has even heard whether I say anything
7 new arising, so you might want to wait until then because I don't think that I'm going to
8 say anything that he didn't address already. I do want to speak in reply of the -- of the cost
9 of the oppression and the public policy claims. Mr. Rasmussen said that they had the same
10 factual basis as the *BIA* claim and, therefore, there shouldn't be any costs associated with
11 them. Well, perhaps that might be true at a very high level of distraction that it all deals
12 with these transactions that occurred in October of (INDISCERNIBLE) 2016, but it's not
13 true when you look at it with any sort of specificity.

14

15 The oppression claim, for example, has the factual background of a party's reasonable
16 expectations, the reasonable expectations of creditors. At paragraph 20 of the Statement of
17 Claim, they allege that all this was done for the benefit of PEI and POT. There is also a
18 different legal analysis for the oppression claim. You have to look at reasonable
19 expectations and, as we did, standing. The same thing can be said for the public policy
20 claim. Their bulk -- policy claims concerned the transactions, plural, and it also involved a
21 different legal analysis. So even if the facts were the same, it doesn't erase the fact that the
22 trustee lost, lost on these claims, and it cost the defendants hundreds of thousands of dollars
23 to get to this point where those claims were struck, and the trustee fought the whole way.

24

25 Where the trustee claims that they -- they had equal success in the summary dismissal
26 application, Sir, the common sense thing is any time where a defendant can knock out two-
27 thirds of a plaintiff's claims in a strike application, that's a successful day for the defendants,
28 and it's a bad day for the plaintiffs. Surely, it could have been more successful for the
29 Perpetual defendants to have a knock-out blow like Ms. Rose, but it was successful
30 nonetheless.

31

32 As far as enhanced costs, Mr. Rasmussen's arguments were that, well, there was no serious
33 issue of fact or law in terms of that criteria of the test, as Mr. Leidl pointed out, that they
34 had to have some sort of subjective mens rea, that they had to know that it was a clearly
35 bad claim, and they couldn't do that until you had told them, Sir. Well, of course, Ms. Rose
36 figured it out that these claims were clearly bad. The Perpetual defendants figured out that
37 they were clearly bad. And they did so by looking at the facts and the law, and that's the
38 same thing that Your Lordship did. You looked at the facts and the law and agreed.
39 And -- and the trustee could have figured that out as well without having to cost the parties
40 all this money and time.

41

1 The things are that they're -- they were clearly bad claims, the oppression claim and the
2 public policy claim. The public policy claim, Sir, in terms of statutory illegality, you found
3 it wasn't even cause of action. That's an elementary principle. Think particulars. If you're
4 going to plead that you breached a statute, you're not just pleading a statute in some
5 regulatory provision or some regulatory directives, but point to a specific provision, a
6 specific section, a specific paragraph.

7
8 The claim for equitable rescission. It's not a cause of action, and an equitable rescission
9 was only pleaded in a heading. The same thing for a breach of public policy. This claim
10 was not within any of the recognized grounds of public policy, and again, a contract
11 contrary to public policy is not a cause of action. You don't need a Court to tell you that.

12
13 In -- in terms of the enhanced costs, Mr. Rasmussen argued that, well, that Mr. Darby
14 certainly investigated the claims against the Perpetual defendants even if -- even if you
15 could say he didn't investigate the ones against Ms. Rose. But on the oppression claim, he
16 provided really old data about all the property taxes that PEOC paid in 2010 -- or 2015,
17 pardon me, and it was the trustee who would have Sequoia's records for 2016 as the
18 property taxes that they were charged and the property taxes that they paid. But they didn't
19 even look at that. They just looked at the records that they had from Perpetual that were
20 obviously old because Perpetual had no relationship with Sequoia after the sale.

21
22 And for the public policy claim, even to this day we still don't know what specific provision
23 expressly prohibited -- prohibited the asset transaction. And that's what the claim says: it
24 was expressly prohibited by the statute -- the regulatory regime.

25
26 And, lastly, in terms of enhanced costs, Sir, Mr. Rasmussen just has no specific response
27 that the allegations were -- against the Perpetual defendants were scandalous and untrue
28 and unproven, and there was no plan to prove them. And the scandalous allegation, Sir, as
29 I said earlier, was that a public company engaged in a scheme to do something illegal and
30 contrary to public policy to oppress its creditors to get a benefit. That's scandalous.

31
32 In terms of the cost of the application to dismiss the *BIA* claim, my friend said that there
33 was no savings because the application to dismiss the *BIA* claim because we're bringing
34 it -- the second application to dismiss the *BIA* claim on a -- on a different ground, and that's
35 that POT is an entity and -- and as a trust, it's not a -- it's a relationship, not an entity, pardon
36 me. Well, the second summary dismissal application doesn't deal with arm's length because
37 it's not a repetition of the first. That doesn't mean that the arm's length argument won't be
38 dealt with at trial if we get there, and that's why it makes sense for the costs of that to be in
39 the cause.

40
41 Now, I assume my friend tries to raise this argument because he's trying to muddy the

1 waters when -- by suggesting some sort of impropriety on the Perpetual defendants by
2 arguing that POT is not an entity. Of course, Sir, that -- that possibility was raised by Your
3 Lordship in written questions that you submitted to the parties in response to the
4 application, the first application for summary dismissal. It was addressed by both parties.
5 And it's an example about how the first application for summary dismissal of the *BIA* claim
6 is already going to prove useful to the parties as it's narrowing the issue and saving the
7 parties costs. And, of course, this argument that the *BIA* -- the second summary dismissal
8 application relies on a different argument doesn't explain why there shouldn't be costs for
9 the oppression claim or the public policy claim. And I only want to point out, Sir, the quotes
10 from *Knight v. Imperial Tobacco* that you cited, Sir, in your reasons at paragraph 28 and
11 paragraph 30. That: (as read)

12
13 Striking claims promotes litigation efficiency, reduces time and
14 costs, and contributes to justice by permitting all stakeholders to
15 focus on the serious claims.
16

17 So that's what was accomplished here. And it's why the Perpetual defendants should be
18 entitled to their costs for getting us to this more efficient result.
19

20 And then finally, Sir, I just want to echo the comments from Mr. Leidl about the -- that why
21 PWC should be liable. The suggestion that there are inconsistent facts is -- just isn't borne
22 out. It's only inconsistent facts, Sir, if you ignore the past four years that have happened
23 and whatever time between now and when the trustee is finally discharged. In the security
24 for costs application, and now, the facts are clear that there are 7 million dollars worth of
25 secured claims. In October or November of 2019, there was 2.3 million dollars in cash in
26 the estate, and that's being depleted every month while the trustee runs up legal fees, and
27 they have no way of getting more revenue because they have run out of assets that they're
28 willing to sell. And then my friend's argument is just, well, okay, but you take that 2.3
29 million, you assume it stays constant, and you add back this 5.6 million that they attribute
30 to the Goodyear assets that the estate hasn't sold, and they get to 7.9 million dollars worth
31 of assets. But, of course, as Justice Veldhuis points out, that was on October 1st, 2016.
32 Now we have a different economic climate. As Sequoia's records show, there is a reason
33 they went insolvent. The price of gas has gone down. Sequoia had abandoned certain wells
34 so they're not longer producing. The trustee itself has abandoned certain wells or shut them
35 in, and so they're not producing anymore. They're being -- the -- the assets are being
36 vandalized, as Mr. de Waal told the Court of Appeal. And, of course, the AER is -- could
37 interject and attempt to enforce some regulatory orders before we even get to the secured
38 creditors. So if you were to order -- if you were to order a cost order against the estate,
39 Perpetual and Ms. Rose stand behind all the secured creditors, stand behind the trustee's
40 fees, and then (INDISCERNIBLE) are only ahead of all the unsecured creditors, but there
41 is not enough to go around. So there is no inconsistent facts, and that's the reason that

1 PWC -- PWC should be liable. That's my reply, Sir.

2

3 THE COURT: Thank you. I have a number of questions. Why
4 don't we take a 15-minute break, and then I'll start proceeding through them. Does that
5 work for everyone?

6

7 MR. RASMUSSEN: My Lord, should I -- should we wait until we
8 have Your Lordship's questions to reply?

9

10 THE COURT: Oh, my apologies. I'm going to grant you
11 permission, sir, to respond as you requested. And, again, my apologies. I -- just an oversight
12 on my part. My only caveat to that is I will give the last word to Mr. Leitl and Mr. Chiswell.
13 Thank you.

14

15 **Submissions by Mr. Rasmussen**

16

17 MR. RASMUSSEN: And I'll certainly keep it -- I didn't mean to
18 suggest, My Lord, that we would do that before the break. I'm certainly in Your -- I'm in
19 Your Lordship's hands in terms of doing that after the break --

20

21 THE COURT: Yeah, let's do --

22

23 MR. RASMUSSEN: -- or before.

24

25 THE COURT: Let's finish everything in terms of submissions
26 before the break, including any further comments by Mr. Leitl and Mr. Chiswell.

27

28 MR. RASMUSSEN: Thank you, My Lord.

29

30 Just dealing with Mr. Chiswell's submissions on behalf of the Perpetual defendants' first,
31 the argument -- one of the arguments made is that the -- even if the facts were the same,
32 the fact that two-thirds -- even if the factual allegations remain the same, the fact that two-
33 thirds of the claims were (INDISCERNIBLE) on their (INDISCERNIBLE) means that
34 there were substantially entitled -- successful. The issue we take with that is that it's how
35 you define two-thirds. So we would say that the proper way to define two-thirds is to look
36 at the amount of liability and did it go up or down, and we would say -- potential liability,
37 My Lord, we would say that that was not changed at all. It did not go down by two-thirds
38 because unlike in the *Predator* case, we're not dealing with discrete claims. We're dealing
39 with several ways to get to the same result, and that result is still on the table in terms of
40 the Section 96 application. So we would say that if we're calculating fractions, the claim
41 was not -- the total potential liability does not go down by two-thirds. It wasn't changed.

1 And -- and I think they -- I don't know if they acknowledged, but that the basic facts have
2 not -- the basic factual allegations have not changed. I appreciate certainly and
3 acknowledge Mr. Chiswell's point that there are nuances (INDISCERNIBLE) different
4 claims, but the basic factual allegations that the asset transaction was improper and should
5 be set aside.

6
7 With respect to the argument that the new application for summary dismissal builds off of
8 the old application and that somehow (INDISCERNIBLE) the argument that POT is just
9 a -- it's just a (INDISCERNIBLE) consistent with Your Lordship's decision. I'll just
10 cite -- take Your Lordship to paragraph 17 of the decisions dealing with the facts. Paragraph
11 17(a): (as read)

12
13 POT sold its beneficial interest in the Goodyear assets to PEOC in
14 the asset transaction.

15
16 That's the first step in the narrative in Your Lordship's decision. Now we have the argument
17 made on behalf of the Perpetual entities that POT is just a relationship. This is really PEOC
18 doing a transaction with itself. And that's where we get into the abuse of process problem
19 where we have one decision from this Court saying that POT transferred its beneficial
20 interests to PEOC, and if the Perpetual defendants are successful, they would potentially
21 have another decision saying POT doesn't -- isn't really anything. It's just a relationship.
22 PEOC sold its beneficial interests in the Goodyear assets to PEOC itself. Therefore, there
23 was no transfer. If the Court looks at the argument made on the summary dismissal
24 application, looks at the brief, that is the argument that's presented. That is
25 (INDISCERNIBLE) reason to dismiss the claim or strike them, that PEOC entered into the
26 transaction with itself directly inconsistent with the findings of fact on which the first
27 decisions were based. And in my submission, that's a fundamental problem.

28
29 THE COURT: Sorry, could you -- Mr. Rasmussen. What was
30 that last statement again?

31
32 MR. RASMUSSEN: That it's a fundamental problem that we have a
33 finding of fact in the -- this Court's written reasons for the August 2019 decision that says
34 that POT sold its beneficial interest to PEOC, and now they're bringing another application
35 of the same kind on the opposite basis which is that PEOC, as trustee, entered into the asset
36 transaction with itself. Therefore, there was no transaction.

37
38 If the Court --

39
40 THE COURT: Thank you. I didn't --

41

1 MR. RASMUSSEN: -- (INDISCERNIBLE).

2

3 THE COURT: Yeah. I just wanted to hear what you had said
4 there. You were -- you were breaking up there, again. But I have got it. Thank you.

5

6 MR. RASMUSSEN: Pardon me, My Lord.

7

8 The argument that the -- on the argument of -- the argument of the value of the estate, the
9 problem with the submission there, in my submission, is that we have the secured claims
10 are treated as a static factor at 7 million dollars based on an April 2018 initial report of the
11 trustee. So that -- that number remains static, and then the statement -- we have the
12 argument that, well, things change. Nothing is static. What about the decrease in oil prices,
13 what about abandonments, what about vandalism? So on the plus side -- on the -- on the
14 side that benefits them, things are static. We have 7 million in claims. That's the number.
15 But on the other side, the number that my -- given in the trustee's argument, we don't know
16 anything, and we assume it's a downward trajectory. Without getting into the security for
17 costs application, which -- that's where we make those submissions, we say that Mr.
18 Darby's evidence is that there are no secured claims actively being pursued. So the
19 argument that we can simply take the 7 million (INDISCERNIBLE) given unchanging
20 static number, we have to take the same approach looking at the plus and the minus side of
21 the equation in my submission.

22

23 Moving to Mr. Leidl's -- or pardon me. Apologies, My Lord. The argument was made that
24 we didn't identify what was supposedly wrong with this transaction. Now, we appreciate
25 that the Court struck that claim -- those claims on the basis they didn't set out a reasonable
26 cause of action. What we -- the basis for the claim was that they were inconsistent with the
27 regulatory regime we cited directed at 006, the LOR licencing regime as discussed in
28 *Redwater*, the idea that licences can't be transferred unless LOR requirements are met. That
29 was the allegation. Now, again, this Court found that that should be struck. I don't think
30 that amounts to a finding that everything about the transaction was (INDISCERNIBLE).
31 There are -- there is evidence that it wasn't, and that this isn't how these transactions should
32 be done, and that issue remains to be determined. That's part of the application that will be
33 dealt with in September, and one of the reasons we say that costs should be in the cause.
34 Let's see what the end result is. And I think it's early for the Perpetual defence to declare
35 that they have been vindicated and that the asset transaction has been vindicated as being
36 proper or by the book. I think that ruling is still to be made. We may die another day, as
37 they say, but that hasn't happened yet.

38

39 Moving to the -- and then just finally with the oppression claim. I made this submission
40 before, but I'll repeat it again. This came up in response. The Court did not find that there
41 was no oppression. The Court struck the oppression claim. So there was not a finding that

1 everything done was proper, and there was no oppression of creditors. That -- that wasn't
2 the Court's finding. Then it will be determined at the end of the day whether the asset
3 transaction was done properly or not, and that hasn't been determined yet.

4
5 Very briefly in response to Mr. Leidl's submissions, the argument made is that there isn't a
6 mens rea requirement because the Court -- the Court can't determine whether conduct
7 (INDISCERNIBLE) or not. That does not change the legal test. The Court can
8 simply -- and it's stated in *Manson*. It does require applying intentional misconduct. Now,
9 of course the Court can draw an inference there there was intentional misconduct. There
10 hasn't been an admission of that, but that doesn't affect the legal requirement. How they
11 get -- the Court gets there on the facts does not affect the legal test, which is the intentional
12 misconduct which can be determined by inference, of course.

13
14 With respect to the argument that the release has to mean something, therefore, we should
15 have (INDISCERNIBLE) the defence, the trustee pleaded Section 122(3) in its Statement
16 of Claim. This wasn't an afterthought. This wasn't an ex facto explanation of how to get
17 around the release. The trustee was aware of the release. It's included in Mr. Darby's
18 affidavit. The trustee pleaded and believed that Section 122(3) precluded Ms. Rose from
19 relying on a release. Ultimately, this Court determined that that was wrong. That doesn't
20 mean that the trustee didn't believe that to begin with.

21
22 Now, Mr. Leidl says that they never used the word perjury. However, if the Court looks at
23 paragraph 26 of his brief -- or, pardon me, the brief submitted on behalf of Ms. Rose, it
24 says: (as read)

25
26 Then without a moment's investigation of the facts, Mr. Darby, an
27 Officer of this Court, falsely swore under oath that...

28
29 So the "under oath" part was not included in the submission in reply, and I think that's
30 important because there is a difference -- not that false statements at any time are good, but
31 a false statement under oath is something entirely different. It's perjury.

32
33 With respect to the idea that Mr. de Waal made a judicial admission that there was no
34 financial benefit, I think -- I just want to clarify that the distinction is between -- and I think
35 the way, in fairness, Ms. Rose responded to the allegation of personal benefit was that it
36 had to be a tangible dollar benefit in terms of a positive. The trustee's allegation was that
37 the elimination of obligations or liabilities is a financial benefit -- is a -- is a benefit. And
38 that's where this -- I think the reference from Mr. Darby was that it was -- it improved the
39 balance sheet or the asset base. So there is a difference between getting money and putting
40 it in your pocket and eliminating an obligation, and they're both benefits, but one is
41 not -- perhaps not a financial benefit. That doesn't mean it's --

1
2 THE COURT: Just -- just --
3
4 MR. RASMUSSEN: I'm sorry, My Lord.
5
6 THE COURT: Did you say you're making a distinction that one
7 is not a financial benefit?
8
9 MR. RASMUSSEN: Well...
10
11 THE COURT: I just want to make sure I understood that, sir.
12
13 MR. RASMUSSEN: Mr. -- the -- the comment from Mr. de Waal that
14 this was not a financial benefit. So one way to interpret that is to say that the argument -- the
15 argument made on behalf of Ms. Rose is that there was no positive dollar benefit, right? If
16 the shares had gone up immediately, then potentially those could be sold, and there is
17 a -- you could actually generate a dollar figure of a particular benefit. If you improve the
18 balance sheet or the asset base of the company of which you're a major shareholder and
19 president/CEO by eliminating obligations or liabilities, that's a benefit. That -- that's the
20 trustee's allegation. It doesn't mean that there was money directly in Ms. Rose's pocket.
21 And -- and I think in fairness, that's the way Ms. Rose responded to the claim, but that
22 isn't -- the trustee's allegation, I think, is more nuanced than that, than to simply say that
23 Ms. Rose benefitted in this many dollars because her shares went up in value.
24
25 Another -- and, again, replying to Mr. Leidl, my friend, again on behalf of Ms. Rose, said
26 that there were allegations of -- took issue with my statement that there were no allegations
27 of fraud or dishonesty, and he took you to the Statement of Claim to say that, yes, there
28 were allegations of fraud or dishonesty. But what -- what I tried to argue initially is that
29 that's inconsistent with this Court's reasons. Paragraph 294 of the reasons finds that there
30 was no allegation of dishonesty or no allegation of fraud and no allegation of criminal
31 conduct. On that basis, the release exception didn't apply. If Mr. Leidl is correct, and there
32 were allegations of fraud or dishonesty, and we said Ms. Rose breached her duties as a
33 director of PEOC, what we really meant was she was acting dishonestly, then there is a
34 problem with the underlying decision. And in my submission, that's another situation
35 created when parties change their arguments depending on the application of the day. We
36 might have a costs decision and a substantive decision with different factual findings, and
37 that's the crux of the problem.
38
39 When I said that -- when I think my friend referred to falling off his chair when I said that
40 all we're saying is that Ms. Rose signed the documents, I tried to be clear in saying that that
41 is all we're saying in arguing costs. I was not saying that that was our allegation to begin

1 with. I was simply responding to the submission that we were being contemptuous of Your
2 Lordship's decision and trying to reargue the directing mind submission. All we're saying
3 for the purposes of arguing costs is that there was evidence that Ms. Rose signed these
4 documents, and to respond to the allegations from -- made on behalf of Ms. Rose that there
5 was no basis for these claims to begin with. So, again, not -- they're not
6 (INDISCERNIBLE) the allegation to begin with was only that Ms. Rose signed documents.
7 That was only the qualification on our submissions on costs.

8
9 With respect to the argument made on behalf of Ms. Rose that we should have seen that
10 (INDISCERNIBLE) prior to the Supreme Court decision in *Redwater* that the AER is
11 (INDISCERNIBLE) creditor. That's exactly our point. That prior to the Supreme Court's
12 decision in *Redwater*, the *Redwater's* decisions had confirmed that AER was a creditor, did
13 meet the *Abitibi* test. It was the *Redwater* decision that changed that. And that was a
14 submission I tried to make by referring to Justice Wakeling's decision (INDISCERNIBLE)
15 reply which was the torturous way of saying that (INDISCERNIBLE) not stating the fact
16 of the *Redwater* Court of Appeal decision, waiting to see what the Supreme Court says.
17 The AER might be a creditor today and not a creditor tomorrow depending on what the
18 next court says.

19
20 And then finally, the -- well, I shouldn't say finally, one more point was that the argument
21 made on behalf of Ms. Rose that Ms. Rose had no doubt that she had been successful on
22 the Section 96 claim but appealed anyway. If that were true, then in my submission that's
23 a form of abuse of process in itself, that one would commence an appeal and do those steps
24 with no doubt that the appeal was unnecessary. That's problematic in itself if that's correct.
25 As I said, and I think the point is that the same standard has to apply to both sides. If it was
26 sufficiently unclear for Ms. Rose to file an appeal, it was also sufficiently unclear for the
27 trustee. The same standard should apply for both cases.

28
29 And then finally the submission is that -- made on behalf of Ms. Rose on the personal
30 liability of PWC is that all we have to do is take the claims, again assumed to be static at
31 the April 2018 7 million level, and the cash on hand, and because the claims are greater,
32 the estate can't pay costs. The problem with that argument is it ignores the value of the
33 assets, which is the whole issue. The whole abuse of process issue comes up -- about
34 because of the treatment of the value of the assets and the liabilities or obligations. The
35 problem is that in the Court of Appeal and in arguing costs and security for costs, the
36 approach is that ARO swamped the value of the assets such that they're worthless. The
37 problem is that in arguing the merits and after seeking summary judgment, it's -- which we
38 heard in September, the opposite argument is made, which is that ARO will have no effect
39 on value; therefore, the assets are worth over 4 million. And our point is that you can't have
40 it both ways. The assets that the -- the key facts have to be the same depending -- regardless
41 of the application being argued on a particular day or else we get inconsistent decisions

1 and that doesn't reflect positively.

2

3 Those are my submissions in reply. Thank you, My Lord.

4

5 THE COURT: Thank you, sir.

6

7 **Submissions by Mr. Leidl**

8

9 MR. LEIDL: My Lord, if I may -- if I may, I'll be brief.

10

11 THE COURT: Certainly.

12

13 MR. LEIDL: One of the -- one of the interesting things about
14 being a litigator is you always have new experiences, and my new experience today is
15 having won on every single issue I have argued, having the case entirely dismissed and
16 winning on the release argument, and then in seeking costs being told I'm abusing the
17 Court's process.

18

19 Now, my friend -- my friend said that he made a claim that we're treating this secured
20 creditor claims as being static. Well, the reason they're static, My Lord, is because Mr.
21 Darby admitted under oath that the trustee is consciously not determining them. And if you
22 look at paragraph 83 of our brief where Justice Veldhuis quoted from my cross-
23 examination of Mr. Darby -- do you have that?

24

25 THE COURT: I'm there, sir. Thank you.

26

27 MR. LEIDL: And you'll see if you go down there is paragraph
28 30 of the reasons where she quotes my cross-examination: (as read)

29

30 Upon further examination Darby admitted that it was highly
31 unlikely that costs could be paid.

32

33 And then if you go down to the bottom of the page, the ultimate question there: (as read)

34

35 So you have got assets of marginal value that you don't intend to
36 sell or try to sell. You have got expensive lawsuits. You have got
37 secured claims that may or may not be allowed. And you have got
38 a very remote prospect of unsecured creditors being paid anything
39 unless you win all your lawsuits. Right?

40

41 Over the page. "Yes."

1
2 So on -- and on top of that, we have the trustee refusing to disclose its legal fees where it's
3 absolutely natural to infer that they're being incurred. So the estate is getting worse and
4 worse for us in terms of trying to collect.

5
6 Now, two more points, and I'll be brief. My friend seemed to take some solace in the fact
7 that the Court did not find that there was no oppression. And why did the Court find -- not
8 find that there was no oppression? Because the allegations that the trustee pleaded were
9 struck. They were void as an issue. So there is no positive inference to draw from that in
10 that they may have been right had they pleaded an entirely different case. And if there is
11 any doubt, My Lord, I'll read -- you may remember this is from paragraph 323 of your
12 reasons, which the trustee doesn't like obviously: (as read)

13
14 The evidence is that Ms. Rose took her responsibilities as a
15 director and officer of PEOC seriously, considered the best
16 interests of PEOC, its stakeholders, and then exercised her
17 business judgment to the best of her ability. Importantly, her
18 evidence was to the effect that the ultimate decision to enter into
19 the Aggregate Transaction was that of Perpetual Energy and its
20 board of directors.

21
22 So contrary to my friend's ostensible surrebuttal, there was a positive finding of good faith
23 conduct and proper exercise of judgment by Ms. Rose.

24
25 And finally, My Lord, on the point of benefit. This allegation of personal benefit has been
26 a moving target to be playing whack-a-mole. Mr. de Waal did say to you, after grilling,
27 there was no financial benefit. Now my friend says, well, our allegation was more nuanced
28 than that. But as you may recall, the debate we were having about financial benefit was in
29 the context of the test of the Supreme Court of Canada for personal liability of a director
30 set out in *Wilson* where you have to show -- in the absence of bad faith, you have to show
31 a personal financial benefit, and there was none. There is nothing nuanced about the
32 Supreme Court of Canada's test because it's a tough nut to crack to make a director liable
33 personally for oppression by a corporation.

34
35 Those are my comments, Sir.

36
37 THE COURT: Thank you.

38
39 Mr. Chiswell.

40
41 MR. CHISWELL: Nothing to add, My Lord.

1
2 THE COURT: Thank you. Let's adjourn for 15 -- well, we're at
3 4:00. I would like to address questions. I'm not sure I'll finish today. Would the parties be
4 able to go until 5:00, and Mr. -- Master Clerk, would you -- let Master Clerk answer this
5 first. Are you available, sir?
6
7 THE COURT CLERK: (INDISCERNIBLE).
8
9 THE COURT: Well, I'm asking the question.
10
11 THE COURT CLERK: I have an appointment, but I can -- I can make it
12 to 5.
13
14 THE COURT: What's the availability of the parties? Master
15 Clerk does have a commitment. What's the availability of the parties to go until 5:00 or
16 alternatively start half an hour early tomorrow morning?
17
18 MR. LEITL: It's Mr. Leitl, Sir. I can go as late as you like.
19
20 THE COURT: Pardon me?
21
22 MR. LEITL: I'm sorry. I can go as late as you like, My Lord,
23 tonight.
24
25 THE COURT: Okay. Thank you.
26
27 MR. LEITL: Mr. Leitl.
28
29 THE COURT: Mr. Chiswell?
30
31 MR. CHISWELL: The same thing -- the same thing for us, My
32 Lord.
33
34 THE COURT: Thank you.
35
36 Mr. Rasmussen?
37
38 MR. RASMUSSEN: The same for us as well, My Lord.
39
40 THE COURT: Okay. Let's take a 10-minute break. We
41 will -- just because of Master Clerk's obligations, we'll come back, and we'll go for about

1 30 or 35 minutes, and if necessary, we'll carry on tomorrow morning.

2

3 Master Clerk, if we could just adjourn for a few minutes.

4

5 (ADJOURNMENT)

6

7 **Discussion**

8

9 **THE COURT:**

So I'll just go through my notes, which are in no

10 particular order. Mr. Rasmussen, at paragraph 26 of the brief for Ms. Rose, and this ties

11 into the discussion right at the end of our hearing today, it states in the last sentence that

12 Ms. Rose -- well, there is the allegation, then without a moment's investigation of the facts,

13 Darby, an Officer of this Court, falsely swore under oath that: (as read)

14

15 Rose personally benefitted from the Goodyear restructuring and

16 allowed POT and PEI to benefit from the Goodyear restructuring

17 all to the prejudice of PEOC.

18

19 What is your response to that? And, again, I'm asking in a very broad sense, but it caught

20 my attention initially, and it's -- I have been refocused on it as a result of these latter

21 comments on the concept of benefit.

22

23 **MR. RASMUSSEN:**

Well, there are two aspects to the statement, My

24 Lord. The first is the "without a moment's investigation," and then there is the second

25 allegation relating to the personal benefit. I understood your question to be focused on the

26 personal benefit part of that, not the last part, so I'll begin by addressing that. The

27 statement -- and we have -- we have included the entire excerpt in Mr. -- from Mr. Darby's

28 affidavit to put that statement into context, My Lord. I'll just find it in our -- in our brief.

29

30 That's at paragraph 56 in our -- in our brief on costs, My Lord. So this is the full excerpt of

31 Mr. Darby's affidavit. What he says is, the introduction to the -- the sentence before is that:

32 (as read)

33

34 At the time Rose was the President/CEO of

35 (INDISCERNIBLE) -- PEI which controlled POT through its

36 trustee PEOC.

37

38 And then the statement about the benefit. And I think that the statement there is absolutely

39 consistent with the submissions I made a few minutes ago, which is that the Goodyear

40 restructuring benefitted Ms. Rose, and it also benefitted POT and PEI. And that's precisely

41 the distinction that I certainly was attempting to make between, let's say, the share price

1 going up, which doesn't benefit POT -- POT. Why does POT care about potential share
2 price? The benefit to all the related parties that relates to this elimination of obligations,
3 and that's what's discussed in Mr. Darby's August affidavit. He refers to the financial
4 statements of the Perpetual -- and these again are consolidated financial statements for all
5 the Perpetual entities, and he refers to the news releases. This is at paragraphs 18.1 and
6 18.2 in Mr. Darby's affidavit. And more importantly, he -- at paragraph 42, My Lord,
7 Exhibits O and P, Mr. Darby has advocated for a news release from Perpetual on behalf of
8 the aggregate entities referring to the benefits of this transaction to themselves, talking
9 about eliminating ARO and he -- and in the same affidavit, he refers to the ARO being
10 reflected on the PEI interim financial statements, again which were consolidated as a 131
11 million dollar -- 131 million dollar (INDISCERNIBLE) let's call it. And then he says at 43:
12 (as read)

13
14 The conclusion of the trustee is also consistent with
15 (INDISCERNIBLE) PEI but it had strategically disposed of both
16 high liability assets and asset retirement obligations and that it
17 would materially improve its LMR as a result of the disposition of
18 the Goodyear assets.

19
20 So the -- again, the versions -- the evidence provided by Mr. Darby on behalf of the trustee
21 is that this benefitted all the entities not just Ms. Rose.

22
23 THE COURT: Okay. What --

24
25 MR. RASMUSSEN: And it was not --

26
27 THE COURT: Just --

28
29 MR. RASMUSSEN: It was not --

30
31 THE COURT: Yeah, Mr. Rasmussen, I'm just asking vis-à-vis
32 Ms. Rose. It states at the commencement of that sentence, "Rose personally benefitted."

33
34 MR. RASMUSSEN: Yes, My Lord. And -- and the nature of the
35 benefit is to -- is related to the elimination of obligations. They're referred to as primarily
36 the ARO, but all the obligations associated (INDISCERNIBLE) what they -- what the
37 Perpetual defendants refer to as high liability assets. So the allegation is not that Ms. Rose
38 got money and put it in her pocket as the focus on the share value would indicate. The
39 focus is on the benefit to Ms. Rose and the entities in improving the asset base by
40 eliminating obligations. That's what is described in paragraph 42.

41

1 THE COURT: Okay. Thank you. I'm going to ask a third time.
2 "Rose personally benefitted." What was the benefit, sir?

3

4 MR. RASMUSSEN: The elimination of the obligations associated
5 with the Goodyear assets that improved the asset base of PEI and the other entities of which
6 Ms. Rose was a president, director, and significant shareholder, and that's -- that's in the
7 paragraph that the Court referred me to from Mr. Darby's affidavit. So, again, the
8 focus -- and speaking strictly on -- with respect to Ms. Rose, the benefit is not dollars in
9 Ms. Rose's pocket. It's eliminating, like we said, liabilities or obligations. This Court found
10 that ARO are -- are liabilities, so -- or, pardon me, are not liabilities, so the elimination of
11 obligations that were associated with the Goodyear assets and the benefit is qua (phonetic)
12 shareholder.

13

14 THE COURT: And Mr. Leidl right at the end of his submissions
15 before we adjourned for a brief break mentioned the *Wilson* case and the requirement to
16 show a personal financial benefit. How do you address that?

17

18 MR. RASMUSSEN: I would -- my response to that, and I don't have,
19 unfortunately, the brief in front of me, but our response to that would be the same as I
20 believe it was when we argued this point before Your Lordship in 2018 that there is no
21 requirement to show a personal benefit. That is one way to establish personal liability of a
22 director for oppression. A personal benefit is not the only way, and what the
23 Court -- (INDISCERNIBLE) confess to not having read it in the last little while, but what
24 the Court says is that there needs to be a nexus between the director personally and the
25 allegedly oppressive conduct. And one way you can achieve that nexus is by a personal
26 benefit, and another way that the Court cites and, unfortunately, I don't have the paragraph,
27 it would be in our brief, on the -- from the November 18 -- 2018 (INDISCERNIBLE) the
28 other way that that could be done is if a director does or fails to do something -- fail -- either
29 breaches their duty or fails to carry out their duty as a director. So that's another
30 independent way that you can obtain the necessary nexus to form personal liability without
31 a personal benefit. And we would say, here, and we certainly appreciate that the Court's
32 findings were the -- were to the opposite effect, but moving back in time to August 2018,
33 the allegation is that Ms. Rose failed to carry out her duties as they should have been carried
34 out. So it's a failure to act, a failure to act in accordance with your duties, and that would
35 satisfy the *Wilson* test.

36

37 So, again, we are -- we're not being contemptuous of Your Lordship's findings, ultimately,
38 in 2019, but moving back in time to what was available to the trustee when it brought its
39 claim, that satisfied the *Wilson* test because there absolutely is a nexus to Ms. Rose as a
40 director. I think what the Court was trying to get at in *Wilson* in those comments was that
41 someone can't simply be sued personally for oppression because they're a member of a

1 board of directors that had nothing to do with it other than being a board -- on the board.
2 Right? So someone who sued the entire board of directors of a company, including the
3 director who had nothing to do with the allegedly oppressive conduct, there isn't the
4 necessary nexus --

5

6 THE COURT: Sir -- sir. Mr. Rasmussen. I'm just asking where
7 the benefit is personally to Ms. Rose.

8

9 MR. RASMUSSEN: Well, okay. So the -- pardon me, My Lord. So we
10 say that there is no requirement to show a personal benefit. We only need to show a nexus
11 with her duties, and that's what the Supreme Court says in *Wilson*. And I -- of course, I
12 don't have that citation for you. It would be in our brief for the previous hearing.

13

14 THE COURT: Okay.

15

16 MR. RASMUSSEN: But --

17

18 THE COURT: Mr. -- Mr. Rasmussen, I'm only going to ask one
19 more time. The statement that was sworn under oath was that Rose personally benefitted.
20 Do you have a --

21

22 MR. RASMUSSEN: (INDISCERNIBLE) --

23

24 THE COURT: -- response to that, and if there is a benefit can
25 you tell me what it is?

26

27 MR. RASMUSSEN: Yes, My Lord. The benefit was as a shareholder
28 and -- and, again, this is 56 in our brief, Rose was -- Ms. Rose was the president, CEO, and
29 shareholder and -- of PEI which controlled POT, and PEI and POT benefitted directly, and
30 Ms. Rose benefitted indirectly, I suppose, by the elimination of the obligations associated
31 with the Goodyear assets. That is what the trustee's allegation was. There was never an
32 allegation that Ms. Rose received a direct financial benefit, dollars in her pocket. That was
33 never the allegation. And --

34

35 THE COURT: Okay. Thank you. Thank you, sir. Let's move on.
36 Thank you.

37

38 In your answer there, you alluded to the trustee and what he -- his knowledge. In the
39 submissions of your friend, there is the allegation that the trustee did not investigate things
40 and a number of examples were used. The shareholders of 198 were not interviewed. Ms.
41 Rose was not asked particular questions. What is your response to that, sir?

1
2 MR. RASMUSSEN: Thank you, My Lord. Dealing with the -- this is
3 dealt with at paragraphs 76 to 84 of our brief on costs, the idea that -- the submission that
4 PWC didn't take steps to investigate this. The trustee's allegations were based on the
5 material provided by the Perpetual defendants and relating -- connecting this back to my
6 response -- my attempt to respond to your -- Your Lordship's previous question, the
7 evidence provided by Perpetual, the Perpetual defendants, the Perpetual entities at the time,
8 suggested overwhelmingly that they had obtained benefit as a result of this and that Ms.
9 Rose benefitted as a shareholder, so what I referred to earlier were the news releases, the
10 financial statements, the -- and our additional news releases referred to in the -- the exhibits,
11 the cross-examination of Mr. Darby back in November 2018.

12
13 The other important piece of evidence on this point, My Lord, is the -- the
14 (INDISCERNIBLE) statements made by the Perpetual entities themselves, and this is at
15 Tab C to the trustee's -- Mr. Darby's affidavit. This is the Goodyear presentation we
16 describe it as. There is extensive commentary in that -- pardon me, My Lord -- extensive
17 commentary in that presentation of the benefit of this Goodyear transaction for the --
18

19 THE COURT: Okay. So the -- Mr. Rasmussen, we have dealt
20 with benefit. I'm now asking about the allegations, the statements by Ms. Rose at, for
21 example, paragraph 30, of the investigative vacuum. What is your response to that?
22

23 MR. RASMUSSEN: Well, and I -- and I think that the -- that Goodyear
24 presentation is a good example of the -- the type of investigation that was done and shows,
25 in their own words, exactly how this benefitted all of them and exactly what happened on
26 their own version with this transaction -- that we were eliminating ARO, we were reducing
27 the LOR of Perpetual, increasing the LOR of PEOC. This was all set out in their own words
28 exactly what happened here. And -- and that is the type of thing that the trustee relied on.
29 Mr. Darby's affidavit shows a lot of the -- and, again, I think it's important to note that the
30 trustee applied for summary judgment immediately on this claim on the basis of the context
31 of the Darby affidavit August 2018. The trustee and -- and, again, it's dealt with in the
32 hearing -- the transcript before Justice Jeffrey. The trustee was ready to go and seek
33 summary judgment on the basis of Mr. Darby's affidavit. So the -- the background
34 information summaries are included with that affidavit. The (INDISCERNIBLE) relating
35 to the benefits obtained by the Perpetual entities, the information regarding the -- regarding
36 the ARO. Mr. Darby's affidavit also details using the -- performing the ARO calculations
37 to the nearest dollar using modelling. So the -- there was extensive investigation done --
38

39 THE COURT: Okay. Well, let's --
40

41 MR. RASMUSSEN: -- (INDISCERNIBLE).

1
2 THE COURT: Extensive investigations. Let's just look at
3 paragraph 31 of the Rose brief where there is some question and answer. Just to reiterate
4 what is stated there: (as read)

5
6 Why not ask Rose about the exercise of her judgment when he had
7 the opportunity?

8
9 I'm just reading verbatim here.

10
11 MR. RASMUSSEN: Well, and it's -- and it's -- Mr. Darby's response
12 is that -- and this is over the page -- he says, "The evidence speaks for itself." And then
13 the further question is, "So you did not think that was necessary, correct?" "Yes." So it
14 isn't that no investigation was done. It's that the investigation that was done, in the trustee's
15 view, supported the claims such that it was not necessary to ask Ms. Rose's subjective
16 opinion regarding her business -- the exercise of her business judgment.

17
18 Now, the Court has made a ruling on Ms. Rose -- the exercise of Ms. Rose's business
19 judgment. I want to be -- be -- certainly not seeking to reargue that point, but I will -- I will
20 go back to the underlying legal issues here. One is that --

21
22 THE COURT: Mr. Rasmussen, if I can just pause you for a
23 second. I'm not looking for you to reargue it. The reason I'm asking the question is did the
24 trustee do an appropriate investigation before drafting and finalizing the Statement of
25 Claim. And I'll give you some context. Should a Statement of Claim of any sort go forward
26 unless there has been an appropriate investigation, especially where there is an Officer of
27 the Court that has a duty?

28
29 MR. RASMUSSEN: Well, I think that if the submission -- and I -- and
30 I think we made this point that if the -- in the brief, that if the narrative (INDISCERNIBLE)
31 here that the trustee went forward with no investigation and recklessly made these
32 allegations without looking into the facts, then that -- that would be the type of thing that
33 would justify enhanced costs. That isn't what happened here. The trustee did investigate,
34 did the necessary investigation, and as I said, was happy to go to court on the basis of Mr.
35 Darby's affidavit and seek summary judgment on Section 96. That was the application filed.
36 And in my submission that shows that the trustee believed that it had done the necessary
37 investigation and that its claims had merit. It wanted those claims determined as quickly as
38 possible.

39
40 I don't think -- in fact, this morning, the trustee was accused of blitzkrieg and moving too
41 quickly. I would suggest that if the Court looks at Mr. Darby's affidavit, including the

1 exhibits, that's evidence that the investigation was -- that the necessary investigation was
2 done and the trustee believed that the claims had merit or it would not have brought them.
3 And I cited the example of the absence of claims of dishonesty. There was not evidence to
4 support that, and those claims were omitted.

5
6 THE COURT: Okay. You have used the word reckless and
7 dishonesty. I did not use those very deliberately. I'm just looking at the question and answer
8 on cross-examination of the trustee. Question -- and I'm looking at paragraph 37. (as read)

9
10 Q And it did not occur to you that it would be better -- that you
11 would be better able to discharge that duty if you examined
12 more carefully the records received from Sequoia or from
13 Perpetual on the negotiation of the asset purchase
14 agreement or follow it up with Ms. Rose on her advice that
15 they were providing additional materials to you?

16 A We completed our review. We gave them ample time to
17 respond.

18
19 What is your response today, as counsel for PWC, in respect of that statement, and how
20 can a review have been completed if the trustee was not -- if the trustee had not followed
21 it up with Ms. Rose?

22
23 MR. RASMUSSEN: My Lord, we're counsel for the trustee in
24 bankruptcy, not PWC.

25
26 THE COURT: No, and I understand that.

27
28 MR. RASMUSSEN: But (INDISCERNIBLE) --

29
30 THE COURT: I'm focused on --

31
32 MR. RASMUSSEN: Pardon me?

33
34 THE COURT: -- the individual. And just the conduct and the
35 inquiry that was made. That's why I'm asking the question.

36
37 MR. RASMUSSEN: Well, we certainly agreed with Mr. Darby's
38 answer on behalf of the trustee that -- that the information that the trustee did have and the
39 information provided by the -- by Perpetual and Ms. Rose supported the allegations, and
40 Mr. Darby's evidence was that further investigation was not required. I think that he -- and
41 I would again refer the Court back to the -- Mr. Darby's August 2nd affidavit and the

1 trustee's application for summary judgment (INDISCERNIBLE) there was ample evidence
2 to support the allegations made by the trustee, and it -- and it certainly believed that its
3 claims had merit.

4

5 So I would say that the answer is that further advice from Ms. Rose was not required at
6 that time. Now, this -- the Court found that the allegations against Ms. Rose are without
7 merit, but -- well, the Court relied on the release to dismiss the claims against Ms. Rose,
8 and then proceeded to consider the issue of whether the claims in the absence of the release
9 would have merit. Now, the release is part of Mr. Darby's materials. That is part of the
10 trustee's affidavit in support of summary judgment application. It's dealt with in the
11 Statement of Claim. So the -- the trustee believed that it had an answer to that and
12 pleaded -- pleaded its response on things.

13

14 THE COURT: But the -- but the lawsuit was launched against
15 Ms. Rose, was it not, without her knowing that it was coming? I'm looking at paragraph 42
16 and the question and answer. (as read)

17

18 Q So you were thinking of a lawsuit against Ms. Rose
19 personally in respect of the alleged breaches of her
20 fiduciary duty? You didn't ask for her side of the story,
21 right? We have covered that?

22

A We have. The evidence speaks for itself.

23

24 So was she asked her side of the story before she received a Statement of Claim?

25

26 MR. RASMUSSEN: Well, asked -- I think the previous question
27 indicated that there was a response that was delayed in being provided, so the -- the
28 trust -- Mr. Darby's evidence was that -- that information was requested. It wasn't provided.
29 The trustee waited long enough and proceeded with the claim.

30

31 MR. LEITL: My Lord -- My Lord, I must object. If Mr.
32 Rasmussen is going ask you to find that there was ever prior to filing of the lawsuit a
33 question put to Ms. Rose about the exercise of her business judgment, that is categorically
34 false, and Mr. Darby admitted that he never asked her and he didn't need to ask her.

35

36 THE COURT: Thank you, sir.

37

38 Mr. Rasmussen.

39

40 MR. RASMUSSEN: -- (INDISCERNIBLE) for that. Yes. So
41 the -- the -- there was a response coming, and I think as Mr. Leidl has pointed out, there

1 was not a question posed to Ms. Rose about the exercise of her business judgment. The
2 information that was provided was relating to the transaction generally. There was some
3 delay in providing more information, and the trustee proceeded to file a claim.

4

5 THE COURT: Okay. Let -- let me just --

6

7 MR. RASMUSSEN: However --

8

9 THE COURT: I'm curious, and this is just part of the narrative.

10 What was the length of the delay?

11

12 MR. RASMUSSEN: I will strive to answer that question.

13

14 MR. LEITL: I believe, My Lord, Ms. Rose discusses this in
15 the affidavit that was before you in November. Perhaps Mr. Chiswell can help.

16

17 MR. RASMUSSEN: It's a -- it would be in Mr. Darby's affidavit. It's a
18 June 26th letter, and the claim is filed -- a June 26th letter addressed to Ms. Rose, and then
19 the claim is filed on August 2nd.

20

21 THE COURT: Okay. Because I'll -- let me just pause you there.

22 I recalled it wasn't very long, in my view, a month, a little over a month. Is that an inordinate
23 delay when a person is going to be individually sued for a quarter of a billion dollars?

24

25 MR. RASMUSSEN: Is it -- I think -- you mean is it -- I think -- is it an
26 inordinate delay in the sense that it's excessive? I would -- I would say obviously it's not
27 an excessive amount of delay. I think the Court -- the question is, is it -- is it an insufficient
28 amount of time, and I would say that in the circumstances there was not an insufficient
29 amount of time, and the factual context, I alluded to this earlier, is what happened after the
30 claim is made. The submission made this morning was that it was blitzkrieg tactics, and
31 the trustee was trying to proceed as quickly as possible with a lightning -- sandbagging Ms.
32 Rose and trying to proceed as quickly as possible. That's not what happened. The claim
33 was filed, yes. And to answer Your Lordship's question, I do not believe Ms. Rose had
34 prior knowledge that she would be sued before she was -- received that claim. But the
35 question is what happened after that. What (INDISCERNIBLE) trustee insisting that things
36 proceed on August 30th state -- and the summary judgment application be heard then. The
37 trustee, in my submission, was reasonable when it gave Ms. Rose and the Perpetual
38 defendants time to prepare a defence and respond to the claim in the normal -- in the normal
39 course of litigation.

40

41 THE COURT: Yeah, but --

- 1
2 MR. RASMUSSEN: Particularly -- pardon me, My Lord.
3
- 4 THE COURT: Okay. Thank you for that. Do you not think it's
5 prudent for a trustee in the capacity as an Officer of the Court to ask as many relevant
6 questions, if not, indeed, all relevant questions before a Statement of Claim is filed? And
7 let me --
8
- 9 MR. RASMUSSEN: Well --
10
- 11 THE COURT: Let me -- let me just add to that. I apologize. I
12 just want to add one more question on there. For example, given the nature of this claim,
13 would it not have been appropriate for the trustee to ask the principals of 198 some
14 questions? Paragraph 44 is relevant here.
15
- 16 MR. RASMUSSEN: Pardon me, My Lord. I don't want to interrupt
17 again.
18
- 19 THE COURT: No. Go ahead. That was my subsidiary question.
20
- 21 MR. RASMUSSEN: Yes. Well, I would say that it was -- it was not
22 necessary for the trustee to ask the principals of 198. I'm not sure that the reference to the
23 principals of 198 came in over the arm's length issue as -- as they would potentially provide
24 information necessary to deal with the arm's length issue. Certainly, from the trustee's
25 perspective on that, the trustee (INDISCERNIBLE) clearly an arm's length transaction for
26 which the presumption of Section 4(5) would apply. So their input was not necessary on
27 that point.
28
- 29 And with respect to generally, I think that there was no dispute that there was a release,
30 and it was signed by the principals of 198 wherein that you had as -- as
31 (INDISCERNIBLE). The trustee was aware of the release. The trustee understood that the
32 release did not apply and bar the claims that it brought against Ms. Rose. Now, ultimately,
33 that proved to be incorrect, but there isn't anything that those individuals would have
34 provided in terms of (INDISCERNIBLE) that would have changed anything.
35
- 36 And I think if we -- if we actually look to the basis on which the Court dismissed the claims
37 against Ms. Rose, it wasn't on the basis that there was some additional fact that Ms. Rose
38 could have provided that shed -- would have shed additional light on this.
39
- 40 THE COURT: M-hm. Yeah.
41

1 MR. RASMUSSEN: The claim was dismissed on the basis of release.
2 Pardon me, My Lord, if I could make one additional point on that, it's that this is not
3 ordinary litigation. Now, certain --
4

5 THE COURT: Sorry, I missed -- I missed that last comment, sir.
6

7 MR. RASMUSSEN: It's not -- it's not ordinary civil litigation, I should
8 say. It's a Section 96 claim brought by a trustee in bankruptcy. It was scheduled to be heard
9 on the commercial list. I think it still is on the commercial list. It's not litigation in the
10 ordinary course of -- it's not the ordinary course of litigation where parties -- it's expected
11 to take years. Certainly the trustee applied for summary judgment immediately and wanted
12 to deal with this expeditiously. So I think in fairness to a trustee in bankruptcy, there are
13 pressing time constraints as well. When a trustee says -- writes to the Perpetual defendants
14 in June and says if you have any additional information, provide it to us so we can consider
15 it, and they don't respond for more than a month, in the context of a -- of an estate in
16 bankruptcy with 2500 wells that are existing in real time, that is a little different situation
17 where the claim is brought, an automobile accident that occurred five years before
18 or -- well, not five years -- less than two years before, but a situation where there is no real
19 time impact of delay, and -- and the trustee in bankruptcy should be judged on the standards
20 that apply in bankruptcy in the insolvency world where the timelines are very expedited.
21 Hearings on very large amounts of money are dealt with expeditiously because that's the
22 nature of insolvency proceedings. We have the real world when it's folding, and a month
23 is a long time when we're dealing with 2500 wells with all kinds of -- and my friends
24 referred to those things in our (INDISCERNIBLE) that the estate has no value, vandalism,
25 abandoned (INDISCERNIBLE) all kinds of obligations on an ongoing basis. So I think
26 that context needs to be examined when the Court looks at a month. A month in this context
27 is a long time.
28

29 THE COURT: Thank you for that.
30

31 In paragraph 55 Ms. Rose commented that the trustee asserted, among other things, and I
32 go down to paragraph K, 55-K, engage in conduct that is analogous to criminal conduct.
33 And the -- and the response I received back at the relevant time was: (as read)
34

35 This is analogous to a release of liability for criminal conduct. A
36 corporation is not entitled to release a claim that belongs to the
37 public, society at large.
38

39 What is your authority for that?
40

41 MR. RASMUSSEN: The analogy we were trying to draw there, My

1 Lord, is comparing the statutory obligations of the director under the *Business*
2 *Corporations Act* to the obligations we all owe each other under the *Criminal Code*, for
3 example. So there are statutory obligations that are owed to society. They're not private
4 obligations of -- in an interim contract. So --

5

6 THE COURT: Okay. Can you just -- I'm asking for authority.
7 When you say statutory obligations, tell me what statutory obligation. Tell me what section
8 and what Act, please. Thank you.

9

10 MR. RASMUSSEN: Thank you, My Lord. It's the *Business*
11 *Corporations Act*, and the *Business Corporations Act* requires that directors comply with
12 its provisions. And I'm looking for the citation for that, for the subsection. And I believe
13 it's 46, but I could be wrong on that. So the argument is that a director is required to comply
14 with statutory obligations under the *Business Corporations Act* in the same way that all
15 members of society have to comply with *Criminal Code*.

16

17 THE COURT: Okay. I'm -- I'm being specific here because
18 I -- this caught my attention. (as read)

19

20 A corporation is not entitled to release a claim that belongs to the
21 public, society at large.

22

23 Tell me what you're referring to there.

24

25 MR. RASMUSSEN: That the director --

26

27 THE COURT: Tell me -- tell me the statutory provision that
28 you're focused on there because you preceded that with analogous to a release of liability
29 of criminal -- or, pardon me, for criminal conduct.

30

31 MR. RASMUSSEN: Well, for the -- the -- I'm just looking for the
32 provision in the *Business Corporations Act* that requires directors to comply with their
33 obligations under the *Business Corporations Act* because that's what we were referring to.
34 Section 120 says a director has to act in the best interests of the company. That is not a
35 private obligation. It's a public obligation owed to society. It's statute. That's what we were
36 saying. It's not a -- it's different from breaching a contract. It's an obligation owed to
37 society. That's why it's incorporated in the statute. And that's why we -- we argued that
38 Section 122(3) should apply for (INDISCERNIBLE) a director from waiving -- from
39 contracting out of their public obligations under the *Business Corporations Act*.

40

41 And I've almost found that. My apologies for the delay, My Lord. It's cited in our brief

1 before Your Lordship on November -- November 2018. I can -- I can find the citation to
2 the *Business Corporations Act*. It's simply the subsection providing that directors have to
3 comply with the provisions in the Act.

4

5 THE COURT: Perhaps you can provide it to the Court
6 tomorrow morning, sir.

7

8 MR. RASMUSSEN: Yes, My Lord, if -- if not earlier.

9

10 THE COURT: Okay.

11

12 MR. RASMUSSEN: I'll -- I'll (INDISCERNIBLE). Oh --

13

14 THE COURT: We're --

15

16 MR. RASMUSSEN: Pardon me.

17

18 THE COURT: We're actually past the deadline that I was
19 accommodating Master Clerk for. I have a number of questions yet to raise. I'll summarize
20 them tonight. Would the -- Master Clerk, are you sitting tomorrow morning?

21

22 THE COURT CLERK: Yes. Yes, My Lord.

23

24 THE COURT: Okay. Thank you. Would the parties be available
25 half an hour earlier?

26

27 THE COURT CLERK: Yes, My Lord.

28

29 MR. RASMUSSEN: Yes, My Lord.

30

31 THE COURT: Mr. Leidl?

32

33 MR. LEITL: Yes, Sir.

34

35 THE COURT: Mr. Chiswell?

36

37 MR. CHISWELL: Yes, My Lord.

38

39 THE COURT: Thank you. Why don't we start at 9:30 then
40 tomorrow morning just to give us a little bit more time because I'm assuming you're going
41 to argue the next application after we're -- I have finished with the questions on this. Is that

1 correct?

2

3 UNIDENTIFIED SPEAKER: Yes, My Lord.

4

5 THE COURT: Okay. Is there any other business that we should
6 touch on before we adjourn?

7

8 MR. LEITL: No, My Lord. This is Mr. Leitl. Just wanting to
9 clarify so I know what I should plan for tomorrow. We'll finish up with your questions and
10 then move on to the security for costs?

11

12 THE COURT: That's correct.

13

14 MR. LEITL: The reason --

15

16 THE COURT: Tomorrow we'll do that. Go ahead.

17

18 MR. LEITL: The reason I ask is that I very well may just
19 observe the security for costs, but I'm not a participant.

20

21 THE COURT: Yeah. I'm assuming -- I recognize that, Mr. Leitl,
22 and I just assumed that either Mr. McDonald or Mr. Chiswell will take the lead on the
23 application for security for costs.

24

25 MR. LEITL: Thank you.

26

27 MR. CHISWELL: That's correct, My Lord.

28

29 THE COURT: Okay. Hearing no other business, I'll ask Master
30 Clerk to adjourn for the day, and we will reconvene tomorrow morning at 9:30. Thank you.

31

32

33 PROCEEDINGS ADJOURNED UNTIL 9:30 AM, JULY 29, 2020

34

35

36

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41

1 **Certificate of Record**

2

3 I, David Marion, certify that this recording is the record made of the evidence in the
4 proceedings in the Court of Queen's Bench held in courtroom 1602 at Calgary, Alberta, on
5 July 28th of 2020, and that I was the court official in charge of the sound-recording machine
6 during proceedings.

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1 **Certificate of Transcript**

2

3 I, Cindy Teruya, certify that

4

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

8

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

11

12 Cindy Teruya, Transcriber

13 Order Number: AL-OR-1005-9294

14 Dated: August 24, 2020

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COURT FILE NUMBER 1801-10960

COURT COURT OF QUEEN'S BENCH
ALBERTA

JUDICIAL CENTRE CALGARY

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

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

DOCUMENT **ORDER [Procedural Matters and Sequencing of
Applications]**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT NORTON ROSE FULBRIGHT CANADA LLP
3700, 400 Third Avenue SW
Calgary, Alberta T2P 4H2
Counsel for Ms. Susan Riddell Rose
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Attention: Steven H. Leitt
Aditya Badami
Email: steven.leitt@nortonrosefulbright.com
File No.: 1001040549



I hereby certify this to be a true copy of
the original order

Dated this 18 day of sept 2018

[Signature]
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: August 30, 2018

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Mr. Justice Jeffrey

UPON THE APPLICATIONS of the Plaintiff and the Defendants; **AND UPON** having read the pleadings and applications filed by the Plaintiff and the Defendants; **AND UPON** having heard submissions from counsel for the Plaintiffs and the Defendants; **AND UPON** noting that all parties seek prompt determinations of the issues and forecast being able to proceed with the Plaintiff's August 2nd Application very early in 2019;

IT IS ORDERED THAT:

1. The parties are to consult the Honourable Madam Justice Horner, Co-Chair of the Commercial Practice Group, and, if necessary, the Honourable Mr. Justice Rooke, Associate Chief Justice, in respect of appointing a justice of the Calgary Commercial List to hear all the applications filed, and which may be filed, by the Plaintiff and Defendants respectively.

2. The Defendants' respective applications filed August 27, 2018, both to Resolve Particular Questions and to Stay the Plaintiff's Application, shall be heard as soon as possible and before the Plaintiff's application filed August 2, 2018.
3. Scheduling of the Plaintiff's application filed August 2, 2018, and any other applications shall be directed by any Justice that is appointed for that purpose pursuant to paragraph 1 of this Order.
4. There shall be no costs arising from this Order.
5. This Order may be consented to via facsimile or electronic transmission and by counterpart.

J.C.C.Q.BA

A handwritten signature in black ink, appearing to be 'J.C.C.Q.BA', is written over a horizontal line. The signature is stylized and cursive.

Action No.: 1801-10960
E-File Name: 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

Calgary, Alberta
December 17, 2018

Transcript Management Services
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Phone: (403) 297-7392 Fax: (403) 297-7034

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

3

4 December 17, 2018

Morning Session

5

6 The Honourable
7 Mr. Justice Nixon

Court of Queen's Bench
of Alberta

8

9 R. de Waal
10 L. Rasmussen
11 D.J. McDonald, QC
12 P.G. Chiswell
13 S.H. Leidl
14 A. Badami
15 K. Salguero

For PricewaterhouseCoopers Inc.
For PricewaterhouseCoopers Inc.
For Perpetual Energy Inc.
For Perpetual Energy Inc.
For Susan Riddell Rose
For Susan Riddell Rose
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.

27

28 MR. LEITL:

Good morning, My Lord.

29

30 THE COURT:

Just one housekeeping matter. I have a bar
admission at 1:00 in this courtroom, otherwise the day is yours.

31

32 MR. MCDONALD:

We better clean up at --

33

34 THE COURT:

That's --

35

36 MR. MCDONALD:

-- before we leave.

37

38 THE COURT:

That's actually why I'm mentioning it. Just at

39 least close your materials, et cetera, and --

40

41

1 MR. MCDONALD: Maybe --
2
3 THE COURT: -- flip them --
4
5 MR. MCDONALD: Is it okay if we put them in -- well, the jury box
6 might be used, too, I suppose.
7
8 THE COURT: I suspect not.
9
10 MR. MCDONALD: Okay.
11
12 THE COURT: I'd put it over there.
13
14 MR. MCDONALD: Okay.
15
16 THE COURT: Thank you, sir.
17
18 MR. MCDONALD: Thank you.
19
20 THE COURT: At your convenience.
21
22 MR. MCDONALD: Thank you, My Lord. First, I wanted to say thank
23 you for rescheduling after I made the mistake of saying I was available on November 30th
24 and found I was supposed to be far away. I appreciate you accommodating me, and I thank
25 my friends as well. And thank you also for the questions which we have been diligently
26 working through over the last several days. Both of us have written answers or speaking
27 points, depending on how you might like to treat them. We both just finished and just
28 exchanged now, but I'll pass up to you the defendants, and that's the combined Norton
29 Rose --
30
31 THE COURT: Thank you.
32
33 MR. MCDONALD: -- Burnet Duckworth (INDISCERNIBLE).
34
35 THE COURT: Thank you, madam clerk.
36
37 MR. DE WAAL: My Lord, I'll just hand up mine as well.
38
39 THE COURT: Certainly. Thank you, Mr. de Waal.
40
41 Thank you, madam clerk.

1
2 MR. MCDONALD: We've had a brief discussion among counsel
3 about the most effective way to deal with this. I think we all see two options. One option
4 would be for us to take you through the answers now. I don't think any of us intends to
5 speak to every answer. The ones that are self-explanatory or don't require any further
6 explanation we'd just leave with you in writing. There are others, though, that some context
7 or elaboration might be helpful to you.

8
9 The other alternative, and perhaps the better alternative, if you wish, is to leave them with
10 you for whatever period of time that might be, an hour, to allow you to read them quickly
11 and perhaps identify some focused areas that you would like us to address and for us to
12 read each other's so that we might, when we address our own, also take into account what
13 the other side has said. I don't know how long it would take to read them. They're fairly
14 comprehensive. There are a lot of attachments that I don't think you'd need to spend time
15 with, but you would need to look at the answers. And my friend's appears to be about the
16 same volume as ours, so I would think it's an hour, an hour and a half, something like that.

17
18 THE COURT: Let me turn the question around to all counsel.
19 Would it be a benefit given what you've just stated for you to pause for an hour to read
20 your friends' commentary and vice versa so that you can speak maybe more effectively?

21
22 MR. MCDONALD: I think so.

23
24 THE COURT: Okay. I'm not adverse to that. Would an hour be
25 sufficient?

26
27 MR. MCDONALD: I don't know, but I guess we should think about
28 trying to complete this today. You know, an hour would certainly be sufficient, in my view,
29 to read what my friends have done, to thoughtfully organize it so that we incorporate it into
30 our oral submissions. We could do our best.

31
32 THE COURT: I think I would get a lot more out of it if I had the
33 benefit of your comments having considered your friends' response --

34
35 MR. MCDONALD: Okay.

36
37 THE COURT: -- and I suspect the parties would too. Mr. de
38 Waal?

39
40 MR. DE WAAL: Yes, My Lord. In fact, that's -- I agree with that.

41

1 THE COURT: Okay. Why don't we adjourn for an hour and
2 reconvene at 11:15. That would give us a clear hour --

3

4 MR. MCDONALD: Okay.

5

6 THE COURT: -- and if you feel comfortable advancing at
7 time -- at that time, we will. Like I said, we have all day. The bar ad is only going to take
8 probably 20 or 30 minutes at the most, so we can start again at 1:30, I suspect. Does that
9 work?

10

11 MR. MCDONALD: Okay. Well, we'll be back at 11:15, hopefully
12 ready to go.

13

14 THE COURT: Okay.

15

16 MR. MCDONALD: If we're not, we'll tell you where we are.

17

18 THE COURT: Advise me accordingly.

19

20 Madam clerk, if we could adjourn --

21

22 THE COURT CLERK: Sure.

23

24 THE COURT: -- until 11:15.

25

26 THE COURT CLERK: Order in court.

27

28 (ADJOURNMENT)

29

30 THE COURT CLERK: Order in court.

31

32 THE COURT: Please be seated. Mr. McDonald.

33

34 **Submissions by Mr. McDonald**

35

36 MR. MCDONALD: Thank you, My Lord. It's been rushed, but I think
37 I'm in a position that I can address my friend's comments. I will do so essentially by going
38 through the document that we provided to you. Some of the questions relate more to the
39 issues that Mr. Leidl was arguing and others to ones that I was arguing, so I'll be skipping
40 over those that Mr. Leidl will be addressing. And so it's going to be -- I think there -- in the
41 first ten or so, they're mostly in my area and then it's a mix after that, probably mostly in

1 Mr. Leitl's area.

2

3 And there's some that I don't think I need to address at all. For example, number 1, I don't
4 think there's any issue. Number 2, I don't know that there's a difference between us, but
5 there is an explanation that's required. And you had asked to provide Schedule 'T' to the
6 share purchase agreement, and you'll see that the answer is that that is Exhibit 'K' to Ms.
7 Rose's affidavit. And I wonder if I could take you there for --

8

9 THE COURT: Yeah.

10

11 MR. MCDONALD: -- a moment because this --

12

13 THE COURT: I'm there. I just -- I do have questions that are
14 vol -- I just want to make sure I had the right document because of --

15

16 MR. MCDONALD: Yes, and you --

17

18 THE COURT: -- the details we'll get into.

19

20 MR. MCDONALD: You do, and you don't.

21

22 THE COURT: Okay.

23

24 MR. MCDONALD: Schedule 'T' to the share purchase agreement is
25 the first page of this document, not the second page. And so we had understood when we
26 were before you last time that Schedule 'T' was these two pages, and that's incorrect. So the
27 direct answer to your question is only the first page behind 'K'.

28

29 But to clarify, the second page or the back of that page if yours are copied on both sides --

30

31 THE COURT: Yes.

32

33 MR. MCDONALD: -- is called Statement of Adjustments Goodyear,
34 and that is the statement of adjustments for the asset transfer agreement, and you'll see the
35 reference to it in subclause 11.01(h) of the asset transfer agreement. And we have then
36 included in the package at tab 2, not the entire statement of adjustments to the asset transfer
37 agreement because that was some 290 pages, but what we've included is essentially the
38 first pages of the schedules or when the pages were multiple sched -- where the pages were
39 multiple pages, we've included the first and last page. So, for example, you'll see you
40 turn -- if you're at tab 2 --

41

- 1 THE COURT: I'm there.
- 2
- 3 MR. MCDONALD: -- if you turn past the cover sheet, you'll see
4 Schedule 1, and it's Statement of Adjustments Goodyear Property Tax --
5
- 6 THE COURT: I'm there.
- 7
- 8 MR. MCDONALD: -- and Schedule 2, Orphan Well Levy. And that
9 takes you on to Schedule 5. So those are single-page documents.
10
- 11 And then you'll see a page described as Mineral Lease Per Diem Report for a project called
12 a series of numbers ending in 004.
13
- 14 THE COURT: I'm there.
- 15
- 16 MR. MCDONALD: And it has in the left-hand corner page 1 of 49.
17
- 18 THE COURT: I'm there.
- 19
- 20 MR. MCDONALD: And then the next page is page 49 of 49. We
21 didn't include the other 47 pages because we didn't think they would be helpful to anybody.
22 And if you turn over, you'll see 1 of 68 and then 68 of 68. One of --
23
- 24 THE COURT: Yeah.
- 25
- 26 MR. MCDONALD: -- 71 and 71 of 71. So these are all the mineral
27 release rental reports for three different -- what are called temporary projects.
28
- 29 THE COURT: Okay. Thank you.
30
- 31 MR. MCDONALD: And then if you go past the -- oh, sorry. There's
32 one more, a six-page document.
33
- 34 THE COURT: Yeah, I see that.
35
- 36 MR. MCDONALD: And then it gets to a Schedule 6, which is a
37 surface lease rental schedule. Schedule 7, Crown deposits, and those just had a couple
38 supporting documents, so we included those.
39
- 40 THE COURT: Okay. Thank you.
41

1 MR. MCDONALD: Okay. So that's just really by way of explanation
2 not a difference between the parties.

3

4 Item 3 might be similarly more of a description rather than a difference between the parties.
5 You asked for a reconciliation between Exhibits 'I' and 'J' of the Darby affidavit?

6

7 THE COURT: Correct.

8

9 MR. MCDONALD: And in a nutshell, Exhibit 'I' are financial
10 statements prepared at the request of 198 for 198's due diligence report, and they're
11 consistent with the financial statements that PEOC prepared and filed for income tax
12 purposes. They're the ones that show on the balance sheet assets of a hundred dollars, no
13 liabilities.

14

15 And then Exhibit 'J' is prepared for the same purpose at the request of 198 and represents
16 internal operating statements for the Goodyear assets on a pro forma basis as if PEOC had
17 held the beneficial interest as per the asset transfer agreement, and those contain the actual
18 numbers if one were to make those assump -- that assumption.

19

20 THE COURT: Yeah. Again, these being on a pro forma basis.
21 The reason I had asked the question when I was glossing through the documents, when I
22 see in the first gloss the balance sheet under 'I' of a hundred dollars, total assets at two
23 different points in time and total liabilities, I was struck by under 'J' where I see revenue
24 expenses/operating loss noted there. And I didn't see pro forma on the -- on that front page,
25 so I just --

26

27 MR. MCDONALD: Okay. I don't know why it wasn't labelled that
28 way, but my information is that they are pro forma, and the assumption is described in the
29 answer to para -- to question 3 at -- in the answers we provided.

30

31 THE COURT: Noted. Thank you.

32

33 MR. MCDONALD: Question 4, I don't know that we differ
34 particularly. The statement of claim is incorrect, and I think the plaintiffs acknowledge that
35 PEOC purchased the Goodyear assets for itself while it was -- while it was trusted upon.
36 And indeed in the answer that we provided, we say PEOC purchased the Goodyear assets
37 for itself.

38

39 And just --

40

41 THE COURT: Okay.

1
2 MR. MCDONALD: -- one additional fact that isn't set out in writing
3 in the response that we provided is that the trust indenture, section 5.2, permits the trustee
4 to purchase trust property, and the trust indenture has been included in response, I believe,
5 to the question 60.

6
7 THE COURT: Yeah, 60(c).

8
9 MR. MCDONALD: You'll see it at tab 60(c) of the materials, and 5.2
10 is entitled transactions with trustee.

11
12 THE COURT: Noted. Thank you.

13
14 MR. MCDONALD: I believe in paragraph 5, we're in 5(a) and 5(b),
15 each of us is referring to clause 2.06. We've got a couple other references that you'll see in
16 the answers that we provided including when it says, does the asset -- your question (b):
17 (as read)

18
19 Does the asset transfer agreement recognize the conveyance
20 involve the assumption of liabilities?

21
22 We refer specifically as well to clause 10.08.

23
24 We have a significant difference on 5(c). Your question is: (as read)

25
26 As a stand-alone basis, did the Goodyear assets have value at the
27 time they were conveyed to PEOC?

28
29 And my friend's answer talks about whether ARO should be regarded or disregarded and
30 then refers to an asset value of 5.6 million based on one of the McDaniel reports and a
31 liability or what is now referred to as a negative value embedded in the assets of \$223
32 million based on the XI Technologies report. We're going to be dealing with the power
33 submission on the many problems with using the McDaniel's report as a basis of asset value
34 and the XI Technologies report as a basis of liabilities. And I won't deal with all of them
35 here, but I'll come to them when -- in answer to some other questions.

36
37 But the answer that is provided in our materials is that the question of the value of the
38 Goodyear assets on a stand-alone basis is something that will be required to be determined
39 by expert evidence. The Goodyear assets were not sold on a stand-alone basis pursuant to
40 the share purchase agreements, so we don't have the benefit of an arm's length transaction
41 between 198 and PEOC, and we are -- have to consider as part of the consideration the

1 variation other components, the Mercuria contract, the office lease, the seismic, and that
2 sort of thing.

3
4 So if one were to isolate the Goodyear assets on a stand-alone basis, one would value those,
5 in our submission, with the analysis of an expert who would look at the performance of the
6 assets, the production, commodity prices, operating costs, taxes, transportation costs,
7 salvage value. All these things are listed in the answer to 5(c), apply an appropriate discount
8 rate and determine a value.

9
10 And I also would like to refer you to paragraphs 99 to 128, which is referenced in the third
11 paragraph in answer to (c), and that's the section of our brief, My Lord, that I didn't deal
12 with in argument. That's the section that addressed if you dismiss our application, we have
13 the application for a stay for the plaintiff's application. We decided to park that for the time
14 being, but much of what you've asked relating to values and solvency or insolvency is
15 addressed in that section of our brief, and the reason for that is that on the threshold issue
16 dealing with whether or not the transaction was an arm's length transaction, we did not
17 address value and solvency because they weren't relevant, in our submission, to the
18 threshold issue. But we did address them extensively as part of the stay application because
19 we take the position that that application cannot be determined -- that the plaintiff's
20 application cannot be determined summarily because you need reliable evidence on, among
21 other things, the value of the assets, the value of the liabilities, and solvency.

22
23 So I'm going to refer, and you'll see reference here and many other places in our answers,
24 to that section of the brief, and we've set out there the frailties of relying on what the
25 plaintiffs seek to rely on, an outdated engineering report of some of the properties, which
26 Mr. Darby acknowledged on cross-examination didn't represent the fair market value, and
27 yet they continue to say, including in this answer, that's the value of the assets. And we
28 similarly say in that section of the brief you can't rely on the hearsay evidence of some
29 computer model by an entity called XI Technologies, which appears to have assessed based
30 on some assumptions that aren't disclosed the asset retirement obligations at some date in
31 2018, which my friends in answer to paragraph 5 say is what you should rely on to
32 determine the value of the liabilities.

33
34 So I'll take you again when we get to some of the more specific questions to some of the
35 sections of section -- of paragraphs 99 to 120(a) of our brief, but we've dealt with all of that
36 in our sections, but I didn't argue them when we were last before you.

37
38 5(d), your question asked for whether the purchase was for a nominal amount, and I think
39 both of us are just directing your attention to the amounts of the stated consideration in the
40 agreements, \$10 in the one agreement and \$1 in the other, subject to the adjustments, and
41 you have the statement of adjustments, which shows there are positive and negative

1 adjustments in the many millions of dollars. I don't know that anything turns on the use of
2 the word "nominal". If nominal is intended to mean a small dollar figure, then \$10 and \$1
3 are small dollar figures. Nominal, as I understand it, has another meaning, which is below
4 real value, and certainly we do not accept that it's below real value.
5

6 THE COURT: Now, just to be clear for both parties, I was
7 asking the question in part because purchase price is defined, as I recall, in the agreement,
8 and the use of nominal amount was not to suggest it was negative, this is just part of
9 narrative, but when I saw the arguments as drafted, the purchase price, the nominal
10 purchase price as defined in the agreement, did not take into account, and I'll use your
11 phrase, Mr. McDonald, the plus and minuses, i.e., that's part of the reason why I asked are
12 we dealing with an asset here? Let's just park the -- to the side the ARO. And I appreciate
13 the comments that have been made that it's embedded, but we just didn't buy this -- this is
14 a question -- for a nominal amount of \$10. We bought it for the asset, acknowledging that
15 there are some liabilities -- I'll use that term with a small 'L' right now -- and that's different
16 from the purchase price as defined in the agreement.
17

18 MR. MCDONALD: Are we talking about the asset agreement or
19 share agreement right now?
20

21 THE COURT: We're talking about the asset agreement.
22

23 MR. MCDONALD: Could I -- my memory is different from yours,
24 and let's me just check for a moment.
25

26 MR. CHISWELL: It's at page 7.
27

28 THE COURT: Let's just go and have a look at that agreement.
29

30 MR. MCDONALD: Yes. At page 7, the agreement is tab 'J' to Ms.
31 Rose's affidavit, and the purchase price is defined in 'KK' on page 7.
32

33 THE COURT: Sorry. Give me that tab again.
34

35 MR. MCDONALD: 'J' of Ms. Rose.
36

37 THE COURT: Okay. I'm there.
38

39 MR. MCDONALD: Page 7, paragraph -- or paragraph 'KK': (as read)
40

41 Purchase price means \$10 as adjusted in accordance with

1 subclause 11.01(i).
2
3 THE COURT: Correct.
4
5 MR. MCDONALD: And then if we go to 11.01(i), which is on page
6 24 --
7
8 THE COURT: I'm there.
9
10 MR. MCDONALD: -- it ref -- well, the article 11 is adjustments, and
11 the purchaser and vendor agree in (i) to make monthly payments for the adjustments, and
12 we'll do a final statement of adjustments within 128 days -- 180 days from closing. So my
13 understanding of the agreement is that the stated consideration is the \$10 as adjusted, and
14 that draws in the --
15
16 THE COURT: Yeah.
17
18 MR. MCDONALD: -- statement of adjustments I just referred to.
19
20 THE COURT: Yeah, yeah. And I think you've answered the
21 question when you say the \$10 as adjusted.
22
23 MR. MCDONALD: Yes.
24
25 THE COURT: That -- that's my point.
26
27 MR. MCDONALD: Okay. If that's --
28
29 THE COURT: Yeah.
30
31 MR. MCDONALD: So have -- have I -- have I answered your
32 question then?
33
34 THE COURT: Yeah.
35
36 MR. MCDONALD: That's what --
37
38 THE COURT: You have.
39
40 MR. MCDONALD: -- you're looking for? Thank you.
41

1 (e) of question 5 is: (as read)

2
3 What evidence is there to support the assertion that the liabilities
4 associated with the Goodyear assets exceeded the value of the
5 Goodyear assets at the time of the conveyance?
6

7 And my friend argues in five bullet points all of the evidence that we say is unreliable and
8 wrong. He starts with the ARO as if it's a liability when I believe he acknowledged on our
9 first appearance that the ARO is not a liability. It's a provision. He turns to the LMR
10 shortfall of \$15.9 million, excluding pipelines.

11
12 I will take you to our argument in a moment, but LMR is not a value of assets or liabilities.
13 It determines assets or liabilities. We're not a determination of fair market value, I suppose
14 I should say. It's a value of calculation, but it attributes the gross value of the assets and
15 liabilities of a well to the licensee. It doesn't consider the value on a net basis. So it's a
16 formula that the AER has determined to use for a particular regulatory purpose. It's not a
17 formula to determine the value of assets and liabilities of a company.
18

19 Municipal taxes is the next point that my friend refers to, plus or minus \$10 million. Ms.
20 Rose dealt with that in her affidavit, and that number is wrong, and the taxes were either
21 paid or following the transactions Sequoia entered into, arrangements with three
22 municipalities to defer taxes. My friend then refers to the ARO again, which has the same
23 difficulties I just mentioned, and, finally, it seems once again referring to ARO,
24 acknowledging it isn't a liability but treating it as if it were a liability for the purposes of
25 valuation. So I say that the answer that the plaintiffs have given you is entirely unreliable.
26

27 If I could then take you to the answer in our materials. We effectively anticipated this, and
28 to the extent that there's reliance on reserve reports, they're outdated. You'll read that the
29 reserve report was effective December 31, 2015, and included only some of the wells, not
30 all of the assets. He included estimated abandonment costs and salvage value for those
31 wells. It was discounted at 10 percent and then compared that to an undiscounted ARO
32 number calculated by -- in accordance with some computer model.
33

34 I think now might be a useful time to ask you to turn to the stay section of our brief where
35 we address much of this. Could I ask you to turn to page 27.
36

37 THE COURT: (INDISCERNIBLE). Which paragraph again,
38 sir?

39
40 MR. MCDONALD: Starting at paragraph 95.
41

1 THE COURT: I'm there.

2

3 MR. MCDONALD: So this is the section that I did not address. If I
4 could then take you over two pages to a heading, the reason the plaintiff's application
5 should be stayed.

6

7 THE COURT: I'm there.

8

9 MR. MCDONALD: There's reference initially to section 96(2) of the
10 *BIA*, which permits a limited hearsay evidence on behalf of a trustee with respect to the
11 value of the consideration given and received and creates a rebuttable presumption. But
12 then we go on to say that at paragraph 104, well, I might say that -- that's for the purposes
13 of the *BIA* claim. There's no similar statutory relaxation of the hearsay rules for the
14 oppression claim and the other claims that the plaintiff makes. It's only for the *BIA* claim.
15 Starting at 104, though, we make reference to what I've already referred you to, the reserve
16 report and the software model, and say that the reason this case has to be decided, if you
17 reject our sub -- our application, at a trial is that the evidence of value will be hotly
18 contested.

19

20 If I could then turn -- ask you to turn over to page 32.

21

22 THE COURT: I'm there.

23

24 MR. MCDONALD: We refer to in paragraph 115 a decision called
25 *Indarsingh*, which addresses the significance of section 96.2 of the *Act*, and the Court says:
26 (as read)

27

28 I appreciate that a certain informality is required under the *Act*, but
29 unsworn opinion evidence or opinion evidence that is merely
30 exhibited to an affidavit of someone other than the expert is, in my
31 view, inadmissible or virtually weightless. The *Act* provides that
32 where a specific matter of procedure is not dealt with in the *Act*,
33 the rules of practice apply. In Alberta, rule 6.11 permits opinion
34 evidence in support of an application but only if it is sworn and
35 presumably without the strict necessity of having to prove the
36 qualifications of the expert.

37

38 The trustee's opinion as to the value received by PEOC is based solely on an outdated
39 reserve report, and there we've quoted Mr. Darby's answer to the question. I think my
40 question was fair market value of the assets but whichever you prefer. The engineering
41 report does not state the fair market value of the assets. So my friend in all the answers

1 today continues to rely on the engineering report to support the value of the assets when
2 Mr. Darby himself concedes that it doesn't state the fair market value of the assets, and any
3 of us who have had experience with engineering reports during the course of our careers
4 know that they are for a specific purpose, and that purpose is not to state fair market value.
5

6 Paragraph 117 then lists some of the problems with the reserve report including an
7 acknowledgment in paragraph -- described in paragraph (e) of 117 that there's already
8 contrary evidence on the point where he says: (as read)
9

10 The McDaniel report includes an estimate of abandonment costs
11 as well as estimates for salvage value. For this reason, the amount
12 of ARO may be overstated.
13

14 So he acknowledges that he's double counting ARO, but he doesn't try to deal with it. He
15 goes on: (as read)
16

17 The trustee does not consider this to be material without doing an
18 assessment of what the amount is in the engineering report,
19 without indeed even attaching the engineering report as an exhibit
20 to his affidavit.
21

22 Paragraph 119 also points out that the trustee ignored the value of the other consideration
23 that PEOC received on the transaction, including the gas marketing contract, the office
24 lease, and the licences -- the seismic licences.
25

26 The other side that Mr. Darby relied on in his affidavit, and I'm not sure if he's relying on
27 it in answer to 5(e) or if he's just referring to the ARO provision of Perpetual, but to the
28 extent that he's relying on the XI Technologies -- well, I'm sorry. He is because he gets that
29 \$223 million number. So inevitably they're relying -- continue to rely on the XI
30 Technologies software. That whatever work XI Technologies has done, we don't know
31 because they haven't provided a witness, they haven't provided a report, we don't know
32 what their inputs were, their assumptions were, their methodology. We don't know the
33 qualifications of the people who did the work.
34

35 We do know, and this is set out in paragraph 122, that Mr. Darby has no training in
36 calculating asset retirement obligations, and that he acknowledges that valuing asset
37 retirement obligations is highly -- a highly judgmental and nuanced process. We also
38 know -- this is set out in 123 -- that while the AER has filed a proof of claim in Sequoia's
39 bankruptcy, it doesn't know what that amount is, and it's filed a claim between \$1 and \$225
40 million. And finally, the reference in 124 to Mr. Darby's submission that AR, asset
41 requirement obligations, are not liabilities but provisions, which is a liability of uncertain

1 timing and amount.

2
3 And, finally on this point, and this comes up in many of your -- in answer of many of your
4 questions, the comparison Mr. Darby makes is assets discounted at 10 percent against
5 undiscounted liabilities, or ARO, which he treats as liabilities. And again, it's
6 inconceivable, in my submission, that a Court could look -- compare a discounted number
7 or assets with a undiscounted number for liabilities have come up with any meaningful
8 conclusion. I'm sorry to repeat this. In addition, it's inconceivable that one could compare
9 an asset value as of December 31, 2015, with a liability value two to three years later and
10 come up with any meaningful conclusion.

11
12 I'll turn then to question 6. You asked: (as read)

13
14 Is paragraph 20 of the Darby affidavit something on which this
15 Court can rely upon for the purposes of this hearing?

16
17 And I'm not sure what your concern was on that paragraph, but Mr. Darby starts by
18 referring to what the Perpetual group contemplated. He says: (as read)

19
20 Although this was not specifically referred to in the Goodyear
21 presentation, it appears from the events that followed that the
22 Perpetual group contemplated that PEI would sell all the shares in
23 PEOC.
24

25 Well, Mr. Darby is in no position to speak to what was in the minds of the Perpetual group
26 or what the Perpetual group contemplated. Frankly, his description of the facts that
27 followed in that paragraph doesn't seem unreasonable, but we take the position that his
28 reference to whatever was in the contemplation of the Perpetual group is not admissible.
29

30 THE COURT: And just --

31
32 MR. MCDONALD: And my friend -- I think my friend's answer is
33 essentially a witness can comment on documents produced by the other side, and there's
34 nothing remarkable about that proposition, but that doesn't mean that a witness can provide
35 his own opinion or perception of what was in the minds of the parties on the other side.
36

37 THE COURT: And just for the clarification of both parties, the
38 reason I asked that question was because of the word "contemplated".
39

40 MR. MCDONALD: Okay.
41

1 THE COURT: I'm just sensitive to that in these particular
2 circumstances, so --

3

4 MR. MCDONALD: Okay.

5

6 THE COURT: -- your friend can speak to that.

7

8 MR. MCDONALD: That takes us to question 7, which states: (as
9 read)

10

11 Exhibit 'G' to the Darby affidavit summarizes the LLR for the
12 northern wells and facilities and the southern wells and facilities.

13

14 Ask you asked: (as read)

15

16 Do the northern wells facilities and southern wells facilities
17 comprise the Goodyear assets?

18

19 And my friend says basically the trustee doesn't know. So I don't know why that document
20 was put in the record if the trustee doesn't know. He says it's a record we found in the -- or
21 received in the production from the PEI data room for the sale of the Goodyear assets, but
22 there's no suggestion in the evidence that the properties listed there are in fact the Goodyear
23 assets.

24

25 The data room was populated in the spring of 2016. You've seen the evidence of the parties'
26 negotiations of the land schedule and that was an evolving document that eventually was
27 agreed to in the asset transaction and there is no -- well, you can't conclude that the northern
28 wells and southern wells and facilities described on Exhibit 'G' are the Goodyear properties.
29 And indeed I can take you to footnote 7, which is part of the answer to 7(a) --

30

31 THE COURT: I'm there.

32

33 MR. MCDONALD: -- question 7(a).

34

35 THE COURT: Yeah.

36

37 MR. MCDONALD: And just to identify not any specifics, but the fact
38 that they were different properties, in Exhibit 'G', the deemed liabilities -- this is for LLR
39 purposes -- are \$202 million whereas the deemed liabilities ultimately were \$176 million
40 for the Goodyear properties. So that's only an illustration that they were different properties
41 from what is in Exhibit 'G'.

1
2 THE COURT: Yeah. Again, for the benefit of all parties, the
3 reason I posed the question is I saw these discrepancies, and I wanted to make sure I wasn't
4 misunderstanding something.

5
6 MR. MCDONALD: Okay.

7
8 THE COURT: Okay.

9
10 MR. MCDONALD: I think the discrepancies exist because the
11 properties are different.

12
13 THE COURT: Right. Okay. Thank you.

14
15 MR. MCDONALD: As I say, my friend's answer was that the trustee
16 has no independent knowledge. In answer to 7(b), your question is: (as read)

17
18 Is there any evidence that the actual value of the Goodyear assets
19 equals the difference between the deemed assets and deemed
20 liabilities as those two phrases are defined in directive 6?

21
22 And my friend's answer is, Not directly, which might be an acknowledgment of what we
23 have stated more specifically in our answer. We say: (as read)

24
25 No. LLR is calculated monthly by the AER as per gross operated
26 working interests as opposed to net operated and non-operated
27 interests. That is, it attributes 100 percent of the deemed assets and
28 100 percent of the deemed liabilities of a well to the licensee. It
29 uses provincial and regional averages as opposed to actual assets
30 and liabilities of a particular licensee. Nor does the LLR
31 necessarily use site-specific abandonment and reclamation costs,
32 and therefore cannot be considered as representative of the value
33 of the Goodyear assets.

34
35 So I'm not sure. My friend's disagreeing with that when he says, Not directly, but that's a
36 more specific answer to why the LLR calculation isn't a calculation of the fair value of the
37 assets. And we've attached directive 6 to the materials, and you can see in the directive the
38 manner in which the calculations are required to be made.

39
40 Question 7(c) is: (as read)

41

1 Should this Court make findings based on deemed assets and
2 deemed liabilities as those phrases are defined in directive 6, or
3 should this Court make findings based on actual asset values and
4 obligations?
5

6 Well, my answer to the first part of your question is you cannot use directive 6 to make
7 findings. My friend seems to acknowledge that, but then goes on to say: (as read)

8
9 It is not necessary to determine the value of assets deemed or
10 actual for finding that the consideration received by PEOC was
11 conspicuously less than the consideration provided in taking over
12 the assets and associated liabilities.
13

14 I find that a remarkable assertion, My Lord, that he's essentially asking you although,
15 frankly, I don't think you need to make a finding for the purposes of this application to find
16 that the consideration was conspicuously less when he hasn't provided reliable evidence of
17 the value of the assets or the liabilities. That would be an impossible finding to make, and
18 I don't know what the assets are worth, I don't know what the liabilities are worth, but I
19 know there's a big difference. That's not what courts do. And we say when -- if and when
20 we ever get in this case to have it to determine the value of the assets and liabilities, the
21 Court will determine that based on all the evidence before it, such as what I've referred to
22 a little earlier.
23

24 At 7(d), we agree that the deemed liabilities for the LLR calculation are on an undiscounted
25 basis.
26

27 It may be that paragraph 8 is one that Mr. Leidl will be addressing, but I would like to touch
28 on it. And your question is that in paragraph 20 of the Darby affidavit states that PEOC
29 was unable to pay the ARO the municipal property tax liabilities and other liabilities
30 associated with the Goodyear assets and was insolvent at the time of or immediately after
31 the asset transaction.
32

33 And you ask: (as read)

34
35 What weight should the Court give to this conclusion?
36

37 And our answer is -- or "this assertion", and our answer is the Court should give no weight.
38

39 My friend's answer is quite different. He says that this is an inevitable conclusion from the
40 uncontested facts. Well, certainly the facts are not uncontested. He goes on to say: (as read)
41

1 PEOC had no other assets or sources of revenue when it received
2 the 2,500 cash-flow-negative wells.

3
4 If you recall, PEOC had 32 million cubic feet per day of production revenue. You'll recall
5 that under the sale -- purchase share sale agreement there was price protection provided by
6 way of the Mercuria contract, so it's far from an inevitable conclusion that PEOC was
7 unable to pay its liabilities at the time of the transaction.

8
9 And I might say that your question refers to Darby's reference to unable to pay the
10 abandonment and reclamation costs. Well, we know you don't have to pay the undiscounted
11 amount of the abandonment and reclamation costs. That's not a liability for the company.
12 It's a provision, and we've discussed that at length. And so while the company has an
13 obligation over time to reclaim wells, the ARO is not a calculation of an immediate liability
14 that's payable and so can't be used as a measure of solvency.

15
16 Then the second part of paragraph 20, and perhaps more what you were driving at is --

17
18 THE COURT: We should clarify for the record. You've referred
19 to paragraph 20. Indeed, it is paragraph 31, and that was my mistake --

20
21 MR. MCDONALD: Correct. Yeah.

22
23 THE COURT: -- so --

24
25 MR. MCDONALD: We both recognized that.

26
27 The second part of paragraph 31 was Darby's statement that PEOC was insolvent at the
28 time of and immediately after the asset transaction. In our submission, you should give no
29 weight to that conclusion. There are many reasons for that, the first of which is that it's an
30 opinion, and while section 96(2) of the *Act* relaxes the hearsay rule for -- or the opinion
31 evidence rule for the purposes of value, it doesn't do that for the purposes of solvency, and
32 Mr. Darby has not been qualified to give an opinion on solvency.

33
34 There's no evidence, in my submission, in the Darby affidavit that PEOC was unable to
35 make the payments as they became due. The reference to the municipi -- well, the reference
36 to ARO I've already addressed. Municipal taxes, you've seen the evidence in Ms. Rose's
37 affidavit. They were paid. There were three municipals that the company was in penalty
38 under, but those were taken over by Sequoia. They were adjusted in the statement of
39 adjustments, and Sequoia entered into payment arrangements with those municipalities.
40 And, of course, all the other liabilities were settled at the time of closing or adjusting.

41

1 I'd like to take you back to our brief and those -- actually, probably an easier way to do it
2 is take you to Mr. Leidl's brief. Sorry, paragraph 9 of Mr. Leidl's brief.

3

4 THE COURT: Thank you. I'm there.

5

6 MR. MCDONALD: My friend -- or Mr. Darby makes the assertion
7 that PEOC was insolvent at the time of and immediately after the transaction. I think I've
8 addressed at the time of, and I refer you also to the more complete answer we've given to
9 question 8(a), but let me also take you to what Sequoia says about their business operations.

10

11 Now, we have a difference between us about whether one tests the post-transaction
12 solvency a moment after the transaction or at a later date, but Sequoia described in March
13 2018 in a letter to its stakeholders its business plan and how it operated and then the demise
14 of its business. And it starts by saying it was formed to implement a gas acquisition strategy
15 during what was thought to be the bottom of the gas price cycle: (as read)

16

17 ...strategy involved in acquiring gas assets, some of which were
18 close to the end of their life cycle, and working on reducing
19 operating costs of these assets in part through the implementation
20 of an aggressive abandonment and reclamation program that
21 would see the restoration of the lands and inactive wells acquired
22 from previous producers back to their original state prior to the
23 commencement of oil and gas operations.

24

25 It goes on to describe this abandonment and reclamation program in the next paragraph:
26 (as read)

27

28 ...created an internal abandonment and reclamation team with in-
29 house environmental functions guided by a seasoned and
30 established operations team.

31

32 It abandoned, in the third paragraph: (as read)

33

34 ...150 wells and received reclamation certificates for 91 wells.

35

36 It goes on to describe -- well, I'll take you to two more passages. Turning over to the next
37 page, the second full paragraph: (as read)

38

39 These strategies were successful and on target through to the end
40 of the summer of 2017. Sequoia steadily increased its production
41 and reduced its overall environmental liabilities. However, by the

1 end of the summer of 2017, gas prices in Alberta began to slide.

2
3 Now, it's very apparent from that that it was a viable and operating business and appears
4 to have been a successful business for the first year or so of its operation. And then, like
5 many gas producers in Alberta, it was faced with the decline in the price of gas, and I won't
6 take you through the balance of the letter, but it describes how this ultimately led to its
7 bankruptcy. But Mr. Darby's conclusion that it was insolvent at the time of and immediately
8 after the asset transaction should be given no weight, and the better evidence is that it was
9 anything but.

10
11 I believe the answer my friends give to 8(b) -- well, it looks like we're on the same page on
12 that. It looks like -- your question was: (as read)

13
14 Did Mr. Darby determine the liabilities of PEOC on a discounted
15 or undiscounted basis?

16
17 And we're all agreed it was an undiscounted basis.

18
19 You ask in question 9: (as read)

20
21 Given that the disputed transaction occurred on October 1, 2016,
22 what is the relevance and the status of the PEOC Sequoia wells as
23 at March 23, 2018?

24
25 And, of course, our answer is that there is no relevance. My friend's answer is that the
26 trustee tracked all the assets, but I think perhaps what he's referring to is the first page of
27 Exhibit 'K', which shows that different wells were purchased by Sequoia from different
28 vendors at different dates. And indeed the trustee seems to have reconciled those, but
29 that -- other than that small point, there's no relevance to the other statements or suggestions
30 in Exhibit 'K', particularly the last page of Exhibit 'K', which is some sort of summary per
31 the XI model. I mean, it doesn't state any effective date for that, but presumably from the
32 context, it's sometime in 2018, and what that could possibly show about the
33 information -- quite apart from all the many frailties with the XI model, what it could
34 possibly show as of two years earlier is hard to conceive.

35
36 The second page of Exhibit 'K', if anything, seems to show that Sequoia was pursuing its
37 business plan for that year and a half leading to its bankruptcy. To the extent that we see,
38 we can draw some sort of conclusions from the status of abandoned, flowing, suspended,
39 et cetera, wells listed there. On balance, frankly, I don't know that there's anything
40 meaningful you can take from that document.

41

1 Your question 10 refers to paragraphs 44 and 51 of the Darby affidavit. You ask: (as read)

2
3 How should the Court deal with each of those opinions for the
4 purposes of this hearing?
5

6 And paragraph 44 refers to value, and so you do have to consider that in the context of
7 section 96(2), but I've taken you to the passage in our br -- or passages in our brief that
8 state that this only creates a rebuttable presumption. And even on Mr. Darby's own
9 evidence, we have evidence to the contrary where he candidly admits that the engineering
10 report he relies on for value isn't a -- has submitted fair market value, so I won't repeat what
11 I've already argued.
12

13 Sorry, I'm going to have to a minute to refresh myself on what my friend argues.
14

15 I think my friend is just referring to section 96. We're on common ground there, and he
16 says: (as read)

17
18 The defendants have deliberately not presented evidence to the
19 contrary yet.
20

21 And in a sense, that's correct in that we say that on the threshold issue that we put before
22 you, you don't need to make a determination of value. It's the arm's length question that
23 you need to address, but I think we've pointed out in the written materials that Mr. Darby's
24 opinion, even with the benefit of section 96, isn't at all reliable.
25

26 Paragraph 51 of Mr. Darby's affidavit, the one in which he offered an opinion on what was
27 in the best interests of PEOC, and my friend concedes that the Court should disregard that.
28 He has, of course, no ability to offer that opinion.
29

30 10(b) refers to some of what we've already been addressing you, referred to the PwC brief
31 at paragraph 1 point -- 104.1. It says: (as read)

32
33 The trustee's evidence is that the difference between the
34 consideration given and received by PEOC and the asset
35 transaction was at least \$217 million. On what basis does Mr.
36 Darby determine this difference? Is he an expert in valuation?
37

38 You've heard me on that. I won't repeat what I've said, and I've addressed that in the written
39 response as well and referred you to the paragraphs in the brief that address it. My friend
40 acknowledges that Mr. Darby is not an expert in valuation, but resorts to section 96(2)
41 again. My friends haven't addressed, maybe they will, in response in their oral argument to

1 the -- any points that we have made about the problems with the values that Mr. Darby is
2 using.

3
4 Paragraph 11, you refer to -- question 11, you refer to paragraphs 46 and 47 of the Darby
5 affidavit providing opinions to the Court: (as read)

6
7 How should the Court deal with each of those opinions for the
8 purposes of the hearing?
9

10 We say they are inadmissible and should be given no weight. These are the questions of
11 solvency, and my friend's answer is that insolvency in this context is not a matter of
12 opinion. Well, insolvency is not defined on its own in the *Act*, but indirectly it's defined,
13 and I'm going to refer to the definition section of the *Bankruptcy and Insolvency Act* which
14 is found at tab 16 of PwC's authorities.

15
16 THE COURT: I'm there.

17
18 MR. MCDONALD: Oh, it doesn't -- oh, it's page 5 of the *Act*, the
19 small number at the bottom middle --

20
21 THE COURT: I'm there.

22
23 MR. MCDONALD: -- of the page. Definition of insolvent person
24 means:

25
26 A person who is not bankrupt and who resides, carries on business,
27 or has property in Canada whose liabilities to creditors provable
28 as claims under this *Act* amount to one thousand dollars, and...

29
30 (a), (b), and (c). Well, we'll see the sections we're all familiar with, unable to meet the
31 obligations as they generally become due, cease to paying current obligations in the
32 ordinary course, or the aggregate of property at fair valuation is not sufficient to satisfy the
33 obligations.

34
35 Surely, when a Court has to decide whether PEOC was insolvent or solvent, it's going to
36 hear expert evidence about those very factors, and there's nothing that is found in the Darby
37 affidavit that could satisfy you. Mr. Darby is not qualified to offer the opinion, and you
38 have evidence, among other things, in the form of the Sequoia letter describing its business
39 for the year and a half that suggests that it was anything but insolvent.

40
41 I'm going to skip over now to question 15. Mr. Leidl may well deal with some of those that

1 I've skipped. Your question was: (as read)

2
3 Do all parties agree that PEOC was solvent at the end of business
4 on September 2016? If not, please direct the Court to the evidence
5 that supports this conclusion.

6
7 And, of course, we agree with that, and we refer you to some of the other answers that also
8 address that. My friend's answer is: (as read)

9
10 No, PEOC wasn't solvent.

11
12 And it say -- the answer goes on: (as read)

13
14 If it was personally liable for property tax on the properties it held
15 in its own name as trustee on behalf of POT, it was not solvent.

16
17 That's completely wrong. A party that might be personally liable for property taxes, like I
18 am in the house I own, does not become insolvent if hasn't paid those taxes the day after
19 their due. I mean, it's a test. You see -- you know the test of solvency. You know I say it's
20 a matter of opinion. This answer, in my respectful submission, is fatally wrong.

21
22 Paragraph 17 raises some interesting questions, and you refer to paragraph 99.1 of the Pw
23 brief that states that POT was an entity and PEOC as -- : (as read)

24
25 PEOC, its trustee, was a person who controls the entity if it is
26 controlled by one person.

27
28 And you ask: (as read)

29
30 On what authority is POT an entity for the purposes of the *BIA*?

31
32 We've provided the answer in writing, and POT is not an entity for the purposes of the *BIA*.
33 An entity is a person other than an individual, and the definition of person in the *BIA* does
34 not refer to a trust. And I should take you to that definition. That's back in -- that's 16 of
35 the PwC materials. Page 6.

36
37 THE COURT: I'm there.

38
39 MR. MCDONALD: (as read)

40
41 Person includes a partnership, an unincorporated association, a

1 corporation...

2
3 And it goes on. There is no reference at all to a trust. My friend seems to argue that, well,
4 a partnership is a person, and so a trust also must be a person, and trust was not excluded
5 by the definition I just took you to. In my submission, that's wrong. There's nothing in the
6 definition of person or entity that would include a trust, and I just point out in the answer
7 we've provided that the *Interpretation Act* doesn't assist the plaintiff, and the definition of
8 corporation in the *BIA* does not include a trust although it does include an income trust, but
9 POT, of course, is not an income trust. So to the extent you can draw some conclusions
10 from other *Acts* or the other provisions of this *Act*, everything suggests to me that a trust is
11 not an entity.

12
13 You say -- or your question in (b) is: (as read)

14
15 As I understand the laws of general application, a trust is a
16 relationship.

17
18 And we both agree with you on that, and we've cited some authority in our answer to
19 support that proposition.

20
21 Your 17(c) question: (as read)

22
23 For purposes of this hearing what are the implications if POT is a
24 relationship and not an entity?

25
26 My friend's answer is that if POT is not an entity or a person or a party, then the other party
27 to the -- I'm sorry. Let me -- I made a note of it, but I better read it more carefully. Oh, it
28 appears that my friends are arguing that in the third bullet: (as read)

29
30 If POT is removed from the occasion -- the equation, the asset
31 transaction is still a related party transaction under section 96.

32
33 And I don't know if that's based on an argument that the counter party to the asset
34 transaction is the beneficiary of the trust PEI or not. Sorry, I can't -- I'm sure my friend will
35 elaborate on that.

36
37 But let me take you to our submission on that point, and that is that if POT is not an entity,
38 then the asset transfer agreement was between PEOC in its own capacity and PEOC in its
39 capacity as trustee for POT. And PEOC did not then deal with POT as a related person for
40 the purposes of section 4 of the *Act*. More importantly, given that section 96 only applies
41 to transfers between persons, the alleged transfer from POT to PEOC is not captured within

1 the meaning of section 96. Section 96 cannot reverse a transaction between a bankrupt and
2 itself, and accordingly section 96 does not apply. It's a broad conclusion arising from that
3 proposition, but in our submission, it's the correct one when one properly understands a
4 trust and doesn't mischaracterize it as it seems to have been mischaracterized in the
5 statement of claim.

6
7 We also point out in the third paragraph of that answer that when you consider the trust as
8 a relationship, the transfer of the beneficial interest didn't affect the creditors of PEOC in
9 any respect. The creditors of PEOC had their claims against PEOC before and after the
10 beneficial interest was merged with the legal interest, and so the mischief that section 96
11 is directed at doesn't even arise.

12
13 And there's an analogy that I'd ask you to consider and that is what if POT -- the beneficial
14 interest had been transferred to a third party rather than merged with the legal interest in
15 PEOC? How would that have affected the creditors of PEOC? It wouldn't have affected
16 them at all. They had their claims as PEOC against a trustee of POT before and after that
17 transaction just as they had the same claims before and after the transaction in evidence by
18 the asset transfer agreement.

19
20 I just noticed the time and was reminded of it. Would you like to break now?

21
22 THE COURT: I'm fine if you want to go for another, say, 5 or
23 10 minutes. I'm short -- I'm good with a short break before my --

24
25 MR. MCDONALD: Okay. I'll --

26
27 THE COURT: -- (INDISCERNIBLE) bar call.

28
29 MR. MCDONALD: I'll see what I can (INDISCERNIBLE).

30
31 THE COURT: I was leaving counsel to make that
32 determination.

33
34 MR. MCDONALD: Well --

35
36 THE COURT: You break when --

37
38 MR. MCDONALD: -- we want to give you enough time to be ready
39 for your bar admission, so --

40
41 THE COURT: I'm ready for it. I just need to get my robes and --

1
2 MR. MCDONALD: Okay. Well, then I'll keep going --
3
4 THE COURT: -- couple pages of notes.
5
6 MR. MCDONALD: -- for another 5 or 10 minutes.
7
8 THE COURT: Okay.
9
10 MR. MCDONALD: But I'm going to flip over --
11
12 THE COURT: And maybe while we're on this, as I mentioned
13 this morning, I'm agreeable to start at 1:30 or 1:45. I should be done by 1:30 because this
14 is just an out-of-province bar call.
15
16 MR. MCDONALD: We'll be waiting outside by 1:30, so if the --
17
18 THE COURT: Okay.
19
20 MR. MCDONALD: As the people leave, we can come in.
21
22 THE COURT: Okay. Thank you.
23
24 Does that work for all parties?
25
26 MR. DE WAAL: Yes, (INDISCERNIBLE)
27
28 THE COURT: Thank you.
29
30 MR. MCDONALD: May I next turn to question 28.
31
32 THE COURT: I'm there.
33
34 MR. MCDONALD: You referred to paragraph 197 of the PwC brief
35 that suggests that current and contingent creditors of PEOC are persons for whose
36 protection the regulatory regime was created. Then you have two questions. First: (as read)
37
38 When you refer to the regulatory regime, please outline what
39 statutes on which you are relying.
40
41 And my friend has answered that by listing the same statute relied on in the statement of

1 claim and then three other statutes never referred to in the statement of claim. He then
2 refers to directive 6, which was in the statement of claim, and then a bullet, and that was
3 not referred to in the statement of claim.
4

5 My only -- of course, the plaintiff can rely on whatever statutes it wants in answer to that
6 question, but I want to make the point that our application on the statutory illegality
7 regulatory regime points is to strike out the pleading because it fails to disclose a reasonable
8 cause of action. And so we take the pleading as it is, and I suggest to you that you should
9 not essentially amend the pleading by taking these initial statutes that my friend adds in
10 answer to your question in considering that they are part of the pleading. They are not. And
11 the pleading is defective for all the reasons we argued earlier and isn't remedied by listing
12 a few more statutes.
13

14 Your second question, part of 28, is: (as read)

15
16 Identify the statute or provisions you identify -- the factors I need
17 to consider in the identification of the persons for whose protection
18 the regulatory regime was created.
19

20 And I think this arose from the Ontario case. The name's on the tip of my tongue, the money
21 lenders case. Can anyone help me on that?
22

23 *Sidmay*. *Sidmay* was the decision, and the argument my friend made was that *Sidmay*
24 provided some relief when there was a specific statute that was for the benefit of people
25 who borrowed money from entities that weren't licenced to loan money. I referred to those
26 as the money lender cases. And so the argument was that the statutes here are for the -- by
27 analogy are for the protection of the creditors of Sequoia, yet the answer that my friend
28 provides is simply that these are statutes for the general benefit of the public, and, in my
29 submission, there is no analogy you can draw from these statutes and the general benefit
30 of the public to the type of analysis that the Court was doing in *Sidmay* in analyzing when
31 there's a specific statute to specifically protect borrowers that certain consequences flow
32 from that.
33

34 Turning to question 30.
35

36 THE COURT: I'm there.

37
38 MR. MCDONALD: Question is: (as read)

39
40 Paragraph 26 of Ms. Rose's brief states that the trustee saw no
41 reason to ask Mr. Wang or Mr. Yang about their participation in

1 **Certificate of Transcript**

2

3 I, Sandy Voga, certify that

4

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

8

9 (b) the Certificate of Record for these proceedings was not included orally on the record.

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

3 _____

4 December 17, 2018 Afternoon Session

5

6 The Honourable Court of Queen's Bench
7 Mr. Justice Nixon of Alberta

8

9 R. de Waal For PricewaterhouseCoopers Inc.

10 L. Rasmussen For PricewaterhouseCoopers Inc.

11 D.J. McDonald, QC For Perpetual Energy Inc.

12 P.G. Chiswell For Perpetual Energy Inc.

13 S.H. Leidl For Susan Riddell Rose

14 A. Badami For Susan Riddell Rose

15 K. Salguero Court Clerk

16 _____

17

18 **Discussion**

19

20 THE COURT CLERK: Order in court.

21

22 THE COURT: Good afternoon. Please be seated. At your
23 convenience, counsel.

24

25 **Submissions by Mr. McDonald**

26

27 MR. MCDONALD: Thank you, My Lord. I'm at question 30(b).

28

29 THE COURT: I'm there.

30

31 MR. MCDONALD: And you ask: (as read)

32

33 Would not evidence concerning the operations between October
34 1, 2016, and the date of bankruptcy be instructive to the Court in
35 respect to the questions raised and the underlying allegations
36 connected to this hearing?

37

38 In our submission, that evidence is not necessary to grant the defendant's application for
39 summary relief on the threshold issues. We do consider it necessary if you dismiss our
40 application, and we're dealing with the stay matter because, while my friends persist with
41 the argument that the only relevant evidence is the date of the transfer when testing

1 solvency, we disagree with that and submit that all the evidence from the date of the
2 transaction through to the date of the bankruptcy ought to be considered in assessing the
3 question of solvency. But for our purposes today on the threshold issue, that evidence, in
4 our submission, isn't necessary.

5
6 I'm next jumping over to question 46.

7
8 THE COURT: I'm there.

9
10 MR. MCDONALD: That question states: (as read)

11
12 Pw asserts that -- PwC asserts that PEOC was set up to fail. What
13 evidence supports that assertion? If that assertion is true, why did
14 198 co-purchase PEOC on October 1, 2016? Do the parties
15 concede that 198 Co. was deemed -- was at arm's length from PEI
16 but for the possible application of a deeming rule?

17
18 Well, our answer, as you see, is that there's no evidence that supports that assertion and
19 indeed there's considerable evidence that is directly contradictory and we have taken you
20 through in the brief the history of the transaction, the negotiations, the role of the counsel,
21 the gas marketing contract, the office lease, the seismic data, the staffing, the low-cost
22 structure that would assist the operations of Sequoia. All the evidence taken together speaks
23 loudly to Sequoia having a business plan, executing that business plan, not being set up to
24 fail but indeed being set up to succeed, and then, being faced with declining gas price and
25 whatever management decisions were made to lead to their demise some year and a half
26 later, going into bankruptcy.

27
28 My friend's answer seems really just to rely on the agreements, and the answer is the best
29 evidence is in the terms of the share purchase agreement and the retained interest
30 agreement. And indeed, the Goodyear assets didn't comprise all of POT's assets, and, you
31 know, undoubtedly the KeepCo assets were retained and the Goodyear assets were sold,
32 but that was a negotiated allocation as between the two parties to the sale purchase
33 agreement and in no way set up PEOC to fail.

34
35 I think the only other question that I'm going to be addressing is question 51.

36
37 THE COURT: I'm there.

38
39 MR. MCDONALD: (as read)

40
41 When considering the arm's length question, what evidence should

1 the Court consider for purposes of the hearing? In particular, for
2 purposes of section 96 of the *BIA*, what evidence to the contrary
3 should this Court consider for purposes of the hearing?
4

5 And the short answer is all evidence that casts -- that is relevant to the relationship on
6 among the parties: The context of the transaction, the negotiations of the transaction, the
7 terms of the transaction, and anything else that would allow the Court to make a conclusion
8 about arm's length.
9

10 The guidance that we've provided to you is the superintendent of bankruptcy's publication
11 on bill C-12, which was the bill that was -- that enacted the evidence to the contrary
12 provision in section 4(5) of the *Act*, and you'll see that we have quoted what the
13 superintendent of bankruptcy says should be considered. And then in the paragraph
14 following that tried to summarize that: (as read)
15

16 The Court should consider evidence that

17
18 (1) establishes the substance of the party's relationship with respect
19 to the transfer was one that exhibited the characteristics of arm's
20 length dealings or

21
22 (2) distinguished the relationship transfer from the mischief that
23 the deeming provisions try to address.
24

25 I've already spoken to that.
26

27 My friend's answer seems to resort to Mr. Darby's position on cross. It was highlighted in
28 our brief that you look at the asset transfer agreement, you look at the parties, and you end
29 your inquiry, and that's been set out in detail in our brief, and I won't repeat that.
30

31 My friend also refers to the *Legge* decision. We argued that last time, and I won't repeat
32 the arguments, but it's a decision that essentially says to assess fair market value, your fair
33 value -- I'm sorry. To assess an arm's length relationship, you just look at consideration;
34 and if the consideration was less than the fair value, then it wasn't an arm's length
35 transaction. And I argued last time that that reasoning is faulty and undermines the whole
36 structuring of the *Act* if one doesn't -- if one can reach a conclusion on arm's length simply
37 by looking at consideration, then the section 96 didn't require as a separate component of
38 the analysis a determination of whether the relationship was at arm's length.
39

40 My friend has referred to one other case that supports *Dover* I think -- sorry, supports
41 *Legge*. When we were last before you, we said it was the only case that seemed to follow

1 that approach. There's is a Quebec Superior Court case in my friend's materials called
2 *Dover Financial*. It provides no analysis. It's simply cites and seems to agree with the *Legge*
3 analysis.
4

5 My Lord, that's all I propose to address. There are some of the questions that I expect Mr.
6 Leidl won't be addressing, but I think are adequately dealt with in the written materials.
7 Otherwise I'll turn it over to Mr. Leidl.
8

9 THE COURT: Thank you, sir.
10

11 MR. LEIDL: Thank you.
12

13 Good afternoon, My Lord.
14

15 THE COURT: Good afternoon.
16

17 **Submissions by Mr. Leidl**
18

19 MR. LEIDL: Indeed, I'll leave Your Lordship with our written
20 answers. I'm not going to read every one, and I'll try and highlight some that I think are
21 more important. And I'll begin, if you have our answers handy, I'll walk you -- you're
22 walking through them, I'm begin at page 8 to deal with question 8. And Mr.
23 McDonald -- are you there?
24

25 THE COURT: I'm there.
26

27 MR. LEIDL: Mr. McDonald addresses -- I'll be brief. The
28 question is in the context of Mr. Darby's opinion or, if you prefer, argument that PEOC
29 was unable to pay ARO at the time of the transaction, and Mr. McDonald's taken you
30 through a lot of important evidence to show that when it's -- it's not plausible. The only
31 answer we got from our friend in their written materials, which I presume they took some
32 time to prepare, was that this is an inevitable conclusion based on what they call
33 uncontested facts.
34

35 Now, the only inevitable conclusion, My Lord, is the decision that the Court will make.
36 There's no inevitable conclusions put forward by parties, and that conclusion that they say
37 inevitable or not based on uncontested facts, obviously the facts are very much contested.
38

39 Maybe contested is the wrong word. In fact, they just ignore the evidence that tells the
40 contrary story. They ignore the evidence of Sequoia in whose shoes they stand today. When
41 I say "they", the trustee. The trustee stands in the shoes of Sequoia. Sequoia reported on

1 the business activities they conducted following closing, and in fact the report that Mr.
2 McDonald read to you, the letter from Sequoia, is adopted in the trustee's only report to
3 date, the preliminary report of the trustee.
4

5 Historically, PEOC paid the taxes. I should back up. First ARO. I mean, at the risk of
6 beating a dead horse, ARO is not a liability, was not at the time, is not today. As we stand
7 here today on the evidence, the trustee still has not accepted the AER's proof of claim. The
8 proof of claim on its face which says this might be worth \$1, and the trustee has authority
9 to say it's worth zero.
10

11 So as of October 1, 2006, to say that the AER was a creditor -- and I'll come to this in more
12 detail -- is absurd. Insofar as they rely on municipal taxes, historically PEOC paid its taxes.
13 On closing, most of the taxes were paid but for three. PEOC exercised a right to defer,
14 which obviously went into the adjustment mix with Sequoia, and then you read Sequoia's
15 report about how they operated through until 2018, and there is not one shred of evidence
16 that any municipality had a default of taxes due.
17

18 Why isn't there an affidavit from the municipalities? Why in Sequoia's records were there
19 no records of municipalities issuing notice of default? None of that. So for Mr. Darby to
20 say they were unable to pay, it's entirely incongruous with the evidence.
21

22 Over to number 10. Page 10, Mr. McDonald dealt with paragraph 44, but I will focus on
23 paragraph 51, a paragraph that I've been focusing on since I got involved, and you'll recall
24 that's where Mr. Darby expresses his personal opinion that there was oppression.
25 Remarkable from a trustee in bankruptcy. The answer from my friends is a partial
26 concession. At page 6 of their response, the Court may disregard the opinion of the trustee
27 in the first sentence, yet they ask the Court to accept the balance of the paragraph where he
28 makes an argument about disregard and prejudice, both pure argument or, if you prefer,
29 opinion. And he's not because "disregard", of course, is one of the magic words in the
30 ABCA when it comes to oppression, and there's Mr. Darby opining that there was disregard.
31 He is not an expert in corporate governance. The entire paragraph has to be struck -- or
32 disregarded, I should say.
33

34 And Your Lordship may recall in my submissions when we were last before you in
35 November, that paragraph was the sum and substance of the trustee's evidence on
36 oppression. So without that paragraph, let's consider what we don't have in the issue of
37 oppression. There is no evidence as to the reasonable expectations of the AER or the
38 municipalities. In the context of the oppression claim, my friend harp and harp on their
39 argument, which I say is flawed, but they harp on it saying the AER and the municipalities
40 were creditors. From an oppression standpoint, the answer to that is pretty much, So what?
41 Creditors do not get to sue for oppression unless there are a whole bunch of other things

1 involved, the Court exercising its discretion, and there being evidence of reasonable
2 expectations that takes them, as you'll recall from our submissions, to the point where they
3 expected to be treated as minority shareholders. Reasonably expected that.
4

5 In the absence of paragraph 51, there is no evidence about the exercise of business
6 judgment from the trustee. Ms. Rose deposed in her affidavit about the exercise of her
7 business judgment, and they didn't touch it on cross. And you may recall from my cross-
8 examination of Mr. Darby, I said, Didn't you think it was important to ask Ms. Rose about
9 that when you interviewed her? He didn't think so.
10

11 There was no evidence before the Court about the process followed in connection with the
12 deal except the evidence of Ms. Rose. There was no evidence from the trustee about
13 alternatives that Ms. Rose or PEOC should have considered because, you know, let's all, I
14 submit, take a step back and look at this from the perspective of the real world. What
15 alternatives were available to PEOC as a subsidiary, a single-purpose subsidiary, and the
16 parent company wanted to enter a deal so the company would become something else?
17 What alternatives do the trustees say should have been pursued that were in better interests
18 of PEOC? They don't offer that, and the trustee is not qualified to muse about that.
19

20 So I'm over to number 12, My Lord, on page 12.
21

22 THE COURT: I'm there.
23

24 MR. LEITL: So you recall the statement of claim in the Darby
25 affidavit both allege that that Ms. Rose personally benefitted from this transaction. Mr.
26 Darby, I use the word "allege" purposely because in his affidavit he says she personally
27 benefitted, but he doesn't say how or how much or what kind. That's why we say his
28 state -- his bald statement is at most opinion, at worse argument.
29

30 You'll recall that Ms. Rose denied having received any personal benefit and explained why,
31 and that was unshaken on cross-examination. And I'll come back to this when we deal with
32 question 22. You'll see -- I'll just, as a note for your notes, My Lord, at page 7 of Mister -- of
33 the trustee's counsel's submission at paragraph 12, they say: (as read)
34

35 Every shareholder of PEI, including Ms. Rose, benefitted from the
36 Goodyear restructuring.
37

38 As a matter of fact, not opinion. There's no evidence about that. And as I'll come to in
39 relation to question 22, in fact the share price of PEI following the transaction being
40 disclosed went down. So how did those shareholders benefit?
41

1 Mr. Darby didn't consider it and offers no analysis and could not explain the drop in the
2 share price, and it's not any kind of personal benefit. If you're suing a director for
3 oppression, it has to be the kind envisioned by the Supreme Court of Canada in *Wilson*,
4 and there the Court gave two types of personal benefit -- immediate financial advantage or
5 increased control of PEOC. There's evidence of neither. No evidence of either.

6
7 The next one I'll take Your Lordship to is number 14.

8
9 THE COURT: I'm there.

10
11 MR. LEITL: And simply to point out that I think I've
12 addressed my submission on the alleged inability to pay, the question where Mr. Darby
13 says there's no ability to pay. That's what -- again their answer, illogical conclusion from
14 undisputed facts. The conclusions are for the Court, and the facts are not as they suggest.

15
16 I think the next one is paragraph 19 -- or question 19. I'm sorry.

17
18 THE COURT: I'm there.

19
20 MR. LEITL: Now, as I read Your Lordship's question, you're
21 asking why PwC used the term "provable claim" in their brief and then as I read their
22 answer, they say it's because something we said. But here's how this works, in my
23 submission, in the context of the oppression claim. To have any basis for an oppression
24 claim, the AER had to be a creditor on October 1, 2016. I don't say that it had to be -- the
25 test on October 1, 2016, is that it had to have a claim provable in bankruptcy, that it had to
26 be a creditor, and it was not. When we refer to the provable claim of AER, that we refer to
27 the fact that the AER has still not proved a claim. It's still not a creditor.

28
29 My friend's response says that for the purpose of an oppression claim, contingent creditors
30 might qualify. And that's true, but you have to ask what kind of contingent creditors, and
31 all the cases they cite are where there was someone with a pressing claim against the
32 corporation where the assets of the corporation had been stripped, and we addressed this at
33 the hearing. That's a collective claim where a trustee might have standing to pursue in
34 contrast with individual claims that a trustee cannot, like the one that the AER they say has
35 or the municipalities.

36
37 But it's not all contingent creditors outstanding, and you still have to go through the other
38 tests. Reasonable expectations -- no evidence. Just to give you one example, My Lord, and
39 we don't have to go there unless you wish, but in our materials at tab 21, there's a decision
40 of Justice Farley in a case called *Royal Trust*. And at paragraph 15, you'll see, just to
41 illustrate, that's a case where the Court said, Your claim is too contingent to qualify for -- to

1 go ahead with an oppression claim.

2

3 And I'll come to this in detail, but while I'm on the subject as we know and is clear from
4 the decisions of *Redwater* and *AbitibiBowater*, for the AER to become a creditor, it has to
5 go through the three-part test in *AbitibiBowater*. And I'll be coming to that in support of
6 the submission that that test is far from being met.

7

8 Over to number 20, question 20.

9

10 THE COURT: I'm there.

11

12 MR. LEITL: I think I've covered this. I just want to make sure,
13 My Lord.

14

15 So the AER proof of claim, \$1, maybe \$0, maybe more than \$1, and that is at the date of
16 bankruptcy. There is no suggestion in the AER's proof of claim that it was ever a creditor
17 previously, and that wouldn't make sense if it did. Which takes me to number 21, My Lord.

18

19 THE COURT: I'm there.

20

21 MR. LEITL: And you'll see here our submission, once
22 something I've touched upon, that, yes, to be a provable claim in bankruptcy, a regulatory
23 claim has to meet all three requirements of the *AbitibiBowater*. Or outside of bankruptcy
24 for the AER to be a creditor, it has to meet that test. It didn't advance credit. It's not a lender.
25 It didn't advance services or materials. It's a regulator, and the only way it can turn its
26 regulatory power into becoming a creditor is to go through all the motions of the order, and
27 this all follows after they reclaim the properties through the fund and then proceed.

28

29 And you'll see at number (b) on page 18, we break that out. For the three bullet points,
30 there are just a paraphrasing of the test in *AbitibiBowater*. And you'll see above
31 there -- sorry, I apologize, on page 18 above (a), where we quote from *Redwater* where the
32 Court says regulatory order can become provable claims in certain circumstances, and that's
33 where you get the concept of the conversion of a public duty into a monetary claim. Now,
34 of course, in *Redwater*, the AER was resisting that, and the decision that's still under
35 reserve, the AER position is we are not creditors, which is somewhat ironic given the
36 trustee's assertion to the Court that they are and that they're representing their interests.

37

38 And to be clear, the AER may never be a creditor of Sequoia. The wells may get sold. The
39 properties may get sold. Who knows? But we're not there yet. There's not even evidence
40 before the Court that it's likely to happen.

41

1 So over to page 19(c), and Your Lordship asked the question about a comment made by
2 Justice Martin in dissent. And I'm not sure I addressed your question, I stand to be
3 corrected, but the implication of the dissent in *Redwater* makes our -- if the dissent succeeds
4 on appeal, our case is even stronger because Justice Martin ruled that the AER does not
5 become a creditor. And if so, they have their statutory rights and remedies, but they don't
6 get to sue for oppression as a creditor is one implication.

7
8 If you go with the majority, maybe you could sue for oppression in theory, but you have to
9 be a creditor, and that hasn't happened either. You have to satisfy the test in *AbitibiBowater*.

10
11 THE COURT: Yeah. Just for the benefit of the parties, the
12 reason I raised that question is often dissents in one era become the law in the next era, and
13 I just want to make sure I'm thinking about things in the proper context.

14
15 MR. LEITL: Yeah. And that why, My Lord, you asked me at
16 the hearing, you know -- I think you asked in so many words, you know, should we wait
17 for the decision to come out? And I say that --

18
19 THE COURT: I did.

20
21 MR. LEITL: -- it doesn't change our position either way. If the
22 Justice Martin's cases wins, our case is even stronger. Based on the majority decision of
23 the Alberta Court of Appeal in *Redwater*, our case is strong.

24
25 It would be really interesting if the trustee had adduced evidence from the AER saying, We
26 think we are a creditor, and here's the evidence of that; and we think that our reasonable
27 expectations existed and were violated, and here is the evidence of that. Nothing. Not even
28 hearsay. And the same for the municipalities.

29
30 Twenty-two is still on page 19 here, My Lord.

31
32 THE COURT: I'm there.

33
34 MR. LEITL: Going back now to the issue of personal benefit.
35 You asked about a part of Mr. Darby's cross-examination. The context of that cross-
36 examination, which was being done by me, was me confirming with Mr. Darby that despite
37 his role as an officer of the court and is supposed to be neutral and thorough and balanced,
38 he had resolved to make an allegation of personal benefit against Ms. Rose and sat across
39 the table from her and never put that to her, never asked her for her evidence on that. In
40 that context and in the context of establishing that in his affidavit he'd given no basis for
41 his argument of personal benefit, he fell back on this argument about the increase in the

1 asset base of PEI. So then we took him through that logically so see where it would go.

2
3 Now, the first proposition from the trustee is that, in essence, PEI was able to foist off to
4 some unsophisticated parties almost a quarter billion dollars in debt for no consideration.
5 So I put it to Mr. Darby do you agree that if PEI announced that its balance sheet had
6 been -- I'm paraphrasing -- a balance sheet had been improved by a quarter billion dollars
7 that would have been material. He agrees with that. Of course, he agrees with that.

8
9 So therefore, he has to agree that that would have had a positive impact on PEI's share
10 price. I mean, imagine the press release from PEI. Guess what, market? We overstated our
11 liabilities by a quarter billion dollars. So therefore, you would expect the share price to go
12 up, but Mr. Darby's hadn't looked at PEI's share price history because in fact he had not
13 considered personal benefit at all. He just said the words. When we did take him to the
14 share price history, we showed him that the share price went down, and he has no
15 explanation for that. It's totally inconsistent with his theory of personal benefit.

16
17 Yet, in my friend's response, there say there was an increase in the asset base, and what is
18 the increase in the asset base? Basically, what they say is the value of the ARO. And, again,
19 their increase in the asset base, while they now cite *Daishowa* in their materials, remember
20 *Daishowa* stands for the proposition that the value of the asset is impacted by the ARO as
21 a future provision, the ARO's not a liability. So if the ARO is, say, for argument sake, the
22 present value -- I'm not accepting this but for argument sake -- but if the present value of
23 the ARO or the present exposure equates to \$200 million, and you sell an asset for \$10,
24 that means the asset, all other things being equal, is worth \$200,000,010.

25
26 A flaw in the trustee's analysis, which is replete in all of their submissions, is that they
27 agree with that. Like the definition of Goodyear assets in the statement of claim said this
28 is a Goodyear's assets and the associated liabilities, in other words ARO. That's consistent
29 with *Daishowa*. But then what they do is they say you also have to deduct the ARO as a
30 liability, so they take it off twice. They take it off as \$200 million suppressing value, and
31 then they take it off again, \$200 million as a liability. A double count.

32
33 Paragraph 23 -- sorry, I keep saying paragraph, question 23. This is put to the trustee: (as
34 read)

35
36 Please articulate the director duty that was breached.

37
38 And in the end, we had to wait for the answer to this one, and it's simply a reiteration of
39 the allegations, My Lord. Including one such as that Ms. Rose failed to disclose things to
40 PEOC. I mean, again, I'd ask us to go back to the real world. Ms. Rose was the sole director
41 of PEOC. Her knowledge was PEOC's knowledge. How could she not have disclosed

1 personal benefit is an increase to the asset base of PEI. So, in my submission, those two
2 theories are not reconcilable. And looking at what my friends wrote, they say benefit is a
3 con -- as a concept is a conclusion, not a fact, and there, My Lord, is a concession, in my
4 submission, that when Mr. Darby used the word "benefit", he was giving nothing more
5 than an argument.

6
7 They then argue section 96.3 of the *Bankruptcy and Insolvency Act* in defining benefit, but
8 the Supreme Court of Canada in *Wilson*, when it talked about a specific kind of personal
9 benefit in relation to oppression claims against directors personally didn't refer to section
10 96.3 of the *BIA*. It's apples and oranges.

11
12 I'm going go to part of 34. Mr. McDonald addressed part --

13
14 THE COURT: I'm there.

15
16 MR. LEITL: -- (b). My friends have now confirmed that they
17 are not challenging per se the release, the validity of the release. They seem to today be
18 taking the position that the share purchaser agreement was not arm's length even though
19 Mr. Darby said he never looked at it because it's outside of his mandate. I don't know how
20 it lies in their mouth to make any comment on the share purchase agreement, but here they
21 do in attacking the release.

22
23 We continue with the release now into question 35, and they say the trustee does not -- this
24 is in their answer: (as read)

25
26 The trustee does not concur that the release was negotiated at arm's
27 length.

28
29 You'll see in our brief, I'm not going to repeat it to Your Lordship, that we cross-examined
30 Mr. Darby on this, about the negotiations, and he said he has no idea what happened other
31 than what the record says. And to back up further, recall the theory of the trustee in
32 attacking the release, which they don't mention in their answers, and this is the theory to
33 which we defended, and this is the theory in respect of which I cross-examined Mr. Darby.
34 And the statement of claim and Mr. Darby's affidavit say that Ms. Rose caused PEI to -- and
35 I'm paraphrasing, I apologize, I don't have it in front of me, but caused PEI to induce the
36 new owners of PEOC to enter the release. That's the theory that's no longer mentioned by
37 my friends. And we established that Ms. Rose was not in a position to cause PEI to do
38 anything, and it's clear on the evidence that the parties acquiring the shares of PEOC were
39 sophisticated business people represented by McCarthy Tetrault.

40
41 So on page 21 under 35(a), the first bullet, my -- the trustee's counsel writes: (as read)

1
2 The evidence shows that nobody represented PEOC in all of this.

3
4 I mean, that's totally inconsistent with the evidence. The release had a signature on behalf
5 of PEOC signed by the new owners. The release recited that all the parties to the release
6 were informed and knew what they were doing and had independent legal counsel, yet my
7 friends argue that PEOC wasn't represented.

8
9 A common theme that runs through the trustee's position appears to be, My Lord, that
10 Sequoia entered such a stupid deal that somehow must have been a breach of fiduciary by
11 Ms. Rose, but that's just ridiculous. You can see from the evidence that Sequoia had a
12 business plan and if they were right about the price of natural gas, a business plan that
13 likely would have worked. But not all business plans succeed, and that doesn't mean that
14 those business plans were doomed to fail.

15
16 Still on the release but now on question 36 -- oh, I'm sorry. This is still under my friend's
17 answer to number 35, now on page 22. They argue there is no evidence that the new
18 directors were aware of potential claims against Ms. Rose at the time release executed. The
19 new directors were advised by McCarthy Tetrault, and they were the ones that negotiated
20 the deal that the trustee is now challenging, so for them to say that the director somehow
21 couldn't have been opinion aware of a possible claim against Ms. Rose at the time is absurd.

22
23 The next bullet they say: (as read)

24
25 A fiduciary cannot rely on a release if there was non-disclosure.

26
27 Referring to *Tongue*, which is an entirely different case of insider trading. There was no
28 non-disclosure in this case. The trustee today is in the shoes of PEOC. PEOC asked for this
29 mutual release. The release was negotiated in connection with the deal.

30
31 Now moving to question 36, which asked about paragraph 51 of my client's brief, and my
32 friend's deal with the issue about the *ABCA* provision and to the extent it applies to releases
33 of directors. And in their response, they rely on one case a few times, *McKay-Cocker*,
34 which we deal with in our brief, and if I may remind Your Lordship that that one case was
35 a pleadings motion in Ontario where somebody was granted leave to amend a pleading,
36 and the issue was never finally determined.

37
38 And you'll see over to page 23 and 24 of my friend's answers.

39
40 THE COURT:

You're on to question 37 now?

41

1 MR. LEITL: Thirty-seven and 38, yes, sorry.

2

3 THE COURT: Yes.

4

5 MR. LEITL: They all bleed into each other. The trustee is
6 taking the position, there should be no doubt, that a director can never be released in
7 relation to prior conduct in respect of its duties to the company. So if that's the case, we
8 better issue a bulletin to the D & O insurance industry right now because that means you
9 can never settle a lawsuit against a director for alleged breaches of duties to the corporation
10 ever, and that doesn't make any sense, in my submission, My Lord.

11

12 What makes sense is the interpretation of the provision -- and I'm not going to repeat what's
13 in our brief -- that directors cannot contract out of existing duties owed to the corporation.
14 If you read, for example, Delaware Law on director liability, there has been some historic
15 issues with the ability of companies to contractually elect their directors out of their
16 fiduciary duties. In Canada, it can't do it. If you're going to be a director, you can't have a
17 contract with a company saying, by the way, I'm relieved of my fiduciary duty. That can't
18 happen. You can retrospectively settle an allegation that you didn't do so.

19

20 My friends go so far on page 24 to say that this situation is analogous to the release of a
21 director for criminal liability. I say it's not even close to that. For criminal liability, you go
22 to gaol. You can't contract out of going to gaol, but that's just a red herring.

23

24 In paragraph -- sorry, question 39, My Lord, you asked a hypothetical, and I'll leave you
25 with our answer. And just to remind you that at the hearing, my friend conceded that if this
26 transaction had been conducted as a direct transfer of assets, we wouldn't be here today. So
27 why are we here today? And they've never answered that in terms of director duties.

28

29 Question 43, My Lord. The --

30

31 THE COURT: I'm there.

32

33 MR. LEITL: My client's statement of defence filed in August
34 pleaded that the trustee had no authority to pursue this lawsuit against her. After we filed
35 our brief for our November hearing, I think we filed our brief in October, my friend wrote
36 to me. And that is at tab 43 of these answers, and this is on the issue of inspector approval.

37

38 THE COURT: Right.

39

40 MR. LEITL: And he said that they hadn't seen us as
41 challenging that point previously, but in any event reported to confirm by e-mail that the

1 inspectors had authorized the lawsuit. And you'll see my response on the same day in less
2 than an hour: (as read)

3
4 Reserving all rights, I'd ask you to send me the evidence of that.

5
6 To date, no response; not a response even in the context of the Court's question to the
7 trustee about this issue; no evidence of informed inspector approval to go ahead and sue
8 Ms. Rose.

9
10 Question 44, these were all questions for the trustee, and just to take you to touch briefly
11 upon some of the answers from the trustee on page 27 --

12
13 THE COURT: Okay. I'm there.

14
15 MR. LEITL: -- and you'll see this reference to the case of
16 *Downtown Eatery* and other cases. Those again were examples of the kinds of cases where
17 contingent creditors might be granted leave to proceed with an oppression case. And, of
18 course, in those cases, that's when the actual contingent creditor came to court, not a trustee,
19 and when there was evidence about the contingent creditor, and there was evidence of the
20 contingent creditor's reasonable expectations. None of that here.

21
22 Another argument my friends make, they say there was no evidence to suggest PEOC's
23 creators had any opportunity to protect themselves. There was no evidence about PEOC's
24 creditors from the trustee, period. There was no argument from my friends about what they
25 could have done. If you're an unsecured creditor of a corporation, the corporation can do
26 all kinds of things lawfully that might impact the creditor's exposure about which they can
27 do nothing. That's why creditors negotiate security, ask for guarantees, things like that.

28
29 There is law about what the municipalities could have done, and I'm sure Your Lordship's
30 familiar with the legislation that deals with them. I'm told the *Act* is something like 600
31 pages, but they have rights on default including lien rights. No evidence about that.

32
33 And the AER has enforcement powers but only those granted to it by statute. At question
34 44(d), which is over to page 32 of our materials --

35
36 THE COURT: I'm one.

37
38 MR. LEITL: -- one of the questions Your Lordship asked: (as
39 read)

40
41 Should a trustee be allowed to advance a creditor-based oppression

1 claim that concerns just two particular creditors?
2

3 We've referred you back to our brief while we say no, and there's a clear delineation
4 between the kinds of creditor claims a trustee can bring and can't. They have to be what I
5 would call collective claims that are claims as a right of all the creditors. You know, the
6 kind of claim we talked about where somebody strips a company of assets to defeat them,
7 so all of their rights are collectively impaired. That's not the case here.
8

9 In my friend's answer: (as read)
10

11 The trustee represents all the creditors of PEOC.
12

13 The phrase that should be added there is all of the creditors of Sequoia as at the date of
14 bankruptcy. To the extent that the creditors were different or had different claims on
15 October 1, 2016, the trustee does not represent them.
16

17 THE COURT: Sorry. What where were you reading that last --
18

19 MR. LEITL: Sorry. Page 28 of the trustee's answers under --
20

21 THE COURT: I'm there.
22

23 MR. LEITL: -- (d). And it says: (as read)
24

25 The trustee represents all the creditors of PEOC.
26

27 THE COURT: Yes. Thank you.
28

29 MR. LEITL: And I'm just adding the temporal reference of as
30 at the date of bankruptcy.
31

32 And you'll see while we're on this page some things that jump out at me. They cite *BCE*
33 for the proposition about the need to establish reasonable expectations, but they don't give
34 any evidence of that. They say that the claim against Ms. Rose satisfies the test for personal
35 liability because they say that she received an immediate financial advantage, and we've
36 covered how the evidence just shows the opposite.
37

38 Question number 47. I believe I've addressed this, but just in that context, to reiterate, when
39 the question is, Do their circumstances warrant this oppression claim? Their circumstances
40 refer to the only theoretical creditors at the time to miss three municipalities who had no
41 outstanding claim at the time. They're the only parties you could possibly consider and only

1 possibly if there was evidence about reasonable expectations. Otherwise, they just get to
2 exercise their credit rights and -- creditors' rights, and they get to do it directly themselves.

3
4 One thing I'd love to hear my friends tell the Court when they're on their feet when I sit
5 down is why did the AER never proceed against my client directly or against Perpetual?
6 Why didn't the municipalities ever take any steps?

7
8 On page 30 of my friend's response to question 48, Your Lordship asked about the test for
9 personal benefit and the factors and I've addressed that and give you references. In my
10 friend's answer, which is at page 30 of his materials, he said: (as read)

11
12 The imposition of personal liability can also be justified where the
13 directors breached a personal duty.

14
15 Ms. Rose didn't owe any personal duties. She owed directors to PEOC as a director of
16 PEOC.

17
18 They then argue that the benefit that Ms. Rose received as a shareholder can be quantified,
19 yet they don't quantify it. What they say is how the formula would work. It is that it would
20 be \$223 million in, quote, liabilities, which we know are not liabilities, transferred to
21 PEOC, multiplied by her shareholding, and they advocate that formula even though the
22 evidence shows that the share price went down.

23
24 Question 49 -- I think I'm near the end for me -- was: (as read)

25
26 What evidence should the Court consider in assessing the business
27 judgment that Ms. Rose exercised?

28
29 I would submit you should consider Ms. Rose's evidence in her affidavit where she talks
30 about her business judgment; and consider that when they cross-examined her, they didn't
31 ask her about that; and consider Mr. Darby's admission that he never asked her about it
32 when he interviewed her because he thought the answer was so obvious. Yet, for some
33 reason, we see in writing in my friend's response the argument that Ms. Rose exercised no
34 business judgment. The trustee is in no position to make that argument because that
35 contradicts the evidence, and they're not experts in business judgment.

36
37 And they don't stop there. The next bullet says: (as read)

38
39 She deliberately abandoned her role as PEOC's sole shareholder.

40
41 Deliberately. Malfeasance. Never put to her on cross-examination and never stated in those

1 words in any -- in the affidavit of Mr. Darby. If you want to accuse someone of deliberately
2 doing something wrong, you have to put it to them on cross-examination, and they didn't
3 bother.

4
5 Another bullet down on this page, they say that: (as read)

6
7 ...this failure to consider all available information in determining
8 fair market value.

9
10 In other words, second guessing, valuation, and business judgment where they have
11 proffered no alternative. In the *Greenlight* case, which I cited when I was on my feet last
12 time, is an example where the Court tests the process in relation to evidence about other
13 alternatives available to the company. Now, those cases tend to be in relation to a public
14 company broadly held by different shareholders which is in a value maximization process,
15 and the board or the special committee is considering should we take the offer to buy our
16 shares from 'X' Co.? Should we sell some of our assets under the offer from 'B' Co.? You
17 know, and weighing the alternatives.

18
19 What are the alternatives that my friends say should have been followed by a wholly owned
20 subsidiary controlled by the parent? Should PEOC, this notional PEOC, stand up and say,
21 No, I think we should do something different. We should open a retail store. I don't like
22 this -- these assets. I mean, it's just commercially absurd.

23
24 My friends argue at page 33 that there was no reasonable degree of prudence or diligence
25 brought to bear. They have offered no evidence about what else should have taken place,
26 what should have happened differently, what should have been done differently, and it
27 doesn't lie in their mouth to now argue that.

28
29 So subject to questions about my answers to your questions, those are my submissions.

30
31 THE COURT: I may have some after I hear from your friend.
32 Thank you.

33
34 MR. LEITL: Thank you.

35
36 THE COURT: I wonder if we -- Mr. de Waal, can we take a 2-
37 or 3-minute break? I've got a couple of binders I meant to bring down just with some
38 reference materials that I had tabbed, and I'd like to get. So if we could adjourn for -- would
39 5 minutes be --

40
41 MR. DE WAAL: Yes, My Lord.

1
2 THE COURT: -- sufficient for everyone?

3
4 MR. DE WAAL: Yes.

5
6 THE COURT: Thank you.

7
8 Madam clerk.

9
10 THE COURT CLERK: Order in court.

11
12 (ADJOURNMENT)

13
14 THE COURT CLERK: Order in court.

15
16 THE COURT: Please be seated.

17
18 At your convenience, counsel.

19
20 **Submissions by Mr. de Waal**

21
22 MR. DE WAAL: Thank you, My Lord. My Lord, like my friends,
23 I don't propose to read all my responses to you, but I do want to clarify certain of our
24 comments and respond to some of my friend's comments.

25
26 The first question I want to take you to is question number 2, and that's Schedule 'I' to the
27 share purchase agreement, and my friend Mr. McDonald referred you to that. The only
28 point I want to make in addition -- and maybe you don't have to turn to that, but --

29
30 THE COURT: I'm there.

31
32 MR. DE WAAL: -- it does refer to liabilities a number of times,
33 current liabilities, total current liabilities, total liabilities, and it's a theme that we find
34 consistently throughout the financial statements of Perpetual, that these are referred to as
35 liabilities. In Mr. Darby's affidavit, he attaches the financials and Exhibit 'P' to his affidavit,
36 for example, has liabilities associated with assets held for sale, note 333 -- \$131 million,
37 so these are referred to as liabilities. I'm not suggesting that that actually makes it liabilities,
38 but to the extent that liabilities as a term is an issue, certainly on the Perpetual version they
39 regarded these as liabilities. I'm not making anything more than that of that, My Lord.

40
41 Then the Exhibits 'I' and 'J', there was a question about the -- what document 'J' or Exhibit

1 'J' actually means, and Your Lordship pointed out that it doesn't say pro forma. What it
2 does, though, My Lord is -- well, two things. One, it shows that in the six months ended
3 June 30, 2016, these assets operated at a substantial loss for those six months, and it's
4 consistent with a cash flow negative proposition that's in the evidence, so it operated at
5 a -- at a substantial loss, and then if you turn over the page to the basis of presentation,
6 you'll see in the first paragraph --

7

8 THE COURT: Just to be clear, it's on not a notional basis. It's on
9 a pro forma basis.

10

11 MR. DE WAAL: Pro forma basis, indeed, My Lord.

12

13 THE COURT: There was no actual loss.

14

15 MR. DE WAAL: Yes, My Lord. I --

16

17 THE COURT: Okay.

18

19 MR. DE WAAL: And I'll come to that to explain how they came
20 up with that number, what they did. The first paragraph under paragra -- under the
21 numbered paragraph 1, basis for presentation, in the middle of that paragraph: (as read)

22

23 The PEOC assets are being acquired by PEOC pursuant to the
24 purchase and sale agreement dated October 1, 2016. Land and
25 lease costs and overhead recoveries, which are not included in
26 these internal unaudited operating statements have been added as
27 corporate costs.

28

29 And then it says: (as read)

30

31 These internal unaudited operating statements have been derived
32 from lease operating statements, which were generated from
33 Perpetual Energy Inc.'s internal accounting system by extracting
34 sales volumes, revenues, royalties, operating and transportation
35 expenses, land and lease costs and overhead recoveries directly
36 associated with the PEOC assets on a production month basis for
37 the year ended --

38

39 Et cetera, et cetera. And it says, the next paragraph: (as read)

40

41 These internal unaudited operating statements do not include any

1 expenses related to general and administrative costs, interest,
2 income, and capital taxes on any provisions relating to depletion --
3

4 Et cetera, et cetera. So this is the basis. It takes the assets from the lease operating
5 statements and puts together this statement. So again, it's -- as you point out, My Lord, it's
6 a pro forma statement, and it indicates a -- what I would say a loss, whether it's substantial
7 or not, but a loss over the first six months.
8

9 THE COURT: But all it's presenting is revenue expenses and
10 coming down, as you say, on a pro forma basis to a number.
11

12 MR. DE WAAL: Yes, My Lord.
13

14 THE COURT: We don't see a balance sheet. That's why I was
15 curious. When I said reconciliation, first of all, I didn't see pro forma. Second, I didn't see
16 any reference to negative retained earnings or shareholders' equity, and I'm always curious
17 when I see a half-presentation. That's why I was asking the question. I wanted a
18 reconciliation because I see an income statement on one document and a balance sheet on
19 another.
20

21 MR. DE WAAL: Yes. Correct, My Lord, but -- so for our
22 purposes, as we have argued before Your Lordship, you have PEOC --
23

24 THE COURT: Well, you're answering a different question than
25 I asked, but I'm going to let you go ahead.
26

27 MR. DE WAAL: Thank you, My Lord.
28

29 THE COURT: I just wanted reconciliation, but go ahead.
30

31 MR. DE WAAL: My Lord, so what we're saying is in Exhibit 'I',
32 we have the position of PEOC prior to the asset transfer, and it is -- has really nothing going
33 on. There's no liabilities, which is one of the reasons why whether it actually had liabilities
34 at that date or not is somewhat up in the air, but no liabilities shown, almost no assets, but
35 certainly no operations. And the next day, we have this -- almost said dumped on it, but it's
36 in this position, the Exhibit 'J' position, where it has 2,500 wells operating on this level,
37 and that is what happens in the share -- in the asset transfer agreement, and that is what the
38 director of PEOC is looking at.
39

40 THE COURT: Well, there's many companies in the oil and gas
41 sector, especially these days, that has negative operations. Does that mean they're

1 insolvent?

2

3 MR. DE WAAL:

No, My Lord.

4

5 THE COURT:

Thank you.

6

7 MR. DE WAAL:

If it has assets that could cover the liabilities,

8 that's fine.

9

10 THE COURT:

Thank you.

11

12 MR. DE WAAL:

But in this case, we know that those assets -- or

13 we know what the -- there's a dispute about whether the --

14

15 THE COURT:

We know?

16

17 MR. DE WAAL:

We have -- we know what PEI reflected those as.

18 That's what I should say.

19

20 THE COURT:

Continue.

21

22 MR. DE WAAL:

My Lord, question number 5(b), Mr. McDonald

23 referred to this, but the clause is specifically quoted there in our submissions at page 2: (as
24 read)

25

26 Although no specific assumption was required, clause 2.06B
27 confirms that under applicable law, the abandonment and
28 reclamation obligations and the environmental liabilities
29 associated with the assets are inextricably linked with such assets
30 so that purchaser will be liable for abandonment and reclamation
31 obligations and environmental liabilities associated with the assets
32 in the absence of the specific assumption of such obligations by
33 the purchaser.

34

35 So there's no doubt, we submit, My Lord, that that was the net effect of that transaction.
36 And it was recognized on both sides.

37

38 Question (d), 5(d), you asked whether PEOC purchased the Goodyear assets for a nominal
39 amount, and our response at page 3, yes, paid for -- purchased the Goodyear assets for a
40 stated purchase price of \$10. The PEOC shares were then purchased for \$1, and we say
41 that that represented the full extent of the financial interests of 198 in the transaction. So

1 there was also a net negative adjustment, so there was in fact an amount payable to the
2 purchaser at the -- on closing. But the point is, My Lord, that the \$10 -- there's no suggestion
3 anywhere in the records, no suggestion that the \$10 was an amount that actually calculated
4 as the true value of any of these assets or of the transaction. It was just an amount, a number
5 that was picked, and that's why we say the consequences flow. You cannot regard that as a
6 real number.

7
8 I'm not going to read what's in paragraph (e), but the conclusion at the bottom of that section
9 is that all the evidence shows that the liabilities associated with the Goodyear assets
10 exceeded the value of the Goodyear assets at the time of the transfer. There's no evidence
11 to the contrary. And instead of calling them liabilities, My Lord, the negative aspects,
12 whether financial, whether future, whether contingent, the negative aspects affecting the
13 value exceeded the positive aspects on the PEI own version by a large margin. And --

14
15 THE COURT: So was the 131 million on a present value basis?

16
17 MR. DE WAAL: Not -- I don't believe that those -- that was a
18 discounted number, 131, or the 133 as it appeared in the -- in the financial statement. These
19 are note --

20
21 THE COURT: And --

22
23 MR. DE WAAL: -- note 3, I believe, to those financial statements.

24
25 THE COURT: And is it a liability?

26
27 MR. DE WAAL: My Lord, it's -- certainly is a contingent liability
28 for which a provision is required.

29
30 THE COURT: Is it a liability?

31
32 MR. DE WAAL: Not an immediate current liability, but it's shown
33 as a liability on the PEI version.

34
35 THE COURT: Is it shown as a provision or a liability?

36
37 MR. DE WAAL: As a liability. As a current liability. My Lord, I'll
38 just take you to that. It's the -- it's Exhibit 'P' to the Darby affidavit.

39
40 THE COURT: 'B' as you said.

41

- 1 MR. DE WAAL: 'P', My Lord. 'P' for Peter.
2
- 3 THE COURT: 'P'. Sorry.
4
- 5 MR. DE WAAL: 'P' for Perpetual.
6
- 7 THE COURT: Okay.
8
- 9 MR. DE WAAL: Under liabilities, the last line there, liabilities
10 associated with assets held for sale, and it's under current liabilities, 131. And if you go to
11 note 3, My Lord, you'll also see the assets associated with those liabilities. Now, those are
12 referred to or reflected as 109 million, and we've seen nothing else; certainly there's nothing
13 else in evidence before you to suggest that that 109 million is a -- is a real number.
14
- 15 THE COURT: Sorry. Give me that last comment again, sir.
16
- 17 MR. DE WAAL: My Lord, this is note 3 --
18
- 19 THE COURT: No. I'm reading it. I'm asking what your
20 comment was on the 109.
21
- 22 MR. DE WAAL: Yes, My Lord. I'm saying that there's nothing
23 else in evidence before you to support that 109 number. The highest value certainly that
24 the trustee could find -- and it has been put before you on that basis -- is just under 6 million
25 as the positive value of these assets.
26
- 27 THE COURT: So let's go to -- let's go to note 12.
28
- 29 MR. DE WAAL: Yes, My Lord.
30
- 31 THE COURT: It says decommissioning obligations, and it goes
32 through a number of calculations, and that comes to the 131, which is transferred to note
33 3.
34
- 35 MR. DE WAAL: Yes, and --
36
- 37 THE COURT: Is that -- is that a liability?
38
- 39 MR. DE WAAL: My Lord, here it's referred to under provisions.
40
- 41 THE COURT: Is that a liability, counsel?

1
2 MR. DE WAAL: It is, My Lord.
3
4 THE COURT: Whose lia -- who is it owed to?
5
6 MR. DE WAAL: It's eventually owed to the AER, My Lord.
7
8 THE COURT: You just made a comment "eventually." What
9 did you mean by that?
10
11 MR. DE WAAL: Because it's not payable immediately, My Lord.
12
13 THE COURT: It's not payable immediately.
14
15 MR. DE WAAL: No.
16
17 THE COURT: Is this a gross number or a present value number?
18
19 MR. DE WAAL: My Lord, I believe --
20
21 THE COURT: That's a different issue than whether you have
22 liability, but I just want to make sure --
23
24 MR. DE WAAL: Yes. I believe that's -- you'll see just the note just
25 under -- at the bottom of the note 12, --
26
27 THE COURT: I'm there.
28
29 MR. DE WAAL: -- (as read)
30
31 The corporation used the weighted average risk-free rate of 1.72
32 to calculate the present value of the decommissioning obligation.
33
34 So it is in fact a discounted number.
35
36 THE COURT: So you're saying it is a present value number.
37
38 MR. DE WAAL: Yes, My Lord.
39
40 THE COURT: Okay.
41

1 MR. DE WAAL: My Lord, so just a conclusion then, going back
2 to note 3, on these financial statements, the Perpetual version, the -- with respect to the
3 assets held for sale only, the transfer of these assets to PEOC was a transfer at undervalue.
4

5 THE COURT: What I'm struggling with, just to continue your
6 point on footnote 3, is why would an arm's length party take these assets and liabilities?
7

8 MR. DE WAAL: My Lord, because the extent of the arm's length
9 parties' interest in these assets is \$1. If 198 had gone up and taken one vehicle offsite and
10 sold that vehicle, it would have had its money back. The rest are all ARO numbers sitting
11 in a self-contained entity called PEOC that it could walk away from as it eventually did.
12

13 THE COURT: You're standing in the shoes of that entity right
14 now. Why would it have pursued -- and I don't mean to break your focus, but we're just
15 looking at these numbers. Why would it have pursued and spent money on its obligations
16 in the first let's just say 12 months?
17

18 MR. DE WAAL: My Lord, that's a more complicated question
19 perhaps than Your Lordship may anticipate. There's in the -- in the Goodyear presentation
20 and in the correspondence -- I believe it's Exhibit 'Z' to the Rose affidavit -- there's an
21 indication that Perpetual failed to complete abandonment and reclamations, held back
22 certain wells in order to make the deal better for the purchaser. Now, these wells that were
23 in fact then abandoned would have been ready for abandonment perhaps. We don't have
24 that evidence before us. But -- so how much money they actually spent, My Lord, is -- first
25 of all is questionable, and then secondly, whether they spent more money than they
26 absolutely have to to retain these assets is another question. But keeping these assets in
27 anticipation that if there is an increase in the share price, they would benefit, certainly, My
28 Lord, made sense if all you had to pay up front was the \$1. How much they spent in addition
29 to that and on what basis they spent that, we don't know.
30

31 THE COURT: So aside of the deeming rule, which I'm sure
32 you'll get to, do you agree that this transaction in terms of the purchase and sale of the
33 shares of PEOC was between arm's length parties?
34

35 MR. DE WAAL: No, My Lord. And the argument there -- and
36 we'll get to that, My Lord. The argument there is in fact an argument my friends make, and
37 they say that if a party has the right to acquire the shares with respect to control over the
38 entity that's acquiring the shares from, it is deemed to be in the same position --
39

40 THE COURT: I said outside of the deeming rule.
41

- 1 MR. DE WAAL: Outside of the deeming rule, 198 had nothing to
2 do with Perpetual, correct.
3
- 4 THE COURT: They were at arm's length.
5
- 6 MR. DE WAAL: Yes.
7
- 8 THE COURT: Okay. Thank you.
9
- 10 MR. DE WAAL: My Lord, but the argument -- I'm sorry, My
11 Lord. I shouldn't agree so quickly. We say that if you look at the terms of the deal and you
12 look at whether the interest -- whether 198 had an interest to pursue the best possible
13 commercial deal, that is an indication that there was not an arm's length deal even though
14 they may have been arm's length -- at arm's length to each other, the parties themselves.
15
- 16 THE COURT: Can you explain that to me again?
17
- 18 MR. DE WAAL: Yes, My Lord. If -- and we've quoted the cases,
19 My Lord. If there is -- if 198 had no interest in negotiating the best possible commercial
20 deal, the interest in PEOC then became the interest of the creditor, so that's the focus. 198
21 cannot be regarded as an arm's length party because it had no interest in negotiating for
22 anything more than the \$1 it had invested.
23
- 24 THE COURT: Why did it issue the letter it did or the reporting
25 notice that's at paragraph 9 of the Norton Rose brief?
26
- 27 MR. DE WAAL: Yes.
28
- 29 THE COURT: And I'm cognizant that this is broader than the
30 threshold issue. I just want to make sure I'm understanding the context.
31
- 32 MR. DE WAAL: My Lord, I was going to comment on this. First
33 of all --
34
- 35 THE COURT: Okay. I'll turn it back to you, Sir. I don't mean -- I
36 didn't mean to derail you.
37
- 38 MR. DE WAAL: No. I've been derailed anyway, My Lord. The
39 question is -- the proposition is this, this is an after the fact, so many months after the fact,
40 explanation by management about why there was an eventual bankruptcy. Doesn't deal
41 with insolvency. Doesn't deal with the reasons for the deal in the first place. It says it had

1 a plan. That does not mean that its plan meant that it had to pay more than \$1 to get into
2 that plan. To the extent that my friends complain about hearsay, this is the best example
3 we have of hearsay in all of this. Why they wrote this and what this all means for the
4 transaction going back to October 2016, My Lord, I say is not something Your Lordship
5 can properly consider. Whether the bankruptcy eventually followed, that's what they try to
6 explain, you know, why the bankruptcy followed, not whether the deal initially was
7 in -- was an arm's length and financially prudent transaction or not. They don't get into that.
8

9 Just on your -- on your previous question, My Lord, we deal with the whole arm's length
10 question, the question Your Lordship posed to me in response to your question number 34.
11

12 THE COURT: I'm there.

13
14 MR. DE WAAL: So we say: (as read)

15
16 We do not agree that this was an arm's length transaction. They
17 may have been arm's length parties at the time, but the trustee has
18 no standing to act or challenge the share purchase.
19

20 And then we quote the authorities in which -- and *Juhasz* is the first one, My Lord, saying
21 that: (as read)
22

23 The transfer of equity and property was on the verge of insolvency,
24 so it had no economic interest -- sorry -- the economic interest and
25 the equity had shifted to creditors, and she had no economic
26 incentive to engage in ordinary commercial dealing. Even though
27 the parties were unrelated, the transaction did not reflect an arm's
28 length bargaining.
29

30 And we say that's the situation here. If you just look at 198 and you just look at PEI, then
31 you may say these are arm's length parties, but when they negotiate in these
32 circumstances -- and this has been cited with approval in those other cases, My
33 Lord -- when you deal with these circumstances, then the focus is on the interests of the
34 creditors because 198 no longer is in arm's length -- is negotiating at arm's length. And then
35 over the page, My Lord --
36

37 THE COURT: Just if I can pause you there, are you saying that
38 because of the deeming rule or not?
39

40 MR. DE WAAL: No, My Lord. We say because of the nature of
41 the transaction, the fact that it had invested \$1 and it was only interested in the potential

1 upside. That's what we say over the page. So it had no interest in limiting its own exposure.
2 Its exposure was limited in fact as much as it possibly could to the \$1, and as long as it's in
3 there simply for the potential upside, then somebody else has to look after the creditors,
4 and that's where the focus then should be.

5

6 THE COURT: And who are the creditors?

7

8 MR. DE WAAL: These are trade (INDISCERNIBLE), the farmer,
9 the landowners, surface rights owners, the AER, the -- the truckers, everyone who services
10 these 2,500 wells, --

11

12 THE COURT: Yeah. And when --

13

14 MR. DE WAAL: -- municipalities.

15

16 THE COURT: Sorry. Go ahead.

17

18 MR. DE WAAL: Including municipalities, My Lord.

19

20 THE COURT: And when are you measuring the creditor's
21 interest?

22

23 MR. DE WAAL: At the time of the transaction.

24

25 THE COURT: So who are the creditors at the time of the
26 transaction?

27

28 MR. DE WAAL: At the time of the transaction, everyone I've just
29 mentioned, so --

30

31 THE COURT: So just --

32

33 MR. DE WAAL: Yeah.

34

35 THE COURT: Okay. Let's just pause there. Again, I'm asking
36 for context.

37

38 MR. DE WAAL: Yes.

39

40 THE COURT: This is just narrative. What creditors at the time
41 of the transaction ultimately did not get paid?

- 1
2 MR. DE WAAL: There's no evidence before you except to -- for
3 the AER and the municipalities.
4
- 5 THE COURT: Is AER a creditor?
6
- 7 MR. DE WAAL: Yes, My Lord. It --
8
- 9 THE COURT: Where is it a creditor?
10
- 11 MR. DE WAAL: My Lord, the difficulty is whether we're dealing
12 with *BIA* provisions or whether we're dealing with the oppression remedy, which is an
13 Alberta corporations -- corporate corporations act -- Alberta *Business Corporations Act*
14 concept, the -- we have to be careful that we -- that we don't just say there has to be a
15 creditor or a liability. In the context of the Alberta *Business Corporations Act*, My Lord,
16 and the oppression remedy, you don't have to be a creditor with a claim and a default as
17 Mr. Leidl suggested. That's not required. So in the context of an oppression --
18
- 19 THE COURT: So you're telling me we don't need creditors?
20
- 21 MR. DE WAAL: Not --
22
- 23 THE COURT: Is that what you're saying? I'm just trying to
24 understand your --
25
- 26 MR. DE WAAL: Yes, My Lord. You don't need a creditor in the
27 sense of somebody who has a judgment and has not been paid.
28
- 29 THE COURT: You raise two or three times there, the
30 oppression remedy, and while I'm still thinking about this, I want to just read a couple of
31 phrases here out of some reference material. And I haven't concluded anything. I just
32 glossed over this in preparation for today. In one service it says: (as read)
33
- 34 Although it is typically considered to be a tool for minority
35 shareholders, the federal and provincial business corporation
36 statutes also grants statutory standing to --
37
- 38 This is all in the context of oppression.
39
- 40 -- directors, officers, current and former shareholders and, in some
41 cases, creditors.

1
2 So I'm caught by the soft reference to creditors. In a different service -- you might want to
3 think about this in the context of your overall questions -- again talking about the
4 oppression remedy in a bankruptcy service: (as read)

5
6 In the same vein, the right to obtain relief from oppression is a
7 personal remedy belonging only to the individuals who have been
8 oppressed. It is not a right granted by statute or otherwise to a
9 trustee in bankruptcy to assert in a representative capacity on
10 behalf of a bankrupt corporation's creditors.

11
12 So I just raise those two comments because they caught my attention. And again, just
13 seeking some explanation.

14
15 MR. DE WAAL: My Lord, we -- in our brief, we quoted those
16 cases that say insofar as a claim is a credit claim only, so if somebody's oppressed and its
17 shareholding or voting rights or something else is affected, presumably then the trustee
18 would not be making that claim, that oppression claim on behalf of that particular, let's say,
19 shareholder. But in *Juhasz* and the other cases that have followed since, it has been clearly
20 stated, we say, My Lord, that even somebody with a claim only, not proven yet, only
21 somebody with a claim, could be in certain circumstances regarded as a creditor for the
22 purpose of the oppression remedy, and we say in this case -- the question started with
23 whether this is an arm's length transaction or not, and we say in this case the interest that
24 we are seeking to protect here is not the interest of a creditor per se but somebody who
25 would normally be entitled to the protection of the *Act* in those circumstances, and so the
26 reason for that is because 198 -- and this is all set out in -- our response to paragraph 34,
27 My Lord, the reason is that the bankrupt was not making transfers with a view to advancing
28 its own -- was making transfers in its own interest and not acting prudently anymore. So
29 these are not arm's length transactions in that sense anymore.

30
31 THE COURT: I'll just note for the record the *Juhasz* case is
32 2015. Again, I'm not suggesting I've made any decision on this at all yet, but the service
33 I'm reading from is updated 2018, so it's pretty current. Be that as it may, I'll leave that.

34
35 MR. DE WAAL: Yeah. The *Royal Trust* case that my friend, Mr.
36 Leitzl, I think, referred to is a '93 case if I'm not mistaken. But there have been cases, My
37 Lord. We refer to them on page 20 of our responses. And in circumstances, we say, like
38 these, even though 198 was an arm's length -- would have been considered as an arm's
39 length party, the facts and the circumstances indicate that the focus should be on the interest
40 of others because 198 was clearly only interested in the upside of this transaction for itself.

41

1 My Lord, if I can go back then to question 5, which is where I was, and just refer to one
2 aspect of section 96, --

3

4 THE COURT: I'm there.

5

6 MR. DE WAAL: -- which has not been mentioned, My Lord,
7 section 96(2) says:

8

9 In making the application referred to in this section, the trustee
10 shall state what, in the trustee's opinion, was the fair market value
11 of the property or services and what, in the trustee's opinion, was
12 the value of the actual consideration given or received.

13

14 Now, that far, we got every time, and it's opinion, so there's no doubt about that. And then
15 it goes on to say: (as read)

16

17 The values on which the Court makes any finding under this
18 section are, in the absence of evidence to the contrary, the value
19 stated by the trustee.

20

21 So that explains why the opinion of the trustee's in there, because it says "shall," "the trustee
22 shall state." So it's required. The trustee's required to state his opinion.

23

24 And the second part of the aspect -- or the question is the Court's entitled to rely on that
25 opinion. Whether he's an expert in valuation or expert in oil and gas or expert in
26 abandonment and reclamation, this *Act* gives the Court the authority, in fact, the direction,
27 to make a decision based on that unless there's evidence to the contrary.

28

29 And my friends have both said that there is sufficient evidence to the contrary, and then
30 they refer to criticism of the trustee's position. They say that the reservoir reports, reserve
31 reports referred to are dated and that there were other problems with the documents that
32 Mr. Darby relied on. However, that's not other evidence. That's criticism of his own
33 evidence. There's no evidence before this Court by the respondents, by the -- by the
34 defendants -- applicants, I should say -- by the defendants to suggest any other values. The
35 only values before you are the values stated by Mr. Darby in his opinion pursuant to section
36 96.

37

38 Question 6, My Lord, I just want to make this one point in -- on page 4: (as read)

39

40 In a bankruptcy situation, it's unlikely the officers or employees of
41 the bankrupt will be willing or able to provide firsthand personal

1 knowledge. Courts have recognized this in accepting affidavit
2 evidence from the trustee's representative.

3
4 And then I've -- we've quoted the cases in which -- and it's all in our material, so I'm not
5 going to refer Your Lordship to that -- but in which the trustee states his opinion about
6 bankruptcy or solvency, and the Courts have accepted that.

7
8 My Lord, question 8, my friends -- and I'm trying to combine my notes as well as my
9 friend's comments. Question 8, my friends say the Court should give no weight to the
10 assertion in the Darby affidavit, and then they say that -- then they quote that this -- what
11 they call the SRC letter in response, which if there's ever hearsay, that's hearsay, and then
12 they say this is a viable business, it operated for awhile after this -- these transactions, and
13 therefore, it certainly was not insolvent at the time. But that, My Lord, does not follow.
14 The fact that they kept going for awhile after the transaction does not mean that it was not
15 insolvent.

16
17 On that same page of my friend's responses to the questions, My Lord -- I don't -- oh. It's
18 page 8. I just want to refer you to the footnote on that page.

19
20 THE COURT: I'm there.

21
22 MR. DE WAAL: It refers to the Darby affidavit, and it says: (as
23 read)

24
25 Schedule 2 to the statement of adjustments for the asset transfer
26 agreement shows that the PEOC LLR or deemed liabilities is 176.3
27 million.

28
29 So again, My Lord, if you look at the woods instead of the trees, if the deemed liabilities
30 were 176 million on the PEI or Perpetual version, the only -- again, the only evidence of
31 any assets, if one considers in the section 96 context consideration provided and
32 consideration received, if the deemed liabilities were more than \$170 million, the
33 assets -- the only evidence of any assets do not exceed \$6 million or, on that financial
34 statement that we saw, My Lord, 109 million. So again, on the -- on the Perpetual own
35 version, clearly a transfer at undervalue.

36
37 And I should interrupt myself, My Lord, just to remind you of this, this is an application
38 for summary dismissal and what my friends have to show and convince you is that there is
39 no merit to this claim, not that the trustee is unable to put a particular number on the ARO
40 or it's arguable whether --
41

1 THE COURT: My assistant just needs to speak to me for a
2 minute, but let's continue on, and at an appropriate time, if you --

3

4 MR. DE WAAL: My Lord, I'll just --

5

6 THE COURT: -- break for --

7

8 MR. DE WAAL: I'll just finish this submission.

9

10 THE COURT: Certainly.

11

12 MR. DE WAAL: So again, what my friends have to show is that
13 there's no merit to this claim, not that there's criticism to be levelled against Mr. Darby's
14 affidavit or to say that the reserve report was dated. That, with respect, does not get them
15 to a summary dismissal of the application, and maybe I can break there, My Lord.

16

17 THE COURT: Okay. I will be just a couple of minutes. Madam
18 clerk, if we could adjourn.

19

20 THE COURT CLERK: Order in court.

21

22 (ADJOURNMENT)

23

24 (PORTION OF PROCEEDINGS NOT RECORDED)

25

26 THE COURT: -- combination.

27

28 At your convenience, Mr. de Waal.

29

30 MR. DE WAAL: Thank you, My Lord. With respect to question
31 number 10(b), just one comment on my friend's answer. They say that: (as read)

32

33 Mr. Darby determined the difference on the basis of an incorrectly
34 calculated asset value and an incorrectly calculated liability
35 value --

36

37 And again, they say incorrectly calculated, but they don't say what the right calculation is.

38

39 -- and does not consider the potential impact on value represented
40 by Sequoia's business plan.

41

1 Now, with respect, My Lord, it also did not consider the potential impact on the value of
2 litigation, for example. Those things are just speculation. And what Mr. Darby has said is
3 based on his review of the Perpetual records. If there's criticism or suggestions that certain
4 things should have been considered that have not been considered, that's for the defendants
5 in this case, the applicants, to bring forward. For the time being, the opinion is as stated,
6 and the Court's directed to -- or at least authorized to make a decision based on that.

7
8 Then paragraph 12 -- or question 12 --
9

10 THE COURT: Sorry. On that last comment, you're saying that
11 the Court's authorized?
12

13 MR. DE WAAL: Yes, My Lord. The section 96(2) says for the
14 purpose of:
15

16 ...the values on which the Court makes any finding under this
17 section are, in the absence of evidence to the contrary, --
18

19 THE COURT: Yeah.
20

21 MR. DE WAAL: -- the value stated by the trustee.
22

23 THE COURT: The reason I'm pausing you, I make the decision,
24 correct?
25

26 MR. DE WAAL: Yes. Yes. Yes. But you make the decision based
27 on what -- you may make the decision based on what the trustee tells you his opinion is
28 because section 96 says you can do that.
29

30 THE COURT: Yeah. Just and you might want to address this.
31 The reason I was asking the question about opinions is normally in an affidavit -- I think
32 we would likely all agree here -- but for any provision in a statute, I'm not to consider an
33 opinion in an affidavit. So I just want to be sensitive to the boundaries there.
34

35 MR. DE WAAL: Indeed, My Lord. It's like the
36 evidence -- admissibility of opinion evidence at trial. There are requirements, and what I
37 think or the witness thinks has nothing to do with what Your Lordship will eventually
38 determine, but in this case, the trustee is not only authorized to state his opinion, he's
39 directed to state his opinion. Must state, shall state, it says.
40

41 THE COURT: Do you agree with your friends in terms of when

1 that applies and when it doesn't?

2

3 MR. DE WAAL: My Lord, certainly the question of value is
4 something right within section 96, so he shall state -- and it's defined. He shall state
5 what's -- what in his opinion is the far -- fair market value -- I keep saying far -- fair market
6 value of the property or services and what, in his opinion, was the value of the actual
7 consideration given or received. And actual consideration, My Lord, goes
8 beyond -- consideration given or received goes beyond liability or debt or fair market value.
9 What was the consideration given by PEOC in this transaction, and what was the
10 consideration received. And if you look at that paragraph of his affidavit -- I think it's
11 44 -- that's exactly the wording followed in that paragraph.

12

13 THE COURT: And on insolvency, the issue of insolvency?

14

15 MR. DE WAAL: No, My Lord. It's -- he's not -- he's not -- certainly
16 not pursuant to section 96 is not authorized to say something about insolvency, but the
17 cases that I've referred you to do state opinions of trustees in affidavits before the Court,
18 including on insolvency, and the Courts have followed those, accepted the opinions.

19

20 THE COURT: So am I to take -- and I just want to probe this
21 one more -- with one more question, if I may, sir. Am I to take Mr. Darby's affidavit on
22 Exhibit 'M' concerning municipal taxes owing without question?

23

24 MR. DE WAAL: No, My Lord. What Mr. Darby says with respect
25 to any of these record -- Perpetual records -- and my friends make a point about the -- what
26 is it -- the LLR document, that he says, I don't have any knowledge about the background
27 to this document. That goes for all the Perpetual records. So he doesn't know, for example,
28 whether these just include the Perpetual assets or not or the Goodyear assets or not. He
29 doesn't. But it's in the data room. It's a document given to him by Perpetual, and he assumes
30 and explains that assumption; he assumes that that relates to these assets.

31

32 So when he says something based on their records, it's not an opinion. He says, This is the
33 Perpetual version, this is what Perpetual tells me, and if Perpetual tells me that the value,
34 the reserve value, for example -- excuse me, My Lord -- if Perpetual tells me in their records
35 that the reserve values are either negative 34 million or, at best for them, positive 5.5
36 million, that's not an opinion; that's just saying, This is your evidence, this is value that I
37 come up with because of your evidence or your records. Not an opinion.

38

39 So not everything that he got from Perpetual, which is a defendant in this case, is hearsay
40 or opinion. If -- the reason for that is because he didn't hear it from a third party. He heard
41 it from Perpetual and read it in the Perpetual records. And for Perpetual to say, "Well, you

1 don't know what this document really means, do you?" is not sufficient to propose, certainly
2 with respect to values, an alternative position that the Court can regard in determining what
3 the real value is. It's still the only version before the Court.
4

5 THE COURT: So I know I'm digressing here and we're going
6 back to something we discussed before, and I still want to think about the discounted
7 because I'm -- I've seen conflicting materials or comments on discounting, but be that as it
8 may, on the balance sheet where you focused on liabilities associated with the assets held
9 for sale of 131 million, this is in a document, at least the one I'm looking at, under tab 'P'
10 as in Paul, that is headed up condensed interim consolidated financial -- statements of
11 financial position. It's not audited. I don't know who the reader is. What weight do I give
12 that?
13

14 MR. DE WAAL: My Lord, this is a Perpetual document, so with
15 respect to Perpetual, this is Perpetual's version, so there's no reason for you to trust
16 Perpetual's or use Perpetual's version in making a finding with respect to Perpetual. If this
17 was a document created by some third party that somehow the trustee introduced into
18 evidence, that would have been hearsay, irrelevant, of no weight, but this is a Perpetual
19 document. This is the Perpetual document. Not contested, it's not disputed this is the
20 Perpetual document. And so Perpetual's a public company. Presumably, its financial
21 statements, including its press releases eventually about the value of -- which is consistent
22 with this, 128 million, 131 million, if that's the public disclosure by this public company,
23 then is there any reason for my friends to argue that Your Lordship should not just take
24 them at their word?
25

26 THE COURT: I'm just posing the question.
27

28 MR. DE WAAL: That's -- My Lord, I'm -- my suggestion is there's
29 absolutely no basis for my friends to say you should not accept Perpetual's own statements.
30 And the fact that we criticize them as being old material or perhaps not all the wells -- you
31 know, we can find some discrepancies between the financial statements -- does not present
32 an alternative version on value that Your Lordship can confidently accept to rebut the
33 presumption in section 96.
34

35 THE COURT: Okay.
36

37 MR. DE WAAL: And on any of these numbers -- My Lord, maybe
38 this is the point I made, I remember, on the -- at the -- on the first occasion. On any of these
39 values, if it had been a matter of the discount rate used or there was a small enough
40 difference so that we could say, Well, that financial statement overstates something by a
41 certain margin and here's a better one, then sure, My Lord, we -- perhaps just to use what

1 Mr. Leidl referred to, then I would have said, We wouldn't have been here. But the different
2 is so vast, My Lord, that you can accept any number from Perpetual on the -- on the value
3 side -- positive value side and almost any number on the negative value side, and there's a
4 huge difference, and this becomes or is clearly a transfer at undervalue. There's no scenario,
5 no combination, that would not give you that result.

6
7 THE COURT: That's on your premise, if I understand correctly,
8 that you've got a quarter of a billion dollars here that's deficient.

9
10 MR. DE WAAL: Not even, My Lord. If we take this value, if we
11 take the 131 instead of 225 or 215 -- I forget what the number is. You can take any value.
12 Take the 6 million in assets, the highest possible value, and you take a lowest negative
13 value, and you still have a transfer at undervalue.

14
15 THE COURT: Continue.

16
17 MR. DE WAAL: Question 12, My Lord -- and I'll try and move a
18 little quicker. I just want to read my response. The evidence is that Ms. Rose was a
19 shareholder, and this relates to a personal benefit, and again, My Lord, this is
20 where -- whether the benefit was -- is an opinion expressed by Mr. Darby or not. The
21 evidence is that she's a shareholder, not disputed. PEI had shared approximately 71 percent
22 of its liabilities, not disputed. That's in the PEI document. Increased its net asset value by
23 28.5 million -- that's the PEI information -- as a result of the transaction. So every
24 shareholder of PEI, including Ms. Rose, benefitted from the Goodyear restructuring as a
25 matter of fact, not opinion.

26
27 And for Mr. Leidl to say the price did not reflect that, well, that does not mean that
28 realistically the 71 percent of the liabilities had not been sent away to PEOC and that there
29 was a corresponding benefit to shareholders. Share price -- in fact, Mr. Darby -- he didn't
30 refer to this, but Mr. Darby responded to his question in cross-examination. Mr. Darby said
31 to him, The share price may have been inflated at the first -- in the first place. So you cannot
32 predict what the share price would do, and it doesn't track the actual value of the shares on
33 a day-to-day basis as Mr. Leidl would suggest.

34
35 THE COURT: So how do you define benefit?

36
37 MR. DE WAAL: Again, My Lord, we've made the submission any
38 benefit directly or indirectly, and it could be a financial benefit, and it could be some other
39 benefit, could be -- in some cases, it's a -- you shares are now converted, no longer
40 nonvoting shares, you now have voting shares, or you have -- you dilute the shareholding
41 of some other shareholder. That would be a benefit. In this case, the benefit we say is a

- 1 direct financial benefit, indirect financial benefit.
2
- 3 THE COURT: So that's your definition?
4
- 5 MR. DE WAAL: Yes, My Lord.
6
- 7 THE COURT: Direct financial benefit.
8
- 9 MR. DE WAAL: Yes, My Lord.
10
- 11 THE COURT: Where's the direct financial benefit?
12
- 13 MR. DE WAAL: The -- her equity stake in Perpetual increased by
14 the amount that the liabilities for Perpetual were reduced.
15
- 16 THE COURT: Just to make sure, I'm understanding what you're
17 saying, where -- direct me to where you're -- you illustrate a direct financial benefit. I'm
18 using your term.
19
- 20 MR. DE WAAL: Yes, My Lord. Say as a shareholder, you own a
21 certain portion of the company. So if you own a hundred percent or 50 percent or 5 percent
22 of Perpetual --
23
- 24 THE COURT: Yeah.
25
- 26 MR. DE WAAL: -- and Perpetual, through this transaction, gets rid
27 of 71 percent of its liabilities, to that extent, your 5 or 50 percent interest in that is your
28 benefit.
29
- 30 THE COURT: Where is there evidence that Ms. Rose received
31 a financial benefit?
32
- 33 MR. DE WAAL: She was a shareholder. That's the evidence, My
34 Lord. And Perpetual's liabilities were decreased by 71 percent.
35
- 36 THE COURT: But Mr. Leidl pointed out the stock price went
37 down.
38
- 39 MR. DE WAAL: Yes, My Lord, but the stock price, as I submitted,
40 does not necessarily reflect the value of the company. You could have an Internet company
41 with a stock price of \$20 a share but no assets. In this case, we have a real financial basis

1 for saying 71 percent of the -- of the liabilities were transferred out.

2

3 And it's not just that, My Lord. It's combined with the fact that the good assets that those
4 liabilities would have been able to be realized against -- those good assets were sheltered
5 in this transaction. So if you have 71 percent of your liabilities in a vehicle that also had
6 assets that could pay those liabilities, then that's one thing. But in this case, those two were
7 separated, and what ended up in PEOC was simply the liabilities.

8

9 THE COURT: So in terms of measuring the benefit -- I'm going
10 to come at it from a different angle, and again, I'm just searching here to make sure I
11 understand your position -- was there a legitimate business relationship between the
12 vendors and the purchasers?

13

14 MR. DE WAAL: A legitimate business relationship between the
15 vendors and the purchasers. Are you -- I'm not sure whether you're referring to the share
16 transfer or the asset transfer, My Lord.

17

18 THE COURT: Well, I'm looking at the whole transaction when
19 I ask that question.

20

21 MR. DE WAAL: My Lord, we deal with the section 96 analysis,
22 and our position is that you cannot look at the whole transaction because 96 does not -- does
23 not contemplate that. Section 96 deals only with one discrete transaction between the
24 debtor and another party. And in this case, the only transaction in which the debtor is
25 involved is the asset transfer.

26

27 THE COURT: Okay. So let's explore that. We have a
28 vendor -- dealing with the asset transaction -- in the form of, just for discussion purposes,
29 the trust --

30

31 MR. DE WAAL: Yes.

32

33 THE COURT: -- and a purchaser in the form of PEOC that
34 acquired those assets. What is the net benefit to Ms. Rose as a result of that transaction?

35

36 MR. DE WAAL: The net benefit is, My Lord, that -- remember,
37 before the transaction, there were -- and I'll call them KeepCo assets and Goodyear assets.

38

39 THE COURT: Yeah. Just say Keepers and Goodyear.

40

41 MR. DE WAAL: They were KeepCo assets, Goodyear assets. The

1 KeepCo assets could potentially, I assume, pay for some of the liabilities associated with
2 the Goodyear assets. Now what you do is you take the good assets and you hive them off.
3 You put them in a -- in -- with a different trustee. So you protect them against any --
4

5 THE COURT: Well, let's just deal with if transaction we're
6 dealing with. The trust sold them to PEOC. What's the difference immediately after that
7 transaction in terms of Ms. Rose?
8

9 MR. DE WAAL: When PEOC -- that transaction on its own, My
10 Lord, when PEOC was -- owned only the beneficial interest in the Goodyear assets, they
11 were worth -- they had a negative value. When they -- prior to that, when it was still in
12 POT, those specific assets would have had the same negative value, but they would have
13 been positive assets associated with them.
14

15 THE COURT: M-hm. But you said just look at the asset
16 transaction.
17

18 MR. DE WAAL: Yes, My Lord.
19

20 THE COURT: I want to make sure I'm understanding.
21

22 MR. DE WAAL: So the asset transaction --
23

24 THE COURT: Just let me ask a question just to make sure we've
25 got the right context. The trust sold the assets -- again, this is just narrative -- to PEOC.
26 Immediately -- what is the difference -- what is the benefit to Ms. Rose when I compare
27 that structure immediately before the conveyance to what was the circumstance
28 immediately after the conveyance of the assets?
29

30 MR. DE WAAL: Immediately after the conveyance, the good
31 assets are gone, are separated, and now you're dealing with a vehicle -- you're dealing
32 with -- and perhaps, My Lord, the analogy would be a garbage can. You put all the garbage
33 in the garbage can, and it's all in the one garbage can. When the garbage was still in the
34 kitchen, there was other stuff around. Now, you've taken all that, and you've put it in one
35 discrete entity.
36

37 THE COURT: Okay. So what? Immediately after the
38 transaction -- you said to focus on the asset sale. Immediately after the transaction, we had
39 a hundred percent entity of Perpetual Energy Inc. holding PEOC. What's the net difference?
40

41 MR. DE WAAL: The associated liabilities have also been

1 separated.

2

3 THE COURT: But aren't they -- aren't they in the
4 same -- immediately after the transaction, it's still a hundred percent sub.

5

6 MR. DE WAAL: My Lord, if the associated liabilities -- for the
7 sake of our discussion, if the associated liabilities associated with the Goodyear assets were
8 a thousand dollars, those thousand dollars would have been payable from all the assets.
9 Now you put them in the garbage can with the assets that are not worth a thousand dollars.

10

11 THE COURT: Yeah. Let's not use the term "garbage can." Use
12 the term NewCo or use the term PEOC.

13

14 MR. DE WAAL: PEOC. So you put -- you put the -- you put the
15 assets in PEOC, and you put the associated liabilities -- the thousand dollars in associated
16 liabilities in PEOC so that those liabilities -- with respect to those liabilities, no other assets
17 are available. So now you have a vehicle, PEOC, with a thousand dollars in liabilities and
18 no assets to cover those liabilities.

19

20 THE COURT: Okay. So let's use that example, thousand dollars
21 in liabilities, no assets. What's the net impact as a result of that conveyance -- if I'm
22 understanding you correctly, what's the net impact that would give rise to a benefit?

23

24 MR. DE WAAL: If those liabilities are not paid, they end up with
25 the trustee.

26

27 THE COURT: No. No. You said just look at the asset
28 transaction.

29

30 MR. DE WAAL: Indeed, My Lord.

31

32 THE COURT: Now you've done the share transaction.

33

34 MR. DE WAAL: No, My Lord.

35

36 THE COURT: No?

37

38 MR. DE WAAL: No.

39

40 THE COURT: Are you now saying look at the whole
41 transaction?

- 1
2 MR. DE WAAL: No, My Lord. I'm saying the asset transaction
3 only, the effect is as soon as you separate --
4
- 5 THE COURT: Okay. Let's just -- let me give you a numerical
6 example. We've got the trust. What do we have in there -- give me some notional figures.
7 What do we have there for assets and liabilities?
8
- 9 MR. DE WAAL: Let's say you have a thousand dollars in assets all
10 related to good assets and you have a thousand dollars for liabilities all related to the bad
11 assets.
12
- 13 THE COURT: Okay. In your scenario, we've got zero value in
14 the trust. Is that correct?
15
- 16 MR. DE WAAL: You have zero value, but -- you have zero value,
17 and that's from a shareholder perspective in the -- in the parent company, zero value.
18
- 19 THE COURT: Okay.
20
- 21 MR. DE WAAL: As soon as you separate those, then you have two
22 separate companies. You now have the trust separate -- separately from the -- from PEOC,
23 and in PEOC, you have the -- did I say -- thousand dollars in liabilities --
24
- 25 THE COURT: Light liabilities.
26
- 27 MR. DE WAAL: -- and zero in assets.
28
- 29 THE COURT: Right.
30
- 31 MR. DE WAAL: And in the trust, you still have a thousand dollars
32 in assets and no liabilities.
33
- 34 THE COURT: How... I misunderstood something. I thought you
35 conveyed -- or you had a shifting of thousand dollars in liabilities over to the PEOC --
36
- 37 MR. DE WAAL: Yes.
38
- 39 THE COURT: -- entity.
40
- 41 MR. DE WAAL: Yes.

- 1
2 THE COURT: So they're no longer in the trust --
3
4 MR. DE WAAL: Yes.
5
6 THE COURT: -- is what you're saying.
7
8 MR. DE WAAL: Yes, My Lord.
9
10 THE COURT: I'm not saying I agree or disagree. So don't you
11 now in your example have a hund -- or a thousand dollars of assets in the trust?
12
13 MR. DE WAAL: Yes, My Lord.
14
15 THE COURT: And a thousand dollars of liabilities assumed by
16 PEOC?
17
18 MR. DE WAAL: Yes, My Lord.
19
20 THE COURT: So what's the net difference?
21
22 MR. DE WAAL: If the thousand dollars in PEOC are not paid,
23 then there are no assets to satisfy --
24
25 THE COURT: No. We're talking about the benefit to Ms. Rose,
26 full stop. What's the net difference at this point in time?
27
28 MR. DE WAAL: You now have a thousand dollars in assets in the
29 trust unencumbered by any liabilities. So that's the benefit, and what you can do then is
30 exactly what happened --
31
32 THE COURT: So just to pause, before the shares are sold, you're
33 saying that because we have, again on your theory, a thousand dollars of liabilities in
34 PEOC, that that's not impacting on the --
35
36 MR. DE WAAL: Before the transfer, My Lord?
37
38 THE COURT: Before the transfer of shares, --
39
40 MR. DE WAAL: Yes.
41

- 1 THE COURT: -- the shifting -- I'll use the word "shifting."
2 Better word is "assumption." As a result of this asset transaction before the share
3 transaction, you're saying the trust has a thousand dollars of assets and PEOC has thousand
4 dollars of liability, and I'm saying -- or I'm asking, Where is the benefit at that point in time
5 to Ms. Rose?
6
- 7 MR. DE WAAL: If you look at the two still as one entity because
8 they're both owned by PEI, mathematically, My Lord, the position is the same. You haven't
9 sold any assets, you're still in the same position.
10
- 11 THE COURT: Okay. So let's pause right there. That's why I'm
12 asking the question.
13
- 14 MR. DE WAAL: But your position has changed. You're now in a
15 position to move your clean assets --
16
- 17 THE COURT: No. No. Before we -- are you now going to the
18 share transaction?
19
- 20 MR. DE WAAL: My Lord, I'm still dealing with before the share
21 transaction. You've now reorganized your affairs, and you've now benefitted from the
22 reorganization of your affairs. Although on a balance sheet you'd say -- still say you have
23 zero net value, your position is different.
24
- 25 THE COURT: So on a consolidated basis, you agree that there's
26 no change.
27
- 28 MR. DE WAAL: Until the share transfer, yes.
29
- 30 THE COURT: No. We're not talking about the share transaction.
31 You said only the asset transaction.
32
- 33 MR. DE WAAL: I say until the share transaction, --
34
- 35 THE COURT: Yeah.
36
- 37 MR. DE WAAL: -- your position does not change. Yes, My Lord.
38
- 39 THE COURT: "Until" is I think the operative word there.
40
- 41 MR. DE WAAL: Yes, and that's --

- 1
2 THE COURT: I just want to understand what you're asserting.
3
- 4 MR. DE WAAL: That's what I was saying.
5
- 6 THE COURT: Okay. Thank you.
7
- 8 MR. DE WAAL: But the position is not the same anymore. You
9 now have the ability to do exactly what happened.
10
- 11 THE COURT: So how do I measure that benefit at that point in
12 time before the shares are sold? Again, I'm just assuming you're correct on your --
13
- 14 MR. DE WAAL: My Lord, it's not necessary to measure the
15 benefit. There's -- the *Wilson* case, Supreme Court of Canada case, says, for example, that
16 you don't have to measure that. You don't even have to have the benefit, the financial
17 benefit or (INDISCERNIBLE) benefit.
18
- 19 THE COURT: Okay. You just said you don't have to have -- you
20 do not have to have the financial benefit. Is that right?
21
- 22 MR. DE WAAL: Yes, My Lord.
23
- 24 THE COURT: So if you don't have a financial benefit, how can
25 there be a benefit to Ms. Rose?
26
- 27 MR. DE WAAL: Because it's not a financial benefit, My Lord.
28
- 29 THE COURT: So that goes back to my first question. How do
30 you measure -- how do you measure benefit?
31
- 32 MR. DE WAAL: My Lord, the benefit is in the -- in the -- in the
33 restructuring of the PEI ownership of these assets.
34
- 35 THE COURT: Unless you have anything further to say, let's
36 maybe move on to the next.
37
- 38 MR. DE WAAL: My Lord, I referred you to the *Wilson* case. I just
39 want to give you the citation. It's tab 45 --
40
- 41 THE COURT: M-hm.

- 1
2 MR. DE WAAL: -- of the Rose authorities, and it starts at
3 paragraph 47, and that (INDISCERNIBLE) that no specific benefit is required.
4
5 MR. LEITL: Sorry. Which paragraph?
6
7 MR. DE WAAL: I don't know. I've closed it. 47.
8
9 MR. LEITL: Thank you.
10
11 THE COURT: But doesn't it say, in the *Wilson* case, "immediate
12 financial advantage"?
13
14 MR. DE WAAL: No, My Lord. I don't believe so.
15
16 THE COURT: But I don't want to spend too much on this. It's
17 an important point, but I can go back and reread the case.
18
19 MR. LEITL: It's paragraph 49, My Lord, and it says exactly
20 that.
21
22 MR. DE WAAL: It says: (as read)
23
24 Where directors have derived a personal benefit in the form of
25 either an immediate financial advantage or increased control of the
26 corporation, a personal order will tend to be a fair one.
27
28 We went through this analysis, My Lord, at the last hearing.
29
30 THE COURT: I remember.
31
32 MR. DE WAAL: Mr. Leitl's brief says there only -- you have to
33 have one of these two. And in fact, all the Court says is you have to have -- there has to be
34 a fair result, and in these cases, the result tends to be fair, but it's not -- it's not a requirement.
35
36 THE COURT: Sorry. That last sentence, (INDISCERNIBLE)
37 put this down, but what do you mean by that last sentence?
38
39 MR. DE WAAL: My Lord, the overall concern is that the -- there
40 has to be an adequate basis for holding a director personally liable, and one of the things
41 you look at -- so in order to impose personal liability, that has to be fit in all the

1 circumstances, and then the Court says:

2
3 The oppression remedy request must in itself be a fair way in
4 dealing with the situation.

5
6 And it refers to a certain indicia of fairness:

7
8 Where directors have derived a personal benefit --

9
10 That's one example.

11
12 -- in the form of either an immediate financial advantage or
13 increased control of the corporation, a personal order will tend to
14 be a fair one. Similarly where directors have breached a personal
15 duty they owe as directors or misused a corporate power, it may
16 be fair to impose personal liability.

17
18 But it's not a requirement that an applicant or plaintiff has to prove one of those two, a
19 personal financial benefit, an immediate financial advantage or increased control.

20
21 THE COURT: But it says:

22
23 Where directors have derived a personal benefit, in the form of
24 either an immediate financial advantage...

25
26 Do you see an immediate financial advantage here?

27
28 MR. DE WAAL: No.

29
30 THE COURT: Base --

31
32 MR. DE WAAL: Not immediately, no.

33
34 THE COURT: Thank you. Do you see an increase in control of
35 the corporation?

36
37 MR. DE WAAL: No, My Lord.

38
39 THE COURT: Thank you.

40
41 MR. DE WAAL: And then the next paragraph -- I'm sorry, My

1 Lord, before you put that away, --

2

3 THE COURT: Go ahead.

4

5 MR. DE WAAL:

6

7 To be clear this is not a closed list of factors or a set of criteria to
8 be slavishly applied. As explained above, neither a personal
9 benefit nor bad faith is a necessary condition in the personal
10 liability equation.

11

12 THE COURT: So how should I measure it? That goes back to
13 my question. How do -- how do you measure personal benefit here? What am I supposed
14 to consider a personal benefit?

15

16 MR. DE WAAL: My Lord, you should consider whether there was
17 a breach of a personal duty as director to the company and whether personal liability of the
18 director in these circumstances will be fit in the circumstances. Whether there's a personal
19 financial or a direct financial benefit should give you the comfort that that will be a fit
20 result, but it's not the only circumstance. So there's no need for you to measure personal
21 financial benefit. You have to determine whether in these circumstances, if there was a
22 breach of the duty of the director to PEOC, whether that director should be personally
23 liable.

24

25 Number 24, My Lord. This is in response to the suggestion that because PEI was the
26 (INDISCERNIBLE) shareholder of PEOC, whatever PEI wanted was legitimate for the
27 director of PEOC to consider, and the question was, Where are these two prerequisites
28 found? And we say, My Lord, that by definition, the notion that you have a director
29 considering the interests of those -- in other words, not all, but only those -- shareholders
30 who elected him or her, must by -- must necessarily imply that there is more than one
31 director.

32

33 Paragraph 25.

34

35 THE COURT: Do you have any authority for that?

36

37 MR. DE WAAL: My Lord, I would submit, My Lord, that that's
38 the only logical way to interpret that. If you -- if there's only one director, then that director,
39 by implication, cannot consider only the interest of a certain number of shareholders. Then
40 that director considers all the shareholders. So if you -- any reference to anything less than
41 all the shareholders must necessarily imply that there's another director, at least one more.

- 1
2 THE COURT: Do you have authority for that, sir?
3
- 4 MR. DE WAAL: No, My Lord, except that -- oh, there's a case,
5 *Pocklington*.
6
- 7 THE COURT: Do you want to give me the cite?
8
- 9 MR. DE WAAL: I'll get it to you in a second, My Lord. I -- we
10 gave it to you the last time, and that's the Court of Appeal, and it rejected that argument.
11 We'll find it again.
12
- 13 THE COURT: Okay. So just to be clear, did -- I remember
14 *Pocklington* being raised before, but did that case talk about this provision specifically?
15
- 16 MR. DE WAAL: Yes, My Lord. It dealt with the argument that
17 because a particular director was elected by a certain number of shareholders, that that
18 director was then entitled to consider the interests of those shareholders over the interests
19 of the corporation in that case.
20
- 21 THE COURT: Yeah, but the question I'm asking is do you have
22 authority that this only applies -- I have no problem with that premise from *Pocklington*.
23 I'm asking if you have authority that this provision only applies if you have, as you say,
24 more than one -- I -- multiple directors is the way it was phrased -- and one or more directors
25 is elected or appointed, et cetera, by that group. That's --
26
- 27 MR. DE WAAL: Not case authority, My Lord, because, again, as
28 I -- as I've submitted, if a director is appointed or elected by a certain number of
29 shareholders or shareholders from a certain --
30
- 31 THE COURT: Yeah. I have no problem with that, Mr. de Waal,
32 but if we have a wholly owned corporation that appoints a director, why wouldn't this
33 provision apply?
34
- 35 MR. DE WAAL: It applies not to the exclusion, though, and not to
36 trump the interests of the corporation. There's no doubt that any director has to consider all
37 kinds of people like creditors and shareholders but not to the exclusion of the interests of
38 the corporation, and so in this case that's a special consideration, where you have a
39 shareholder elected just by a specific group. Presumably, the other shareholders would not
40 have the same specific considerations, but not again to the exclusion of the interests or to
41 trump the interests of the corporation in the first instance. That's the submission, My Lord.

- 1
2 THE COURT: Thank you.
3
- 4 MR. DE WAAL: My Lord, we now have agreement, it seems, that
5 the concept of a provable claim is not relevant, so I'll just move on.
6
- 7 27, My Lord, 27(a), the question is whether the trustee is asserting that the asset transfer
8 rendered PEOC insolvent. And just in addition to the answer there at the bottom of the
9 page, I should refer you to the evidence of Mr. Darby in cross-examination with respect to
10 the \$14 million that would have been required as a deposit if this had not -- if this
11 transaction had not been structured in the way that it was. That's page 51, line 22, and page
12 80, line 3.
13
- 14 THE COURT: Sorry. You're referring to?
15
- 16 MR. DE WAAL: My response on page 13 to question 27, My
17 Lord.
18
- 19 THE COURT: Right.
20
- 21 MR. DE WAAL: And in addition to what I've set out there that I'm
22 not going to repeat, My Lord, Mr. Darby testified in cross-examination on two occasions
23 that if the transaction had not been structured in this way, there would also in addition have
24 been a \$14 million deposit required, and I've given you the references page 51, line 22 and
25 page 80, line 3.
26
- 27 THE COURT: And you're referring to his questioning.
28
- 29 MR. DE WAAL: Yes My Lord. Cross-examination.
30
- 31 THE COURT: Yeah.
32
- 33 MR. DE WAAL: Yes. Yes. Question number 30, My Lord.
34
- 35 THE COURT: I'm there.
36
- 37 MR. DE WAAL: The question relates to whether evidence
38 subsequent to the transactions and up to the date of the bankruptcy would have been
39 relevant or instructive. Instructive, I think, is the word. And we say at page 18 at the top:
40 (as read)
41

1 have been exactly the same, and so for the purposes of considering the validity of that
2 transfer, whether it was under value or not, that is not affected by whether there was a
3 subsequent share transfer or not. The analysis and the result is exactly the same.
4

5 THE COURT: So we would be here today?
6

7 MR. DE WAAL: If the bankruptcy eventually followed. But this
8 all depends on whether the shareholder or some other entity is entitle -- is prepared to put
9 money in, and whether the bankruptcy eventually happened or not is the issue. If there's no
10 bankruptcy, PEOC and Perpetual can enter into all the deals they want. As soon as there's
11 a bankruptcy, that triggers this inquiry, and we say for -- if that had in fact happened, the
12 analysis and the result would have been the same. So if we had ended up here and Perpetual
13 was still sole shareholder, there'd never been a share transfer, the result would have been
14 the same.
15

16 35, My Lord.
17

18 THE COURT: I'm there.
19

20 MR. DE WAAL: We say in the first bullet point after (a): (as read)
21

22 The evidence shows that nobody represented PEOC in all of this.
23

24 PEOC did not have separate legal counsel. PEOC's interests were represented, according
25 to Ms. Rose, by the purchaser of the shares eventually, and when this release was
26 negotiated, that was -- that was negotiated in the context of the share transfer. There was a
27 deliverable pursuant to the share transfer transaction, and in that transaction, of course,
28 PEOC was not a party to that. So the negotiation about the potential release occurred
29 between PEI and 198 at a point in time when presumably the directors of PEI negotiated
30 against the interests of PEOC in granting this release. We make that point in the third bullet
31 as well.
32

33 Just to clarify pursuant to a comment that you just made, when Mr. Leidl said my
34 submission at the time of the first hearing was that if this had been a deal directly between
35 198 and the trust, then we would not have been here, that does not mean that I think that
36 that would have been a good deal or that that would have been a beneficial transaction -- the
37 share purchase would have been a beneficial transaction. All that means is that other
38 mechanisms would have been triggered. It would have been other requirements for the
39 transaction, and that's why we would not have been here. This could not have happened
40 without the retained interest agreement, for example. Could not have happened without
41 separating the good assets and the bad assets.

1
2 As for the release itself, My Lord, we do not take issue with the fact that releases can be
3 granted. However, the wording of the *Act* is clear. If you grant a release with respect to a
4 breach of the director's duties under the *Act*, that has no effect, and so you can release the
5 director from all kinds of things, including negligence, but you cannot release the director
6 from liability under the *Act*, from her duties or from -- subsequently from liability.
7 Presumably in terms of a settlement, thinking practically, the parties can agree that there
8 was no breach. I imagine that that could be -- I'm not a solicitor, but I imagine that that
9 could be something that you could agree to. But insofar as there's a release that's
10 pursuant -- or that's contrary to the direct language of the *Act*, that has no effect.

11
12 So we do not take the position, as I think Mr. Leidl suggested, that no releases can ever
13 work and the whole world should know that. That's not what we say. We're effectively just
14 saying look at the *Act*, and as long as you stay within the boundaries of that exclusion or
15 outside of the boundaries of that exclusion, releases work.

16
17 Number -- question 40, My Lord, four zero.

18
19 THE COURT: I'm there.

20
21 MR. DE WAAL: The last bullet point we make on page 25 is worth
22 noting, My Lord. Mr. Leidl reminded you that we now rely on this. We've always said that
23 the inherent value of the transaction from a section 90C -- section 96 perspective relates
24 not to specific liabilities or specific amounts; it's consideration given and received. And in
25 deciding what consideration was given by PEOC in this transaction, the ARO -- not a
26 particular number, but the ARO, the future obligations, as in *Daishowa* is a valid
27 consideration. And if somebody -- if I had to buy those shares, My Lord, I would certainly
28 be looking at what the future obligations were, and in that context, a trustee is obliged to
29 consider how much somebody would pay for this and how much would have been given
30 as consideration that would be commensurate with the consideration received. And I've
31 made the point, My Lord, that on none of the evidence before you it's even close, so that's
32 the conclusion.

33
34 With respect to 44, Mr. Leidl submitted that there are lots of things that is a corporation can
35 do that unsecured creditors cannot prevent, and that's true as a proposition. What we're
36 dealing with here, though, is something that would oppress unsecured creditors or deal with
37 unsecured creditors in a manner that would invoke the provisions of the oppression remedy,
38 and so it's not a matter of saying an unsecured creditor now has reason to complain about
39 what happened at PEOC. That's not the point. The point is that it happened in a way that
40 unfairly disregarded or deliberately disregarded their interest.

41

1 We quote on page 27 in the third bullet the *Downtown Eatery* and *The Brick Furniture* and
2 the other cases, My Lord, that deal with internal maneuvering to prejudice creditors.

3
4 46, My Lord, the issue of whether PEOC was set up to fail, we again make the argument,
5 My Lord, that 198, in acquiring the shares of PEOC, after it had collected all these assets,
6 paid \$1, and that was its complete and total exposure to the downside, so it only had one
7 interest, and that was the interest going forward. And in order to make that deal work, the
8 whole thing was structured -- including the retained interest agreement -- was structured in
9 a way that would avoid the usual scrutiny and the regulatory regime that's set up to not
10 have these things land in a -- in a public (INDISCERNIBLE) as we -- as we quote in those
11 statutory provisions that we refer to in the end.

12
13 49, we say Ms. Rose exercised no business judgment on behalf of PEOC. As I understand
14 Mr. Leidl's argument, he says unless the trustee tells us what else she should have
15 considered, we cannot say that she didn't consider the best interests of PEOC. In fact, My
16 Lord, there is a question in the -- in the transcript, the cross-examination transcript, at page
17 79, line 2. I said: (as read)

18
19 Q I'm going to ask you just a open-ended question, and then
20 you can tell me what you think. Why was this asset
21 purchase agreement in the best interests of PEOC?

22 A It affected the transaction, the transaction. The deal was part
23 of the arrangement with 198 and Kayliss (phonetic). It was
24 a requirement. And it -- it was certainly in -- as I've already
25 described, I think that going forward they had a business
26 plan that was actually very positive.

27
28 In other words, it was in the interests of PEOC because it was a requirement of the bigger
29 transaction between Perpetual and 198 and Kayliss, which doesn't really explain why
30 PEOC would benefit from that. And then it says: (as read)

31
32 Going forward, they had a business plan that was actually very
33 positive.

34
35 In other words, if they could make this work, then maybe that was good for PEOC. Doesn't
36 explain why the assets had to be transferred into PEOC when -- just because there was a
37 future business plan. So how was this good for PEOC? That's the complete answer to the
38 business judgment question.

39
40 50, again suggestion that Ms. Rose -- question is how did she breach her duties, and her
41 evidence is clear that she never considered the interests of PEOC as separate from that. In

1 fact, Mr. Leidl's submission today is consistent with that, that -- I remember he called PEOC
2 a fictional blob, but he called them something else this morning. But if you regard PEOC
3 as something without its own interests -- he said it wasn't a baby that was born. But in fact,
4 in corporate terms, corporate law, PEOC was a baby, and somebody had to take care of it,
5 and somebody had to consider its assets -- its interests.

6
7 51, you refer to the arm's length question, and I say the arm's length question in section 96,
8 My Lord, specifically relates only to the party paying consideration to the debtor and the
9 debtor, and in this case, that can only mean one transaction, the asset transaction.

10
11 And then finally, My Lord, perhaps at the bottom of page 36, question 59, the Darby
12 affidavit and hearsay to the extent that there is hearsay. We say -- we refer to the *Rules*,
13 and then we say in the second bullet point there, My Lord: (as read)

14
15 A party responding to an application for summary dismissal is
16 entitled to rely on hearsay.

17
18 So this whole argument about whether something is hearsay -- and that's hearsay. That's
19 not opinion. But that whole argument, My Lord, that's the answer to that. And then in the
20 (INDISCERNIBLE), one of the decisions, it specifically deals with business records as
21 admissible, so it's -- hearsay itself is not excluded by definition. There are exceptions, and
22 one of the exceptions is business records, in this case, the business records of Perpetual
23 itself. And the last bullet point there under that number, I say towards the end: (as read)

24
25 In the present case, the trustee's only saying what PEI had said
26 regarding the intent of -- with the transactions, the purpose and
27 objectives of each transaction, the values of the Goodyear assets
28 and their associated liabilities, and the overall objective of the
29 transactions collectively.

30
31 So it's really the PEI version.

32
33 So, My Lord, in authority then, this is a summary dismissal application, and the question
34 that you have to decide is whether, despite these arguments about specific issues, like
35 whether something's an entity or whether there was liability, whether you can find with
36 confidence on this record that there's no merit to the claims, and I submit that you cannot.

37
38 May I have just a second. My Lord, the decision -- we expect that the decision that was
39 referred to in those texts that you refer to is the *Royal Trust* decision. If there is a
40 basis -- *Standard Trust Company*, My Lord. It's the 1991 decision, *Standard Trust*
41 *Company*. So in that decision, there was suggestion that the trustee cannot bring an

1 oppression claim, but that has since been overruled by the cases that we've -- specifically
2 decided and overruled by the cases that we've referred you to. We were just look --

3

4 THE COURT: So you're saying that this 2018
5 commentary -- and who knows how long it goes back -- is not correct? And again, --

6

7 MR. DE WAAL: My Lord, we --

8

9 THE COURT: -- that's just a question.

10

11 MR. DE WAAL: We anticipate that it comes from that decision
12 because there was a decision that said that, but the subsequent decisions have overruled
13 that -- or not overruled, but not followed that.

14

15 THE COURT: Do you have a full cite for that case.

16

17 MR. DE WAAL: Yes, My Lord. I should be able to give it to you
18 in a second. My Lord (INDISCERNIBLE) second.

19

20 THE COURT: Is that a case of Justice Houlden?

21

22 MR. DE WAAL: I don't remember, My Lord.

23

24 UNIDENTIFIED SPEAKER: Yes.

25

26 MR. DE WAAL: Well it's referred to in *Olympia Trust* and in
27 *Dylex* subsequently. I just don't have the reference.

28

29 THE COURT: I think the cite, if I can assist, was [1991] OJ No.
30 1945, or an alternative cite, 5 OR (3d) 660 (Gen. Div.). I say that with a bit of hesitancy
31 because of the way they do the footnotes in the service. But it refers to *Standard Trust*,
32 *Canada (A.G.) v. Standard Trust Co.*, Houlden's decision. I'm just paraphrasing here.

33

34 MR. DE WAAL: Yes, My Lord.

35

36 THE COURT: I'll have a look at that. Thank you.

37

38 MR. DE WAAL: My Lord, that's referred to in -- at tab 11 of our
39 authorities initially. That's where it was dealt with by *Olympia & York*. It's referred to there.
40 Yes. (1991) 5 OR (3d) 660.

41

1 THE COURT: Thank you.

2
3 MR. DE WAAL: Yes. My Lord, then one final submission, My
4 Lord, the suggestion that if the trust is not an entity, then we still -- then PEOC was simply
5 negotiating with itself, and I'm not sure whether the conclusion then is it was at arm's length
6 or not, but if it a trust is collapsed in that way, My Lord, then the trust ceases to exist. What
7 happens is the interest of the beneficiary of the trust should be taken into account. So
8 the -- for the sake of the argument, to deal just with the argument, if there is no trust
9 because, as my friends argue, the trust is not an entity, then you still cannot ignore the fact
10 that there's a trust beneficiary, and without that relationship between the trust beneficiary
11 and the trustee, there would not have been a transfer and there would not have been a trust.

12
13 THE COURT: Okay. So let's just pause there because I was
14 actually looking through my notes because I wanted to ask you about that. First of all, in
15 your reply to question 15 -- the question is: (as read)

16
17 Do all parties agree that PEOC was solvent at the end of business
18 on September 30th, 2016? If not, please direct the Court to the
19 evidence that supports a contrary conclusion.

20
21 Your answer -- and I'm just reading the text here: (as read)

22
23 No. If it was personally liable for property tax on the properties,
24 it -- pardon me. If it was personally liable for property tax on the
25 properties it held in its own name (as trustee on behalf of POT), it
26 was not solvent.

27
28 MR. DE WAAL: Yes. And if --

29
30 THE COURT: So who has the liability?

31
32 MR. DE WAAL: The liability, in fact we know now it's conceded
33 in the -- in the responses from my friends there were some tax -- there were some tax
34 liabilities outstanding with respect to what they call a small number of municipalities. This
35 is in response to question 42. Those were outstanding. And the evidence of Ms. Rose is not
36 that there was this -- that they had an entitlement to negotiate an extension. They had to
37 pay a penalty first of all. But she says in her affidavit that those negotiations occurred after
38 the closing. So at the time of the transfer, at the time of the -- when the deal closed, those
39 liabilities were still outstanding, and those liabilities were PEOC liabilities.

40
41 THE COURT: At what point in time?

- 1
2 MR. DE WAAL: At the time of the transfer. At the time of the
3 closing of the share transfer -- the asset transfer.
4
5 THE COURT: Okay. At the time of the close of the es --
6
7 MR. DE WAAL: Yes.
8
9 THE COURT: -- asset transfer.
10
11 MR. DE WAAL: Yeah.
12
13 THE COURT: So question 15 says -- I'm going to repeat it: (as
14 read)
15
16 Do all parties agree that PEOC was solvent at the end of business
17 on September 30th, 2016?
18
19 And your -- I'll won't read the rest of it, but your answer is: (as read)
20
21 No. It was personally liable for property tax on the properties it
22 held in its own name.
23
24 MR. DE WAAL: Yes. So it held its properties in its own name as
25 trustee. So it is required to hold the properties in its name --
26
27 THE COURT: Okay. So just -- let's just pause. Who's got the
28 liability?
29
30 MR. DE WAAL: The person whose name the property's
31 registered.
32
33 THE COURT: Okay.
34
35 MR. DE WAAL: That's the taxpayer.
36
37 THE COURT: Okay. So if it has the liability on September 30th,
38 does it have all of the relevant liabilities?
39
40 MR. DE WAAL: With respect to property tax, My Lord?
41

1 THE COURT: Well, I didn't say, in the question, property tax. I
2 said, Do the parties agree that PEOC was solvent at the end of business on September 30th,
3 2016? And you said, No.

4
5 MR. DE WAAL: My Lord, because the answer is if you look at
6 those two exhibits to the Darby affidavit, 'I' and 'J', PEOC had no assets. It had a hundred
7 dollars, had no assets, had no business, but it had this liability. And so despite what 'I'
8 shows -- it doesn't show those as liabilities -- we know from the Rose affidavit, we know
9 from my friends' answers to these questions, we know that it had the liability for the
10 municipal tax. So if it had the liabilities and had no revenue on its own, then it --

11
12 THE COURT: Okay. So let's just pause there. You're saying it
13 has those liabilities under the *Act*.

14
15 MR. DE WAAL: Yes, My Lord.

16
17 THE COURT: Okay. So if it has those liabilities before the
18 conveyance, then we don't need to assume those liabilities?

19
20 MR. DE WAAL: No. It had the liabilities. It now -- the -- it just
21 changes the capacity in which it holds the -- its --

22
23 THE COURT: Well, no. I -- I'm ask -- I asked the question, Is it
24 solvent? You said, No. And you said no because it has the liability. So does it have the
25 liabilities or not?

26
27 MR. DE WAAL: It does, My Lord, yes.

28
29 THE COURT: It does.

30
31 MR. DE WAAL: Yes.

32
33 THE COURT: Okay. So if it has the liabilities, then it didn't
34 assume anything. Is that what you're telling me?

35
36 MR. DE WAAL: Yes, My Lord.

37
38 THE COURT: Thank you. If it -- if those liabilities for the
39 municipal property tax -- and again, you've added that in here, and that's fine. I'm just trying
40 to explore this. If it had those liabilities in the first instance, i.e., before the conveyance,
41 and if the obligations for remediation are not liabilities, then did the conveyance improve

1 the status of PEOC? That's a different question than I've asked here, but you've got my
2 curiosity now.

3

4 MR. DE WAAL: Well, the --

5

6 THE COURT: If PEOC already had the liabilities, then what
7 does the conveyance of if I can use the term "the assets" do to PEOC?

8

9 MR. DE WAAL: My Lord, this issue came up in the context of
10 whether there was -- there were claims and whether there were creditors at the time, and
11 it's in the response, the written response, but it's sections 304 and 331 of the *Municipal*
12 *Government Act*.

13

14 THE COURT: Yeah. I'm not --

15

16 MR. DE WAAL: So in the context of --

17

18 THE COURT: You already conceded, I think, the point on the
19 municipal property tax, and if I accept that position, then doesn't PEOC already have the
20 liabilities?

21

22 MR. DE WAAL: For the municipal property tax, My Lord? Yes.

23

24 THE COURT: Okay.

25

26 MR. DE WAAL: Well, could I add one comment? And this is tab
27 17 of my friend's authority, so it's part of their replies to the questions. In the tabs
28 attached, --

29

30 THE COURT: I'm there.

31

32 MR. DE WAAL: -- tab 17.

33

34 THE COURT: It's got a number of sub tabs.

35

36 MR. DE WAAL: 17(a), My Lord.

37

38 THE COURT: Yes, I'm there.

39

40 MR. DE WAAL: The Ontario Court of Appeal decision in *Spencer*
41 *v. Riesberry*, and I want you take you to paragraphs 54 and 55.

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THE COURT: I'm there.

MR. DE WAAL: And this is something we did not discuss, My Lord:

Trust is also a type of relationship, namely, the fiduciary relationship that exists between trustee and beneficiary. The foundation of the trust relationship is a separation of roles between the trustee and the beneficiary with the trustee being the legal owner of the trust property and the beneficiary being the equitable owner of the trust property. The trustee holds legal title to the trust property so it can manage, invest and dispose of the trust property solely for the benefit of the beneficiaries. The trust can only exist when there is a separation between legal ownership in the trustee and equitable ownership in the beneficiaries.

If the Court were to ignore or conflate the separate entities, it would destroy the foundation of the trust relationship. Put another way, absent the separate entities, there is no trust relationship and, therefore, no trust.

And this goes to Mr. Leitel's submission in particular that PEOC was simply dealing with itself in purchasing these assets because the trust was not an entity.

THE COURT: So the first sentence at paragraph 54, I think, confirms that it's just a relationship, correct?

MR. DE WAAL: Yes, My Lord, as is an unincorporated association, as is a partnership.

THE COURT: Yeah, well.

MR. DE WAAL: And those are all included in that definition.

THE COURT: Yeah. Partnership is mentioned, but trust isn't mentioned, so how do -- how do you deal with that?

MR. DE WAAL: It's not, but it says including, and then it lists things like an unincorporated association, for example, which is a relationship, not an entity. So there's no reas -- it's never excluded. Trust is not excluded. And the only reason

1
2 Mr. de Waal, I asked the question earlier about the narrative that's in paragraph 9 of the
3 Norton Rose submission, and I think your answer was -- and correct me if I'm wrong -- was
4 that this is just hearsay. Is that correct?
5

6 MR. DE WAAL: It's hearsay, My Lord, but it also relates to events
7 to explain or describe the circumstances giving rise to the bankruptcy as opposed to the
8 circumstances of the transaction so many months earlier. So hearsay, yes, but you
9 cannot -- you cannot take from the fact that there was a plan that didn't work out, that the
10 transaction was not a good transaction for PEOC. If they were looking at the upside as we
11 say they were, and only at the upside because there's no interest in covering any of the
12 downside or \$1 worth of interest, then explaining why the upside never materialized really
13 doesn't address the issue.
14

15 THE COURT: So is it hearsay?
16

17 MR. DE WAAL: It is still hearsay, yes, My Lord.
18

19 THE COURT: Okay. So when I look at the financials that are
20 unaudited that we referred to earlier that are in the binder here and they are a component
21 of Mr. Darby's affidavit, do I take all of that information to be -- and both parties can
22 address this -- valid for the proof of the truth of their contents?
23

24 MR. DE WAAL: My Lord, it's Mr. Darby -- and I think we
25 addressed this, My Lord. Mr. Darby cannot say that all those documents are factually
26 correct. He can only say, This was the Perpetual version business record recording of what
27 it was thinking and what it was doing and what -- the values it attached to these properties,
28 et cetera. And that's all. He's not putting it forward as for the truth of its contents because
29 he simply wasn't around, which is, unfortunately, the case of a trustee generally. You can
30 only rely on the business records that you're presented with. And he presents the case for
31 the trustee on the basis of Perpetual's own records, and it's for Perpetual to come forward
32 and say, Here's why we said this, we actually meant that, or, Here's why we had this value
33 but there was a subsequent revision or anything to that effect. And they have not done that.
34

35 THE COURT: Thank you, sir.
36

37 Mr. McDonald, I know you were going to rise. I've got a few questions, but maybe I'll let
38 you have the floor first.
39

40 **Submissions by Mr. McDonald**
41

1 MR. MCDONALD: Well, I'll try to be brief. I only planned to deal
2 with three points arising out of my friend's submissions, but of course, I'd be pleased to
3 answer your questions.
4

5 The first point -- and I hesitate to go back here because we have heard so much about it -- is
6 the value question. My friend argued that essentially Mr. Darby is required under section
7 96(2) of the *Act* to state the value of the consideration given and received and you should
8 accept that absent evidence to the contrary, and he says evidence to the contrary necessarily
9 means evidence coming from the defendants. What he's asking you to do when he says
10 that, in my submission, is accept evidence that is patently unreliable.
11

12 And the answer is that evidence to the contrary is not limited to evidence that comes from
13 the opposing party in the lawsuit. A Court looks at all the evidence that's before it, and if
14 it finds within the evidence of one party conflicting evidence -- and in this case, patently
15 conflicting evidence to show that in the case of the value of the assets the \$5 million that
16 my friends are relying on is unreliable -- then it has evidence to the contrary. And that's an
17 easy example because while Mr. de Waal argues the asset value is \$5 million based on the
18 engineering report, Mr. Darby testified the engineering report isn't -- doesn't present the
19 fair market value of the assets. Now, surely that's evidence to the contrary, and surely it
20 would be absurd for you to say, Well, in spite of that evidence that -- from the very witness
21 for the plaintiff that it's not fair market value, I'm going to treat it as fair market value. The
22 same thing goes with respect to the liabilities or the value of the consideration received.
23

24 And that takes us to this question of ARO and whether ARO is a liability. And you've heard
25 so much and so many conflicting things, in my submission, on that. You asked the question
26 directly in question 40, and the answer was, well, the ARO is a provision which is a form
27 of liability. I don't know what that means. Mr. Darby testified about it at page 91 of his
28 cross-examination, and I don't know if you have that --
29

30 THE COURT: Yeah, I do.

31
32 MR. MCDONALD: -- handy.

33
34 THE COURT: Tab 17. I'm there.

35
36 MR. MCDONALD: Page 91, line 19.

37
38 THE COURT: I'm there.

39
40 MR. MCDONALD: He was presented with a present out from the
41 PwC website. Mr. Leidl said: (as read)

1
2 Q You'll agree with this statement on your firm website, that:
3 a liability is a present obligation of the entity arising from
4 past events, the settlement of which is expected to result in
5 an outflow from the entity of resources embodying
6 economic benefits.

7 A Yes.

8
9 Q That's how liability is defined?

10 A Yes.

11
12 Q And that's distinct from a provision, which is a liability
13 of an uncertain timing or amount?

14 A Yes.

15
16 Q Right? When you talk about the liabilities of PwC, you
17 talk about it in terms of provisions, right? What -- ARO
18 is a provision?

19 A ARO is a provision. Municipal tax would be a liability.

20
21 And finally, in terms of this evidence to the contrary relating to the \$220 million number,
22 the very part that the plaintiff says is owed this liability or provision, the AER, has
23 presented evidence that its claim is between \$1 and \$220 million. So surely when you put
24 that all together, you have evidence to the contrary coming from the plaintiffs, and you
25 would find it as unacceptable to take at face value Mr. Darby's evidence that the liabilities
26 are \$220 million as you would find it unacceptable to take his evidence at face value that
27 the assets were valued at \$5 million.

28
29 My second point addresses the discussion you had with my friend about whether Sequoia
30 was set up to fail, and his answer was, Yes, it was; it only paid \$1; had it sold one truck, it
31 could have recouped its investment. Well, if you look at all of the evidence, part of the
32 transaction, part of what Sequoia had following the transaction was a hedging contract
33 which Ms. Rose testified cost \$12.7 million. Surely a company set up to fail and without a
34 business plan other than to fail would have cashed in the hedging contract on day two and
35 pocketed the \$12 million. The evidence is also that there were 32 million cubic feet of gas
36 produced per day. Surely a company that was set up to fail would just pocket that
37 production revenue. But that's not what happened. And we know what happened. The
38 company was a viable business for a year and continued in operations for another half year
39 before it went into bankruptcy. So in my submission, on all the evidence, it wasn't set up
40 to fail. It was a legitimate business plan, and it was one that, for all the reasons you've
41 heard, wasn't successful.

1
2 My third point was to address something that actually wasn't addressed by my friend, but
3 because of your comments, I wondered if you were interesting -- interested to hear
4 submissions on it and that was this question of whether 198 and Perpetual were dealing at
5 arm's length when one considers the deeming rule. And there was an exchange between
6 you, and I don't know that anyone's addressed that other than I believe we addressed it in
7 our submissions on day one. Is the deeming rule that you're thinking of 4(3)(c) of the --
8

9 THE COURT: Correct.

10
11 MR. MCDONALD: -- *Act*? Well, let me then deal with that in case I
12 didn't deal with it as well as I should have the first time. Before I go there, I want to just
13 remind everyone of Mr. Darby's evidence on whether or not the parties were at arm's length
14 because this seems to be inconsistent with some of the answers that were given by my
15 friends today in answer to your questions, and in that regard, could I refer you to Mr.
16 Darby's transcript at page 53?
17

18 THE COURT: I'm there.

19
20 MR. MCDONALD: There's a reference to paragraph 22 of the
21 statement of claim. I'll start at line 21 on 53.
22

23 THE COURT: I'm there.

24
25 MR. MCDONALD: This is me asking the question: (as read)
26

27 Q I'm correct, am I, that the trustee is alleging only that the
28 asset transaction was not at arm's length, and you accept
29 that the share transaction was at arm's length?

30 A I never reviewed the related status of the share transaction,
31 but my understanding was they were an unrelated party.
32

33 Q Acting at arm's length?

34 A Yes.
35

36 So that's the evidence we have from Mr. Darby. Now, the deeming rule, as I understand
37 the argument made in my friend's brief, relies on section 43(c) of the *BIA*, which is at tab
38 16 of my friend's authorities.
39

40 THE COURT: Just bear with me here.
41

- 1 MR. MCDONALD: White bound volume, quite thick.
2
- 3 THE COURT: Yeah. Oh. Just a second. (INDISCERNIBLE)
4 right here. Go ahead.
5
- 6 MR. MCDONALD: And the section is at page 10 of the *Act*.
7
- 8 THE COURT: I'm there.
9
- 10 MR. MCDONALD: And the argument my friend makes is that once
11 the share purchase agreement was executed on September 26th, 198 had a right under
12 contract to acquire the shares of PEOC that brings into play 4(3)(c), which says a person
13 who has a right under a contract to acquire an ownership interest is deemed to have the
14 same position in relation to control of the entity as if the person owned the ownership
15 interest. And my friend then uses that section to argue that 198 is related to PEOC -- fair
16 enough -- but makes the leap that I don't -- in my submission, cannot be made that it also
17 causes 198 to be related to Perpetual or PEI. And the argument's not really developed, but
18 it's stated, and I take it that's what my friend is saying.
19
- 20 And I have four points to make in response to that. The first is that just on the plain wording
21 of the section, that's not what it says. It -- I already closed the book. It doesn't say that it is
22 deemed to --
23
- 24 THE COURT: It isn't --
- 25
- 26 MR. MCDONALD: The party with the right under contract is deemed
27 to be related to the owner of the party, that is, the party in the position of Perpetual.
28
- 29 THE COURT: But just let me pause you, and is he not asserting
30 that -- and maybe he can speak to it -- because of the deeming the rule in sub (5)?
31
- 32 MR. MCDONALD: Well, I will -- I'll get to that, but I didn't think that
33 was his argument. I thought he was saying 4(3)(c) makes 198 and PEI related parties.
34
- 35 THE COURT: M-hm.
36
- 37 MR. MCDONALD: And I thought that's what you were concerned
38 about.
39
- 40 THE COURT: Well, it is but not to exclude the application of
41 4(5).

1
2 MR. MCDONALD: That's the -- that's the ultimate answer. I think
3 there are many answers to it, but the ultimate answer is 4(5) still applies. Even if you accept
4 that 4(3)(c) makes 198 and PEI related -- and I don't accept that -- 4(5) says that they
5 are -- the related parties are, in the absence of evidence to the contrary, deemed not to deal
6 at arm's length, and so it takes us in a circle back to the evidence of the contrary argument.
7

8 THE COURT: Yeah, and I haven't forgot your argument and,
9 you know, the submissions that were made in the first instance. I just wanted to make sure
10 we weren't glossing over (5).
11

12 MR. MCDONALD: No. Okay. Well, the other arguments I was about
13 to make -- he referred to a case called *Green Gables*. It doesn't take him where he wants to
14 be. And my colleague, Mr. Chiswell, had taken you to the Income Tax Bulletin example, --
15

16 THE COURT: M-hm. M-hm.
17

18 MR. MCDONALD: -- which again illustrates it doesn't go as far as
19 my friend argues. But the final answer to all that is that 4(5) is still in play. You still
20 consider all the evidence, and you've heard all our arguments on the evidence to the
21 contrary.
22

23 THE COURT: Thank you.
24

25 MR. MCDONALD: That's all I have to say, My Lord, but I'm happy
26 to answer your questions, or perhaps if you prefer Mr. -- if I don't know if your questions
27 will be ones that better fit in my --
28

29 THE COURT: Well, let me just --
30

31 MR. MCDONALD: -- court or Mr. Leitzl's.
32

33 THE COURT: I don't have very many more. We've been
34 on -- touched on a lot of things. Just bear with me for a minute here.
35

36 These are not in any particular order, but first question I have for Mr. McDonald or Mr.
37 Leitzl -- and either one can respond to it -- is, What is your position on the discounting
38 question I asked earlier today that Mr. de Waal pointed me to buried in the notes of the
39 financial statements? And there seems to be conflicting information on that. So that's one
40 question.
41

1 Second question, response from your side on Mr. de Waal's comments on the business
2 judgment rule. Just bear with me here.

3
4 Third question, any further comments on ARO given Mr. de Waal's comments.

5
6 Next question, any further comments regarding the entity, i.e., the relationship, the trust
7 issue.

8
9 Next question, If it is the case that PEOC already has the liability for the property tax, is
10 PEOC improved by virtue of -- and, again, just narrative -- the conveyance of the assets
11 from the trust to the body corporate?

12
13 And I do have a couple questions for Mr. de Waal, but I'll let -- part of the reason that I'm
14 querying coming back to the ARO, on page 10, in response to question 8 that I asked, the
15 response to 8(b), the question was: (as read)

16
17 In swearing the Darby affidavit did Mr. Darby determine the
18 liabilities of PEOC on a discount or an undiscounted basis?

19
20 And the answer is -- that I was provided was: (as read)

21
22 Mr. Darby determined the ARO and municipal taxes of the
23 Goodyear assets on an undiscounted basis.

24
25 And the letters "UN" in undiscounted were underlined. So that's why I was pausing there,
26 because I think I was getting a different answer from the parties.

27
28 Go ahead.

29
30 MR. MCDONALD: Shall I try some of those? The first question was
31 discounting and --

32
33 THE COURT: And there's some overlap obviously here, so --

34
35 MR. MCDONALD: Right.

36
37 THE COURT: Yeah.

38
39 MR. MCDONALD: My answer when -- in the context of value -- and
40 I think that's what we're talking about when we're talking about discounting -- is that it's
41 important to compare apples to apples when you're comparing assets and liabilities to

1 assess whether there's this conspicuous difference that my friend refers to, and it's
2 completely unhelpful to compare undiscounted numbers with discounted numbers or to
3 compare discounted numbers with different discount rates. One gets different results every
4 time, and it's not a fair comparison.

5
6 And to deal with the facts, we know on the asset side of the analysis, Mr. Darby's dealing
7 with a discounted -- 10 percent discounted number, and on the liability side of the analysis,
8 putting aside for the moment whether ARO is a liability and just talking about the
9 discounting point, we know from Exhibit 'N' to Mr. Darby's affidavit, --

10
11 THE COURT: I'm there.

12
13 MR. MCDONALD: -- which is a description of the -- well, in part,
14 refers to the XI Technology work, item -- or paragraph (b) about halfway down the page, --

15
16 THE COURT: I'm there.

17
18 MR. MCDONALD: -- (as read)

19
20 Estimated value of abandonment and reclamation costs for the
21 wells included in the PEOC transaction undiscounted generated
22 from the XI ARO model --

23
24 And that's the number that we see above of \$192 million, and with some other calculations,
25 it gets to the 223 million that we're dealing with.

26
27 THE COURT: I'm there.

28
29 MR. MCDONALD: So comparing a \$5 million discounted at 10
30 percent number with an undiscounted number provides a meaningless comparison.

31
32 The one other place that we see discounting is in the excerpt from the PEI financial
33 statements at Exhibit 'B' to Mr. Darby's affidavit.

34
35 THE COURT: I'm there.

36
37 MR. MCDONALD: Provision -- or sorry. Note 12 on page 9.

38
39 THE COURT: Did you say 'B' as --

40
41 MR. MCDONALD: No. I meant -- I'm sorry. Note 12, page 9, entitled

1 provisions.

2

3 THE COURT: But what tab? Sorry.

4

5 MR. MCDONALD: Oh. 'P' as in Peter.

6

7 THE COURT: Thanks. I was looking at 'B' again. I'm there.

8

9 MR. MCDONALD: And here we see the provisions including
10 the -- well, the \$131 million number that's referred to as transferred to assets for sale. But
11 at the bottom, what I was referring is: (as read)

12

13 At September 30, 2016, the corporation used a weighted average
14 risk-free rate of 1.72 percent; December 31, 2015, 2.31 percent, to
15 calculate the present value of the decommissioning obligation.

16

17 THE COURT: Right.

18

19 MR. MCDONALD: And I don't know the significance of the use of
20 that discount rate as compared to some other discount rate, but the point I'm making is
21 again we don't have an apples and apples comparison, and so to the extent my friend and
22 his answers today was using the \$131 million figure, perhaps to distance PwC from the XI
23 Technologies report, it's still a number discounted at a particular discount rate that doesn't
24 bear fair comparison to an undiscounted number or, indeed, to a 10 percent discounted
25 number.

26

27 Does that address what -- oh. Just one more point. Oh. And Mr. Chiswell just refers me, I
28 guess, to one other piece of information. The trustee's answer to question 8(b), where it's
29 acknowledged that the trustee's numbers referring to the liabilities are presented on an
30 undiscounted basis.

31

32 THE COURT: If I can just pause. I'm not writing all these
33 questions down, but, Mr. de Waal, if you respond to that 8 -- answer to 8(b) of your
34 materials.

35

36 Continue, Mr. McDonald.

37

38 MR. MCDONALD: That's all I have to say about discounting, and I
39 circle back to --

40

41 THE COURT: Yeah. That covers --

1
2 MR. MCDONALD: -- to get a meaningful answer, you need apples to
3 apples.
4
5 THE COURT: Yeah.
6
7 MR. MCDONALD: Mr. Leidl will deal with the business judgment
8 rule. You asked if I had any additional comments on ARO. Frankly, I don't, but if you have
9 anything specific arising out of my friend's submissions, I'd like to address it.
10
11 THE COURT: And the reason I asked the broad -- the broad
12 question is going back to effectively do we have a liability here or not.
13
14 MR. MCDONALD: No. We don't -- we don't have a liability here, and
15 Mr. Darby says that. The -- Mr. Leidl probably argues that more than I did, but it's not a
16 liability. It's a provision. They're distinct accounting terms, and they're described by PwC
17 on its website and accepted by Mr. Darby, and --
18
19 THE COURT: When you --
20
21 MR. MCDONALD: -- perhaps the more -- the -- if it's a liability, is it
22 a liability to whom? And my friends say it's a liability to the AER. And of course, that's
23 patently wrong. The AER is not owed any money until certain events occur, as Mr. Leidl
24 described. And so whether you want to characterize it as a liability, or a provision, it's not
25 a sum of money owed to the AER at the time of the transaction. It's a reflection of an
26 amount calculated on a certain basis to be set up in financial statements to show that there
27 will be obligations to be incurred in the future by an oil and gas producer to satisfy its
28 statutory obligations to abandon and reclaim its properties. It isn't a debt owing to a third
29 party.
30
31 Your fourth question was the entity trust issue and whether I had anything further to say
32 on that. My friend's argument that trust isn't excluded from the definition of person and so
33 it must be analogous to a partnership and included, in my submission, is unpersuasive, and
34 the far better answer is that a trust is not an entity.
35
36 Your fifth question is if PEOC had the property tax liabilities before the asset transaction,
37 is PEOC improved by a conveyance of the property or the assets from the trust or, as we've
38 been characterizing it, a merger of the beneficial and legal interest. And I hadn't thought of
39 it in this context before, and perhaps Mr. Leidl will have a better answer, but my answer
40 would be that it's neutral. It didn't improve or whatever the opposite of improve is -- make
41 PEOC's position any worse. Before the transaction, PEOC as trustee had a right under the

1 trust indenture to pay the obligations it has -- it incurred as trustee under the trust property
2 and, that is found in the trust indenture -- oh. It's 6(c) -- or 60(c) of our answers, but I
3 wanted to give you the paragraph reference (INDISCERNIBLE), and I had a moment ago,
4 but I'm sorry. I probably (INDISCERNIBLE).

5
6 MR. DE WAAL: So it's on page 17.

7
8 MR. MCDONALD: Page 17, tab 60(c). It's under 4.2, power and
9 authority of the trustee, sub (t), payment of expenses.

10
11 THE COURT: I'm there.

12
13 MR. MCDONALD: One of the powers of the trustee is to settle and
14 pay and satisfy out of the assets or property of the trust properties any of the obligations of
15 the trust, including, without limitation, the following: Item 1, the amount of any -- lists a
16 number of -- or other tax. So if PEOC was obligated to pay the municipal tax before the
17 transaction, it had a right to pay that out of the trust property. If the trust property then was
18 merged into PEOC, it had the right, through its own property, to pay the tax. And so as I
19 see, it would not have been effected in that respect before or after, which I guess, from that,
20 one could conclude that if the mischief of next section, 96, is directed at, is a transfer of
21 property that acts to the detriment of the creditors of the bankrupt, this certainly isn't that
22 sort of transfer.

23
24 THE COURT: Okay.

25
26 MR. MCDONALD: That's all I have in answer to questions unless
27 you have others or need more from me.

28
29 THE COURT: No. No, I do not, sir.

30
31 Mr. Leidl.

32
33 MR. MCDONALD: Thank you. We'll see if Mr. Leidl can improve on
34 those now.

35
36 Mr. Chiswell just points out that we've got a cite incorrect in our answers that we should
37 correct for you.

38
39 So it's (INDISCERNIBLE) 15, so it is the Schweitzer affidavit, but it's not paragraph 20.
40 It's paragraph 12.

41

1 THE COURT:

12.

2

3 MR. MCDONALD:

And that's the cite for the discounted basis where

4 (INDISCERNIBLE).

5

6 THE COURT:

Thank you.

7

8 MR. MCDONALD:

Okay. Thanks.

9

10 THE COURT:

Did Mr. de Waal get that just --

11

12 UNIDENTIFIED SPEAKER:

Yes, he did.

13

14 THE COURT:

Thank you.

15

16 **Submissions by Mr. Leidl**

17

18 MR. LEITL:

(INDISCERNIBLE) thank you, My Lord. I

19 won't be long. I appreciate the indulgence to go so late.

20

21 The Sequoia letter quoted at paragraph 9 of our brief -- and if I can call it the Sequoia
22 letter -- my friend's submission that it's hearsay, there's some irony to that because the
23 trustee is Sequoia before you today in the sense that it's standing in the shoes of Sequoia,
24 and it somehow wants to downplay one of its own records. These are records the trustee
25 had amongst thousands and thousands more, according to Mr. Darby, that they obtained
26 and have not cited. That letter from the -- from Sequoia, however, was cited in the trustee's
27 preliminary report, which is an exhibit to Mr. Schweitzer's affidavit. They've treated it as
28 credible. So in essence, it's a party telling you, Our own evidence is hearsay, which doesn't
29 make sense.

30

31 Mr. de Waal talked about -- in the context of your questions -- about personal benefit. He
32 said that PEI had been able to send away 75 -- 71 percent of its liabilities. Now, aside from
33 the fact that that number 71 percent is completely fallacious because it's almost entirely
34 premised on the idea that the ARO is current liability, which is completely fallacious, but
35 you can't, as a matter of law, send away liabilities. If I am your creditor, you can't send me
36 away and say, You now can claim this as against somebody else. Real liabilities get
37 assumed with the consent of the creditors, and that didn't happen because these weren't real
38 liabilities.

39

40 You then pressed Mr. de Waal on the concept of personal benefit in the context of the asset
41 transaction alone, and I have nothing substantive to say other than there was an express

1 concession on his part that the personal benefit theory holds no water when you look at it
2 in the isolated context. It doesn't generally, but it doesn't when you artificially look at it in
3 the asset transaction isolated scenario alone either.

4
5 Now, Mr. de Waal said that *Wilson* stands for the proposition that you can prove oppression
6 on the part of a director without proving a personal benefit, and ironically, he's right. And
7 here's why I say it's ironic -- and if you have that, it's at tab 45 of our authorities.

8
9 THE COURT: I'm there.

10
11 MR. LEITL: At paragraph 50. Sorry there are no page
12 number -- or there is. Page --

13
14 THE COURT: I'm there.

15
16 MR. LEITL: Page 13. The Court -- don't read the whole
17 paragraph except to go over to the scenarios, but the court says there are basically four
18 scenarios where there might be personal liability, and if you go over the page, first one is
19 the director acted in bad faith and obtained a personal benefit. Not the case, no allegation
20 of bad faith. The second is director acted in bad faith but did not obtain a personal benefit.
21 Not the case, but that is an example of where you might approve oppression in the absence
22 of personal benefit, but again, not applicable. The director acted in good faith and obtained
23 a personal benefit. There, personal benefit is required; you still have to prove it. And fourth,
24 the director acted in good faith and did not obtain a personal benefit. And they say, of
25 course, that fourth one is also possible to prove oppression.

26
27 I just find it remarkable that the trustee, who's supposed to be a dispassionate officer of the
28 court, persists in advocating this idea of personal benefit, changing its position throughout,
29 changing its position today in writing, and then changing its position on their feet, where
30 it just flies in the face of the evidence.

31
32 My friend said he's happy to see that the concept of provable claim is no longer relevant,
33 that there's agreement. There's no agreement. Again, while you don't have to prove in
34 proving oppression that your claim is provable under the *BIA*, you have to prove that you're
35 a creditor, and for the AI -- AER to prove that it is creditor, it has to, in this -- in these
36 circumstances, prove its claim in bankruptcy, and it still hasn't done so, and it may never.
37 It's nothing more than a placeholder at the moment, the proof of claim.

38
39 My friend referred to Mr. Darby's evidence on the cross-examination about the -- if the
40 transaction had been done differently, there would have been a deposit paid to the AER.
41 That is hearsay that was totally unsubstantiated. It's not -- there's no evidence from the

1 AER as to whether they would require that deposit or in what amount.

2
3 My friend said that PEOC did not have separate legal counsel. Well, PEOC did have legal
4 counsel as reflected by the writing in the release. McCarthy was -- were there. And I think
5 we should ask, If another lawyer was retained and said you're now acting for PEOC in this
6 transaction, what would that advice have been? Would it have been to do anything but that
7 which they did? And again, my friend didn't answer that.

8
9 With respect to the release. My friend argued that it's inoperative, and he said the way you
10 might deal with it otherwise is for the parties -- and I'm paraphrasing -- to pretend that there
11 had never been a breach. I was just very struck by that. So he's saying you can't release
12 someone based on the facts, but the parties can mutually agree to false facts to get it done.
13 That is absolute absurdity, and when I say that, I'm referring to the absurdity principle of
14 statutory construction cited in my friend's brief.

15
16 My friend accepted my analogy of childbirth and subsidiaries and said that PEOC is a baby
17 and has separate interests, but despite my undiplomatic poking and poking and poking and
18 I said earlier today I can't wait for my friend to stand up and answer the question, What are
19 those interests, what else should it have done, you still don't have an answer, and I submit
20 that that is now foreclosed. There is no answer. There's no *parens patriae* jurisdiction for
21 the Court to deal with the interests of wholly owned special purpose subsidiaries.

22
23 Your Lordship asked -- well, my friend said in relation to the cases and the services you
24 cited, he said, No, that's wrong because of *Standard Trust* or cases following *Standard*
25 *Trust*. *Standard Trust* was Justice Houlden. It was the first time a Court looked at the issue
26 of whether a trustee in bankruptcy could sue for oppression, and Justice Houlden thought
27 not. And I agree that that has changed, and we dealt with this at length when it was last
28 before Your Lordship, and it's dealt with in our brief. Where there's a fork in the road, a
29 trustee can come forward and seek to advance an oppression claim, but it has to be a
30 collective claim. It can't be a personal claim. I think the authorities cited by Your Lordship
31 in this was on a different point and that is, what kind of creditor does a party have to be to
32 get into the oppression remedy, and that's different. And again, not all creditors get their
33 foot in the door.

34
35 With respect to your specific questions on the business judgment rule, my friends cite some
36 authority, but they don't offer any evidence or viable argument. The Courts do defer to the
37 judgment of directors unless there is evidence of a bad process or unless there's evidence
38 that the board or directors didn't look at viable alternatives. There is no evidence of a bad
39 process, and the trustee has no expertise in that regard, and there's no evidence of any
40 alternatives that were better than the one that was followed.

41

1 And in relation to the question about whether PEOC would be better or worse, as I
2 took -- understood it, in terms of receiving the beneficial interest, I don't know how you
3 can say a trustee who only has the legal interest in an asset, who receives the beneficial
4 interest, can -- how can you say that that party is worse off? They -- after -- among other
5 things, after the combination of the interest, PEOC now had the beneficial ownership of
6 substantial gas reserves.

7

8 So unless you have any questions flowing from that, My Lord, I'm done.

9

10 THE COURT: No, sir. Thank you very much for that.

11

12 **Submissions by Mr. McDonald**

13

14 MR. MCDONALD: My Lord, I'm sorry to rise, but --

15

16 THE COURT: Yes, sir. That's fine.

17

18 MR. MCDONALD: -- I just I spoke to my client, and he pointed out
19 one thing that related to what I've been arguing that I failed to mention, although I believe
20 it is -- was mentioned earlier. When we were talking about ARO and value and discounting,
21 there's also a problem with the ARO analysis of my friends because it's double counted.
22 It's included in the engineering report and discounted presumably through the discounting
23 of the future cash flows for 26 percent of the properties, and then it's also calculated
24 separately by XI Technologies or calculated separately for the purposes of the accounting
25 provision. So there's a double counting problem in there that further undermines the
26 reliability of any value calculations.

27

28 THE COURT: Thank you, Mr. McDonald. That's actually a
29 springboard.

30

31 I only have a few questions for Mr. de Waal, but I did want your reply to the double
32 counting. It was mentioned earlier, I think by Mr. Leidl, and I think the phrase was
33 Goodyear assets taken off twice, double counting.

34

35 **Submissions by Mr. de Waal**

36

37 MR. DE WAAL: My Lord, Mr. Darby makes that clear. He says
38 there was -- I'm just trying to find it. Here we go. That's Exhibit 'N' to his affidavits.

39

40 THE COURT: I'm there.

41

1 MR. DE WAAL: Under note 'A', second paragraph --

2

3 THE COURT: I'm there.

4

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

6

7 The trustee notes that the reserve report value of 5.8 million
8 includes an estimate of abandonment costs for those wells
9 included in the report, approximately 650 wells --

10

11 So it's not all the wells.

12

13 -- as well as estimates for salvage value. For this reason, the
14 abandonment amount included in note 'B' may be overstated.
15 However, the trustee does not consider it to be material to this
16 analysis.

17

18 Now, again, there's no -- this is not the trustee's document. Trustee got these numbers from
19 Perpetual, fully disclosed the concern about possible double counting but says it's not
20 material. Again, the point of the argument is, well, these numbers are not to be trusted, but
21 there is no other number. My friends in fact filed an affidavit saying, We're not going to
22 get into issues of valuation or numbers at this point, we will need experts and more time
23 and opportunity to present those numbers. So eventually, we end up in this situation, where
24 the only numbers before the Court are the Perpetual numbers presented by the trustee, and
25 my friends are poking holes in that number and saying, We don't have an alternative
26 number, but because you cannot trust that number, the only number before the Court, you
27 should disregard that despite section 96(2).

28

29 THE COURT: I know we're touching on this ad nauseam today,
30 but ARO is a provision; municipal tax would be a liability. That's Mr. Darby's comment.
31 Again, are we ad idem that we do not have a liability with the ARO?

32

33 MR. DE WAAL: My Lord, again, ironic, as Mr. Leidl would say,
34 that this opinion, they're fine with that. If Mr. Darby says he thinks this is not a liability,
35 then they're happy with that. The point is, though, My Lord, that the issue is not whether
36 there's a liability. If you look at the *Daishowa* case and if you look at what Mr. Darby, the
37 trustee, has to consider for purposes of section 96, it's whether the ARO number is a number
38 or is a factor that has legitimately been concerned -- that is legitimately to be considered
39 by a prospective purchaser of these properties to effect the consideration provided and
40 received. That's the issue. Now, whether you call that a liability as Perpetual does in its
41 own statements, whether you call that a liability as the -- as the accounting -- the standards

1 request even though it's a -- it's an allowance or a provision, My Lord, it's a factor to be
2 considered which affects negatively the consideration received, and in this case, because
3 it's the account -- it's a negative, it affects the consideration provided by the PEOC in
4 assuming these liabilities.

5
6 THE COURT: Further comments?

7
8 MR. DE WAAL: My Lord, on that same point that's the -- that's
9 confirmed, I think, as inextricably linked, that's confirmed in the agreement, and it's
10 confirmed in the response, my friend's response to question 5, so the negative value aspect
11 was inextricably linked to the value of the properties.

12
13 If I can make one -- and I'm not sure whether Mr. Leitl misunderstood me --

14
15 THE COURT: When you say negative value, you're talking
16 about --

17
18 MR. DE WAAL: The ARO (INDISCERNIBLE) that's called
19 liability.

20
21 THE COURT: -- potential obligation.

22
23 MR. DE WAAL: Indeed, My Lord. So --

24
25 THE COURT: Underlying potential, you're agreeing with that.

26
27 MR. DE WAAL: It's a future -- it's not even potential, but it's a
28 future -- certainly a future obligation. If you drill a well, you have that obligation. It's not
29 a potential obligation.

30
31 THE COURT: Well, the law can change.

32
33 MR. DE WAAL: You could sell the well and make it somebody
34 else's obligation, but it's still an obligation.

35
36 THE COURT: The law can change.

37
38 MR. DE WAAL: It could.

39
40 THE COURT: Regulations can change.

41

- 1 MR. DE WAAL: Yes, My Lord.
2
- 3 THE COURT: At this point, is it not potential? Is it not --
4
- 5 MR. DE WAAL: At this point, it's a real obligation, My Lord.
6
- 7 THE COURT: Pardon me?
8
- 9 MR. DE WAAL: At this point, it's a real obligation. It's a future
10 obligation, but it's an obligation.
11
- 12 THE COURT: Okay. I'll take that under advisement, but it's not
13 a liability.
14
- 15 MR. DE WAAL: My Lord -- yeah, provision is a form of liability.
16 That's what the rules say, the accounting rules.
17
- 18 THE COURT: Is that a liability? If it's a liability, who's it a
19 liability to?
20
- 21 MR. DE WAAL: Well, if it's -- if it's paid, it's an obligation that's
22 paid. It's not payable to someone. It's a cost that's inextricably linked and has to be incurred
23 by -- it's not a payment to some --
24
- 25 THE COURT: And I'll take -- I'll take that comment under
26 advisement. You've said it a few times today. Who's the liability to?
27
- 28 MR. DE WAAL: My Lord, it's not a payment --
29
- 30 THE COURT: Or the --
31
- 32 MR. DE WAAL: -- owing to --
33
- 34 THE COURT: Who's the -- who's the obligation to?
35
- 36 MR. DE WAAL: Obligation is to the -- to the owner of the well, so
37 the licensee.
38
- 39 THE COURT: No, no, no.
40
- 41 MR. DE WAAL: But it's not --

- 1
2 THE COURT: That's who has the burden.
3
- 4 MR. DE WAAL: My Lord, it's not a payment to someone or --
5
- 6 THE COURT: Yeah.
7
- 8 MR. DE WAAL: -- an obligation to someone. It's like in
9 *Daishowa*. It's an obligation to incur these expenses in the future. If you don't pay them, it
10 becomes --
11
- 12 THE COURT: Yeah.
13
- 14 MR. DE WAAL: -- a liability.
15
- 16 THE COURT: I think you're agreeing with me. We don't have a
17 party that we can say the amount is -- an amount is owed to.
18
- 19 MR. DE WAAL: I agree, My Lord.
20
- 21 THE COURT: Okay.
22
- 23 MR. DE WAAL: Yes. Then, My Lord, just finally -- and I'm sure
24 whether, as I said, Mr. Leidl misunderstood me or I misunderstood him, but when he says
25 this 71 percent of the corporate liabilities that were -- that went with the Goodyear assets
26 to PEOC, he says those included the ARO. And I gathered that he -- that he'd understood
27 that that's a number that I calculated, but that's in fact, again, the PEI Goodyear presentation
28 number, and it's at tab 'C' to the affidavit of Mr. Darby, just behind page 21, at the bottom
29 of page 22.
30
- 31 THE COURT: We looked at this earlier, I think, did we?
32
- 33 MR. DE WAAL: Yes, we did, at the last time, My Lord, not this
34 time. But the question is, Where does the 71 come from? And I think the submission was
35 that because that includes AROs, you cannot really take the 71 to mean what it says,
36 something to that effect.
37
- 38 THE COURT: Sorry. Give me that last statement again, sir.
39
- 40 MR. DE WAAL: My Lord, you said the 71 percent includes ARO
41 and because ARO is a number that's up in the air, the 71 really doesn't mean what it seems

1 to mean. That's at page 22. It's not numbered, but at the bottom of the page, My Lord.
2

3 THE COURT: I'm there.
4

5 MR. DE WAAL: And it does refer to corporate liabilities, for what
6 it's worth.
7

8 THE COURT: Just refer me to what you were touching on.
9

10 MR. DE WAAL: My Lord, in red --
11

12 THE COURT: Oh. Right at the bottom. Sorry.
13

14 MR. DE WAAL: At the bottom.
15

16 THE COURT: Yes. I was looking at the text. Okay.
17

18 MR. DE WAAL: Well, it's text, My Lord.
19

20 THE COURT: No. Sorry. In terms of the inside the tables as --
21

22 MR. DE WAAL: Yes.
23

24 THE COURT: -- opposed to at the bottom. I'll take the comment
25 under advisement, but I appreciate that.
26

27 MR. DE WAAL: Thank you.
28

29 THE COURT: Thank you. Mr. de Waal spoke. You have the last
30 word. Anything else?
31

32 MR. MCDONALD: Nothing here.
33

34 MR. LEITL: No.
35

36 THE COURT: Okay. Thank you all for your submissions today
37 and for your patience in going over. I wanted to finish. I'm going to reserve, and I will -- I
38 hope to have a decision out in January. That's my objective. I would hope earlier rather
39 than later, but let me reflect on the points made today. Again, thank you very much.
40

41 Madam clerk, we can adjourn.

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UNIDENTIFIED SPEAKER:

Thank you, My Lord.

MR. MCDONALD:

Thank you, My Lord.

THE COURT CLERK:

Order in court.

PROCEEDINGS ADJOURNED

1 **Certificate of Record**

2

3 I, Karina Salguero, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench, held in courtroom 1603, at Calgary, Alberta, on
5 the 17th day of December, 2018, and that I was the court official in charge of the sound-
6 recording machine during the proceedings.

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1 **Certificate of Transcript**

2

3 I, Sandy Voga, certify that

4

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

8

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

11

12 Sandy Voga, Transcriber

13 Order Number: AL-JO-1002-1688

14 Dated: December 19, 2018

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COURT FILE NUMBER 1801-10960
COURT Court of Queen's Bench of Alberta
JUDICIAL CENTRE Calgary
PLAINTIFF PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
DOCUMENT ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Counsel for Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp.

Feb. 18, 2020
Let this order be filed.
[Signature]
MCCRB

I hereby certify this to be a true copy of the original Order
 Dated this 18 day of Feb 2020
 [Signature]
 for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: August 15, 2019
NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon
LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATIONS of the Defendants; UPON review of the pleadings and evidence filed by the Defendants and the Plaintiff; AND UPON consideration of the written and oral submissions of the parties:

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Defendants' applications to strike and/or dismiss the Plaintiff's claim pursuant to s. 96(1) of the *Bankruptcy and Insolvency Act* are dismissed, subject to paragraph 5.
2. The Plaintiff's claims pursuant to s. 242 of the *Alberta Business Corporations Act* are struck as against all Defendants pursuant to Rule 3.68.
3. The Plaintiff's claims on the grounds of public policy, statutory illegality and equitable rescission are struck as against all Defendants pursuant to Rule 3.68.
4. The Plaintiff's claims against the Defendant Susan Riddell Rose (Rose) for breach of fiduciary duty and breach of duty of care are dismissed pursuant to Rule 7.3 and struck pursuant to Rule 3.68.
5. The application of Rose to dismiss all of the Plaintiff's claims against her on the basis of the Resignation & Mutual Release effective October 1, 2016 is granted pursuant to Rule 7.3.
6. Costs shall be determined by the Court following the parties' submissions thereon.



Justice of the Court of Queen's Bench of Alberta

COURT FILE
NUMBER

1801-10960

COURT

COURT OF QUEEN'S BENCH
OF ALBERTAJUDICIAL
CENTRE

CALGARY

PLAINTIFFS

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

DEFENDANTS

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

DOCUMENT

**REPLY OF
SUSAN RIDDELL ROSE**

Settling Form of Order

ADDRESS FOR
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CONTACT
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OF PARTY
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DOCUMENT

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Gunnar Benediktsson

Counsel for Susan Riddell Rose

File No. 1001040549

CLERK OF THE COURT
FILED
FEB 10 2020
JUDICIAL CENTRE
OF CALGARY

PART 1 - INTRODUCTION

1. The Defendant Susan Riddell Rose (**Rose**) respectfully tenders this Reply to the Submissions of the Trustee filed February 7, 2020 (the **Trustee Submissions**).
2. Capitalized terms are as defined in Rose's Submissions filed on February 4, 2020.
3. It is more than remarkable that the Trustee – an officer of the Court – who sued Rose for a quarter billion dollars without seeking to set aside the Release; who said nothing in reply to Rose's Statement of Defence and three rounds of submissions as to why the Release is a complete bar to all claims against her; now, in the face of the clear and express Reasons which unequivocally state that the Release is a complete defence to all claims made against Rose, argues that the Reasons do not say what they say.
4. Lest there be any doubt, these are the considered words of the Court:

Given the above facts and analysis, I find that the Release provides a **complete defence** to Ms. Rose **in respect of all of the Trustee's claims against her**. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that **there can be no damages against Ms. Rose and she is shielded from financial exposure**. [Emphasis added.]¹

5. In the face of those words, the Trustee argues that it may continue to seek a money judgment against Rose. Rose is forced to incur yet more expense in asking the Court to reconfirm its clear ruling, while the Trustee continues to gambol at the expense of the Estate.²

PART 2 - ORAL REASONS OF AUGUST 15, 2019

6. The Trustee submits that *both* the oral reasons of August 15, 2020 and the Reasons "are *determinative*".³ Paragraph 1 of the Reasons states:

A summary of my decision in this case was given orally on Thursday, August 15, 2019 from the bench. I advised the parties that I would be issuing written reasons. The detailed reasons and conclusions are provided below. **If there are any discrepancies between the brief oral reasons provided and this written decision, this written decision takes precedence**. [Emphasis added.]

¹ Reasons, para. 327 (emphasis added).

² See reasons of Velhuis JA: Rose Submissions, Tab 3.

³ Trustee Submissions, para. 3.

PART 3 - PRIMARY BIA CLAIM

7. The Trustee Submissions go on at length about the Primary BIA Claim, which was made only against PEOC and POT.⁴
8. Rose did not apply to summarily dismiss the Primary BIA Claim because the Primary BIA claim was not made against her.

PART 4 - ALTERNATIVE BIA CLAIM

9. The Trustee chose to craft the Alternative BIA Claim so as to avoid a challenge of the Release under the BIA.⁵ Rose defended on the basis that the Release barred that claim and all others made against her.⁶
10. Rose did apply to summarily dismiss the Alternative BIA Claim on the basis of the Release.⁷ The Trustee never argued that the Alternative BIA Claim was not subject to the Release. Instead, it argued that it could seek damages under the ABCA in the context of the Director claim on the basis that the Release was *enforceable*.⁸ That claim was struck.

PART 5 - TERMS OF THE RELEASE

11. The Trustee now attempts to make an entirely new argument about the definition of "Claims" in the Release.⁹ The Trustee's actual pleading and submissions regarding the Release are summarized in Rose's Submissions.¹⁰
12. The scope of the Release was addressed at length in Rose's Brief filed November 1, 2018 under the heading "Release is a Complete Bar to Claims Against Rose".¹¹ On the basis of the evidence and the actual submissions of the parties, the Reasons concluded:

[291] The term "Claim" is defined broadly in the Share Purchase Agreement as "any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing."

...

⁴ Trustee Submissions, paras. 5-22; Rose Submissions, para. 18.

⁵ Rose Submissions, paras. 18-19.

⁶ Rose Submissions, para. 30.

⁷ Rose Submissions, paras. 43-44.

⁸ Rose Submissions, paras. 45-54.

⁹ Trustee Submissions, para. 18.

¹⁰ Rose Submissions, paras. 21-29, 45-54.

¹¹ paras. 36-81. The concluding sentence of that section states: "Accordingly, on the basis of the Release alone, this Court should dismiss all claims against Rose."

[294] As is evident from the above text in clause 3 of the Release, it includes an exclusion that provides that the Release does not apply if the Claim is based on the fraud, criminal conduct or deceit. None of the claims or particulars in the Trustee SOC allege fraud, criminal conduct or deceitful conduct in respect of Ms. Rose.

PART 6 - BARE ALLEGATIONS OF BENEFIT GO NOWHERE

13. The Trustee makes this curious argument at paragraph 22:

“Conspicuously absent from Ms. Rose’s lengthy submissions, both in support of her applications and more recently in relation to the form of Order, is some explanation of how the Trustee’s claim that Ms. Rose benefitted from the Asset Transaction *as a shareholder of Perpetual Energy* could be a claim “in relation to [her] having acted as a director covered by the release and confirmed by the decision of the Court.” [Emphasis in original.]

14. With respect, the argument is non-sensical and goes nowhere.
15. As noted in Rose’s Submissions, the bare allegation of a benefit in the Alternative BIA Claim was patently belied by Mr. Darby’s own affidavit, which did not suggest that Rose had benefitted from the Asset Purchase Agreement. On his cross-examination, he was forced to concede that he had not given the idea a moment’s thought, and that it was patently clear that the shareholders of PEI had not benefitted. Rose’s express evidence in her affidavit went entirely unchallenged.¹²
16. The only allegation of a benefit from the Asset Purchase Agreement in terms of a benefit to PEI shareholders was made in the context of the Director Claim, which was struck.¹³ The allegation no longer exists.
17. Moreover, while never argued in the series of hearings regarding Rose’s summary judgment application, the Trustee now appears to advocate a theory under which not only a party “privity” to the Asset Purchase Transaction might be liable under the BIA, but a *shareholder* of a “person privity” can become liable on no basis other than that they happen to hold shares of the entity that the Trustee asserts to have benefitted. In other words, under the trustee’s Theory of a. 96, a “person privity” can mean a shareholder of a non-party to the transfer, who benefits only by virtue of a change in the value of his or

¹² Rose Submissions, paras. 24-29, 32-42.

¹³ Rose Submissions, para. 27.

her shares. Under that scenario, corporate separateness is meaningless and liability is infinite. All of PEI's shareholders could be liable.¹⁴

PART 7 - ROSE APPEAL

18. The Trustee Submissions go on at length about Rose having filed a Notice of Appeal following the hearing of August 15, 2019 - going so far as to assert that Rose's counsel intentionally made *misrepresentations* to the Case Manager of the Court of Appeal, and that her Submissions to Your Lordship make the same *misrepresentations*.
19. The Trustee's assertions are dead wrong and inappropriate. As Rose counsel explained to the Trustee's counsel, Rose filed a Notice of Appeal out of an abundance of caution knowing that the Reasons would supersede the comments of the Court made on August 15, 2019. The filing of the Notice of Appeal was not an admission as to the impact of the Reasons, which did not exist at the time.

PART 8 - CONCLUSION

20. Rose respectfully asks the Court to approve the form of Order that follows the express findings in the Reasons regarding the Release: that the Release bars all claims against Rose; that there can be no damages against her; and that she is shielded from financial exposure. That form of Order is found at Tab 2 of the Rose Submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF FEBRUARY 2020.

Norton Rose Fulbright Canada LLP

Steven Leitl
Gunnar Benediktsson
Counsel for Susan Riddell Rose

¹⁴ Regarding Ms. Rose, the Court stated at para. 310 that "there is no evidence that Ms. Rose caused [PEI] to do anything. Indeed, the evidence is to the contrary. [PEI] is a public company. It has its own board of directors. Further, there is no evidence that Ms. Rose controlled [PEI]. Given that context, I find that Ms. Rose did not control [PEI]." Furthermore, when the beneficial and legal interests were united in PEOC through the Asset Purchase Agreement, PEI shareholders were in the same position as stakeholders.

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Ma v. Ma* | 2012 ONCA 408, 2012 CarswellOnt 7415, 1 B.L.R. (5th) 10, 78 E.T.R. (3d) 18, 111 O.R. (3d) 195, 294 O.A.C. 34, 353 D.L.R. (4th) 662, 219 A.C.W.S. (3d) 826 | (Ont. C.A., Jun 15, 2012)

1993 CarswellOnt 147

Ontario Court of Justice (General Division — Commercial List)

Royal Trust Corp. of Canada v. Hordo

1993 CarswellOnt 147, [1993] O.J. No. 1560, 10 B.L.R. (2d) 86, 41 A.C.W.S. (3d) 809

**ROYAL TRUST CORPORATION OF CANADA v.
MICHAEL JOHN HORDO and DIANA HORDO**

MICHAEL JOHN HORDO and DIANA HORDO v. ROYAL TRUSTCO
LIMITED, ROYAL TRUST CORPORATION OF CANADA, ROYAL
TRUST BANK (SWITZERLAND) and WILLIAM J. INWOOD

Farley J.

Judgment: June 25, 1993

Docket: Doc. B198/93

Counsel: *Charles F. Scott* and *David Layton*, for plaintiffs and defendants by counterclaim.
James S. Marks, for defendant and plaintiff by counterclaim Michael John Hordo.
Terrence J. O'Sullivan, for Royal Bank of Canada.

Headnote

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply

Shareholders — Shareholders' remedies — Relief from oppression — Claim of oppression could not be founded on status of complainant arising after acts complained of.

In 1991, the respondent trust company brought an action against the applicants on a promissory note given by them to RTC in connection with a loan. They advanced a complicated defence and counterclaim that included allegations regarding a Soviet venture in which RTC and its subsidiaries (the "RTC Group") became a joint venture partner. The applicants alleged that the RTC Group did not give support to the joint venture and that it failed as a result. The withdrawal of support constituted a breach of fiduciary duty and was oppressive.

In 1993, the applicant moved in the existing action for additional relief including the appointment of a receiver-manager for RTC pursuant to s. 241(3)(b) of the *Canada Business Corporations*

Act. The additional relief was sought in relation to acts of RTC that were allegedly of a public interest that went beyond the applicants. The source of the applicants' evidence in that regard was newspaper reports. In addition, the applicants stated that they became shareholders of RTC in April 1993, that is, after the date of the matters said to form the basis for the claim for additional relief.

Held:

The motion was dismissed.

In order to qualify as a "complainant" under the Act, a person must hold that capacity at the time of the acts complained of. At the time of the acts complained of, the applicant was not a shareholder. The court retains a discretion to deny status to a shareholder who has purchased shares with a view to bringing an oppression remedy application and with the collateral purpose of furthering a pre-existing civil action.

Regarding the applicant's status as a creditor, at best he had a contingent interest in an uncertain and speculative claim for unliquidated damages against RTC. In any event, under the Act a creditor is not a "complainant" as of right and the court may use its discretion to grant or deny a creditor status as a complainant. Debt actions should not be routinely turned into oppression actions, especially where the creditor's interest in the affairs of the corporation is too remote or where the complaints of a creditor have nothing to do with the circumstances giving rise to the debt, or if the creditor is not acting in good faith.

Table of Authorities

Cases considered:

- Canadian Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (H.C.), affirmed (1990), 75 O.R. (2d) 720, (sub nom. *Canadian Opera Co. v. Euro-American Motor Cars*) 75 D.L.R. (4th) 765 (Div. Ct.) — referred to
- First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) — applied
- First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1989), 45 B.L.R. 110, 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670 (C.A.) — referred to
- Hendin v. Cadillac Fairview Corp.* (January 17, 1993) (Ont. H.C.) [unreported] — referred to
- Jacobs Farms Ltd. v. Jacobs* (April 23, 1992), Doc. 92-CQ-17714, Blair J. (Ont. Gen. Div.) — referred to
- Lee v. International Consort Industries Inc.*, 4 B.L.R. (2d) 268, 63 B.C.L.R. (2d) 119, [1992] 3 W.W.R. 298, 10 B.C.A.C. 137, 21 W.A.C. 137 (C.A.) — referred to
- Michalak v. Biotech Electronics Ltd.*, 35 B.L.R. 1, [1986] R.J.Q. 2661 (C.S. Que.) — referred to
- Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164, 39 C.C.E.L. 211 (Ont. Gen. Div.) — referred to
- Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) — referred to
- R. v. Sands Motor Hotel Ltd.* (1984), 28 B.L.R. 122, [1985] 1 W.W.R. 59, 36 Sask. R. 45, [1984] C.T.C. 612, 84 D.T.C. 6464 (Q.B.) — referred to

Strather Investments Ltd. v. Royal Bank of Canada (April 27, 1993), Farley J. [unreported] — *considered*

Trillium Computer Resources Inc. v. Taiwan Connection Inc. (1992), 10 O.R. (3d) 249 (Gen. Div.) — *applied*

80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd., [1972] 2 O.R. 280, 25 D.L.R. (3d) 386 (C.A.) — *referred to*

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44 —

s. 238

s. 238 "complainant"

s. 238(d)

s. 239

s. 241

s. 241(1)

s. 248

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 11

Rules considered:

Ontario, Rules of Civil Procedure —

r. 1.04

r. 4.06(2)

r. 21.01

r. 25.11

r. 39.01(4)

Words and phrases considered:

CREDITOR

A creditor is not specifically defined as a "complainant" under the [*Canada Business Corporations Act*, R.S.C. 1985, c. C-44] and . . . creditors generally are not "complainants" as of right. The court may use its discretion to grant or deny a creditor status as a complainant under s. 238(d) [of the *Act*].

Farley J.:

1 These are my reasons that I indicated I would give following my decision in favour of Royal Trustco Limited ("Trustco") to dismiss the motion by Michael John Hordo ("Hordo") wherein Hordo claimed oppression remedy in the form of a receivership against Trustco together with an investigation of Trustco's activities.

Background

2 Two years ago Royal Trust Corporation of Canada ("Corporation") brought an action against Hordo and his wife on a promissory note (on collateral mortgage) given by them in connection with a loan for approximately a quarter million dollars. The Hordos have advanced a complicated defence and counterclaim which includes allegations concerning a Soviet venture in which Trustco and its subsidiaries ("Royal Trust Group") became joint venture partner of the Hordos. The Hordos alleged that Royal Trust Group failed to provide support that it was obligated to give them in the joint venture and that the withdrawal of this support constituted a breach of fiduciary duty and was oppressive. Hordo counterclaimed for \$31.5 million U.S. for general damages, restitution and punitive or exemplary damages.

3 Under these pleadings there was then no allegation that Hordo was a shareholder of Trustco nor was there any claim for an appointment of a receiver-manager or for an investigation. As well there is no reference to the Trilon Financial Corp. ("Trilon") one billion dollar stand-by facility (and its cancellation) nor the redemption of any Series F Trustco preferred shares.

4 On May 18, 1993 counsel for Hordo advised counsel for the Royal Trust Group that he was bringing a motion in this matter but the basis of the motion was not then disclosed. However, after inquiry by counsel for the Royal Trust Group, Hordo's counsel advised that:

Among other things, the motion will be seeking an order appointing a receiver-manager of Royal Trustco, pursuant to section 241 the *Canada Business Corporations Act* ...

As well, the motion will be seeking remedies dealing with Royal Trust's cancellation of Trilon and Great Lakes' \$One Billion standby [sic] line of credit and Trilon's retraction of \$25 million worth of Royal Trust preferreds.

It would appear that *the issues to be brought before the court are of a public interest which goes beyond Mr. Hordo. I trust that your firm will be giving this matter the serious which [sic] it requires.* [emphasis added]

5 Subsequently the Notice of Motion returnable June 4, 1993 was served. The relief sought included:

- (a) the appointment of a receiver manager for Trustco;
- (b) security for costs;
- (c) setting aside "Trustco's cancellation of the \$One billion Standby line of credit with Trilon Financial Corp. and Great Lakes Group Inc."; and
- (d) setting aside "Trilon Financial's retraction of \$25 million worth of Royal Trustco preferred shares".

6 The affidavit sworn by Hordo in support of his motion stated that in respect of his application for receiver-manger "the source for most of the evidence is the Globe and Mail". In many paragraphs, the Hordo affidavit does not set out facts or evidence, but simply asks questions (e.g., paragraphs 6, 14 15, and 25). In other paragraphs, second or third level hearsay is set out (example paragraphs 9, 15 and 16). In some paragraphs opinions expressed by other persons are repeated — e.g., paragraph 7 and Exhibit D involving editorial writers, paragraph 9 and Exhibits F and G involving unnamed analysts and legal experts and security lawyers, paragraph 15 and Exhibits J and K involving newspaper columnists, paragraph 16 and Exhibit K involving bond rating services and paragraph 11 and Exhibits H and I involving unidentified graphmakers. It was only at the last moment that Hordo purported to serve a further affidavit indicating that he in fact believed the information contained in his previous affidavit.

7 Hordo stated that he is a common and preferred shareholder of Trustco; however it appears that he only now owns 100 common shares and 10 Series Q preferred shares which were acquired by him and put into his name in the last ten days of April 1993. The value of the common shares would be about \$40 and the preferred shares about \$25, a total investment of \$65. It is clear that Hordo's acquisition of his Trustco shares was after the date of the matters which are said to form the basis of the present motion for the appointment of a receiver-manager — namely the cancellation of the Trilon standby facility, the retraction of the Series F preferred shares and the disclosure of Trustco's financial position and subsequent dealings with the Royal Bank of Canada ("RBC"). Hordo did not attend for cross examination although arrangements were attempted to be made and only when these failed was a notice of cross-examination served.

8 There was some dispute as to whether or not in contacting the Office of the Superintendent of Financial Institutions Hordo had misleadingly written "as an officer of the court" asking that the Superintendent provide certain information about the Corporation and Trustco and that counsel for Corporation had given her consent to the release of such information. It seems to me that as a lawyer himself, Hordo should not have been under any impression that the consent had been

given by Corporation's counsel in the dialogue that they had. One would have to stretch very hard to reach a consent conclusion.

The Law

Jurisdiction

9 The court has jurisdiction to strike out a pleading on the ground that it discloses no reasonable cause of action or that it is scandalous, frivolous or vexatious or it is an abuse of the process of the court. It seems to me that the Notice of Motion in issue (particularly having regard to the fact that it is an originating document for an application under s. 241 of the *Canada Business Corporations Act* ("CBCA")) should be considered a "pleading" or an analogous to a pleading for this purpose, whether under the *Rules of Civil Procedure* or within the inherent jurisdiction of the court to control its own process. In this regard see r. 21.01, 25.11 and 1.04, *Courts of Justice Act*, s. 11 and *80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.) at p.282. The court may determine, on a preliminary motion, the status of a person to seek relief from alleged oppression under s. 241 of the CBCA: see CBCA, ss. 238 and 248 and *Michalak v. Biotech Electronics Ltd.* (1986), 35 B.L.R. 1 (C.S. Que.) at p.6.

Form of Hordo Affidavit

10 It strikes me that the form of the Hordo affidavit offends r. 4.06(2) and 39.01(4). Affidavits used on interlocutory motions must be confined to statements of fact and, for facts not within the personal knowledge of the deponent, they must state the source of information and the belief of the deponent on the truth of the facts. It seems to me that paragraphs 2, 3, 6, 7, 9-25, fail to meet either or both of those conditions and must be struck out.

Status of Hordo

11 Hordo has, at best, a contingent claim against Trustco and the other defendants by counterclaim. He is not owed a liquidated debt by Trustco and is not now a creditor of any of Trustco or other defendants by counterclaim. However Hordo does state that he is a shareholder of Trustco. It is noted that he became a shareholder after the events which were well publicized which he now says supports the bringing of his motion. While his counsel indicated initially in his correspondence that "... the issues to be brought before the court are of a public interest which goes beyond Mr. Hordo", I do not see him in the role of Don Quixote.

Who May Be A Complainant Under The Oppression Provision Of The CBCA

12 Section 241(1) CBCA states that "a complainant" may apply to a court for an order under the oppression section. The definition of "complainant" for the purpose of both an oppression proceeding under s. 241 and a derivative proceeding under s. 239 is set out as follows in s. 238:

"complainant" means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

13 The person who qualifies as a "complainant" must be in that capacity at the time of the acts complained of: see *Trillium Computer Resources Inc. v. Taiwan Connection Inc.* (1992), 10 O.R. (3d) 249 (Gen. Div.) at p. 253; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.) at 60, rev'd on other grounds (1989), 45 B.L.R. 110 (Alta. C.A.).

14 A creditor is not specifically defined as a "complainant" under the CBCA and therefore creditors generally are not "complainants" as of right. The court may use its discretion to grant or deny a creditor status as a complainant under s. 238(d). It does not seem to me that debt actions should be routinely turned into oppression actions: see *R. v. Sands Motor Hotel Ltd.* (1984), 28 B.L.R. 122 (Sask. Q.B.); *Canadian Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (H.C.) at 536, aff'd (1990), 75 O.R. (2d) 720 (Div. Ct.); *Jacobs Farms Ltd. v. Jacobs*, [1992] O.J. No. 813 (Gen. Div.); *First Edmonton*, supra. I do not think that the court's discretion should be used to give a "complainant" status to a creditor where the creditor's interest in the affairs of a corporation is too remote or where the complainants of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith. Status as a complainant should also be refused where the creditor is not in a position analogous to that of the minority shareholder and has no "particular legitimate interest in the manner in which the affairs of the company are managed": *Jacobs*, supra, at pp. 12-14. See also *Lee v. International Consort Industries Inc.* (1992), 63 B.C.L.R. (2d) 119 (C.A.) at pp. 127-129 and *Canadian Opera*, supra, at p. 536 (H.C.).

15 As well it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained: see *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349 at pp. 351-355 and 358; *First Edmonton*, supra, at pp. 111-112; *Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164 (Ont. Gen. Div.) at pp. 165-166.

Discretion In The Court To Deny Status To Bring An Oppression Proceeding Even To A Shareholder Or Former Shareholder

16 In my view a person who is a shareholder is not automatically ensured status to bring an oppression proceeding simply because he owns or formerly owned shares in a corporation. In my opinion the court retains a discretion to deny status to such a person where the shares were purchased with a view towards bringing an application under the oppression remedy or in full awareness of the circumstances alleged to constitute oppression.

17 I think it fair to observe that a sale of those shares from a holder who may have been oppressed does not carry with it the right to collect damages for such oppression. If this is the case it is clear that the value of those shares in the market would have decreased to compensate for the amount of the oppression. That benefit should generally remain with the person who is actually oppressed. See *Strather Investments Ltd. v. Royal Bank of Canada*, an unreported decision that I gave on April 27, 1993 where I observed at p.1:

I note as well that the applicant acquired his 100 shares in each of the Bank and Trust Company after he knew of a proposed deal (and for a cost of less than \$3,000). Clearly he has created his own exposure to a financial loss which he alleges will ensue. In this regard has he not shot himself in the foot?

See also *Jacobs*, supra, at pp. 11-12. *Michalak*, supra, at pp. 9-11 and *Hendin v. Cadillac Fairview Corp.*, unreported decision of the Ontario High Court of Justice dated January 17, 1993 at pp. 4-5. It seems to me that the court should look to the "real" purpose and motivation of the application and refuse the status of the complainant where the primary reason for seeking relief is the collateral purpose of furthering a pre-existing civil action: see *Michalak*, supra, at pp. 12-15 and *Strather*, supra.

Conclusion

18 In my view Hordo has clearly missed the mark on all of these above grounds. I would therefore dismiss his motion for the oppression remedy. In my view he has proceeded in a frivolous, vexatious manner and he has abused the process of the court.

Motion dismissed.

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4 — Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings

Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings

Janis Sarra *

I. — Introduction

There has been recent suggestion by several scholars and practitioners that the oppression remedy should not be available in insolvency restructuring proceedings.² This article takes issue with that view, offering empirical evidence of precisely the extent to which oppression applications are an issue during insolvency. The data suggest that the oppression remedy is unlikely to become an issue in the vast majority of insolvency restructuring proceedings. The oppression remedy continues to be an important corporate law remedy that should be available in such proceedings; it offers a significant remedy in the judicial toolbox of statutory and equitable authority.³ The caselaw illustrates that it is used sparingly in the insolvency law context, but that it is extremely valuable in remedying particular harms and in assisting with aligning director and officer incentives with the best interests of the corporation and its stakeholders. What is needed is a framework for approaching claims, as well as principles that can guide the court's consideration of oppression claims when they arise in the context of insolvency restructuring proceedings. This article commences that discussion.

Part II examines the most recent direction from the Supreme Court of Canada on the oppression remedy and how it may impact insolvency restructuring proceedings. Part III offers some empirical evidence to suggest that access to the oppression remedy is simply not a problem for which an adjustment in law or policy is required. The oppression remedy is sought in 0.006% of all insolvency and related proceedings; is alleged in 1% of *Companies' Creditors Arrangement Act (CCAA)* proceedings; and not at all in *Bankruptcy and Insolvency Act (BIA)* proposal proceedings.⁴ Part IV discusses how the statutory definitions serve an important gate-keeping role in oppression remedy cases. The judgments also evidence a gate-keeping role by the courts in their determination of the availability of the remedy. Part V addresses the current policy debate

in respect of whether it is appropriate to allow oppression actions in the context of *CCAA* or *BIA* proposal proceedings. Part VI then suggests a framework and principled approach to dealing with oppression claims within insolvency restructuring proceedings.

II. — Recent Direction from the Supreme Court of Canada

A starting point for this discussion is the most recent pronouncements on the oppression remedy from the Supreme Court of Canada. Two cases are of significance. In the first, *Peoples Department Stores v. Wise*, when giving its rationale for finding that directors have no statutory fiduciary obligation to creditors at the point of company insolvency, the Supreme Court held that directors, in using their skills for the benefit of the financially distressed corporation, must be careful to act in its best interests by attempting to create a “better” corporation, and not to favour the interests of any one group of stakeholders. The Court held that in light of the availability both of the oppression remedy and an action based on the duty of care, stakeholders have viable remedies at their disposal.⁵ In the Court’s view, “the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by the *Canada Business Corporations Act (CBCA)* to include creditors”.⁶ Hence the Court made two important observations in respect of the oppression remedy. First, the remedy is available to creditors. Second, the benchmark in the insolvency context is that directors must continue to act in the best interests of the corporation. Duly diligent service in aid of the best interests of the corporation is unlikely to attract any personal liability.

More recently, in the context of a plan of arrangement and going-private transaction under corporations legislation, the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders* held that oppression is an equitable remedy that gives the court broad, equitable jurisdiction to enforce not only what is legal, but what is just and fair.⁷ The Court observed that a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined.⁸ Drawing from earlier cases, the Court held that the best approach to the interpretation of oppression provisions in corporate statutes is one that combines two stages.⁹ The court should look first to the principles underlying the oppression remedy, and in particular, the concept of reasonable expectations. If a breach of reasonable expectations is established, the court should then consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in corporate statutes.¹⁰

The oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors; and the Court held that the remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.¹¹ The Court held that although directors must consider the best interests of the corporation, it may be appropriate, although not mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders, citing its judgment in *Peoples Department Stores*.¹²

In considering claims for oppression, the court should look at business realities, not merely narrow legalities.¹³ The reasonable expectations of stakeholders are the cornerstone of the oppression remedy, and the Supreme Court held that the concept of reasonable expectations is objective and contextual, and the actual expectation of a particular stakeholder is not conclusive.¹⁴ In determining whether it is just and equitable to grant a remedy, the Court held that the question is whether the expectation is reasonable having regard to the context and facts of the specific case, including the fact that there may be conflicting claims and expectations.¹⁵ Conduct that may be oppressive in one situation may not be in another.¹⁶

The reasoning is apt to the insolvency context. Creditors have particular expectations, both prior to insolvency and in the period of financial distress leading up to insolvency proceedings. Prior to insolvency, those expectations are that directors and officers meet the terms and conditions under which credit was granted, including any covenants or restrictions on the use of the assets lent and payment of principal, interest and fees that were negotiated. In this respect, where a contract has been negotiated, such as for secured credit, the contract serves as the basis for enforcing default and, in some circumstances, to discern what the reasonable expectations of the creditor are. As the company becomes insolvent, creditors may reasonably expect that the actions of the corporation and its directors and officers will continue to be in the corporation's best interest, having regard for the parties that hold the residual economic interest in the company; and a reasonable expectation that directors will not act to unnecessarily deplete corporate assets or inappropriately direct resources to themselves. The precise contours of creditors' reasonable expectations will depend on the context and circumstances of the case.

The Supreme Court analysed the relationship between the oppression remedy and directors' duties under corporate statutes:

Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. 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.¹⁷

The Court further held that even if reasonable, not every unmet expectation gives rise to an oppression claim; the conduct complained of must amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests.¹⁸ It observed that the remedy addresses a continuum of conduct: "oppression" is conduct that is coercive and abusive, and suggests bad faith; "unfair

prejudice” may admit of a less culpable state of mind, that nevertheless has unfair consequences; and “unfair disregard” of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders’ reasonable expectations.¹⁹

The Supreme Court noted that it is impossible to catalogue exhaustively situations where a reasonable expectation may arise, to their fact-specific nature, but found that some generalizations can be made. Actual unlawfulness is not required to invoke the oppression remedy as the remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play; and thus, not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression.²⁰ The Court held that it will consider the following in determining whether a reasonable expectation exists: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.²¹

The Court held that commercial practice plays a significant role in forming the reasonable expectations of the parties; and that a departure from normal business practices that has the effect of undermining or frustrating the complainant’s exercise of legal rights will generally, although not inevitably, give rise to a remedy.²² It observed that courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.²³ Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors.²⁴ Another factor is past practice; however, the Supreme Court noted that practices and expectations can change over time, and where valid commercial reasons exist for the change and it does not undermine the complainant’s rights, there can be no reasonable expectation that directors will resist a departure from past practice.²⁵ In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered.²⁶ The Supreme Court also held that reasonable expectations may be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications.²⁷

The Court held that where the conflict involves the interests of the corporation, “it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”²⁸ The duty of the directors to act in the corporation’s best interests comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. The Court held that not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression; the court must be satisfied that the conduct falls within the concepts of oppression, unfair prejudice

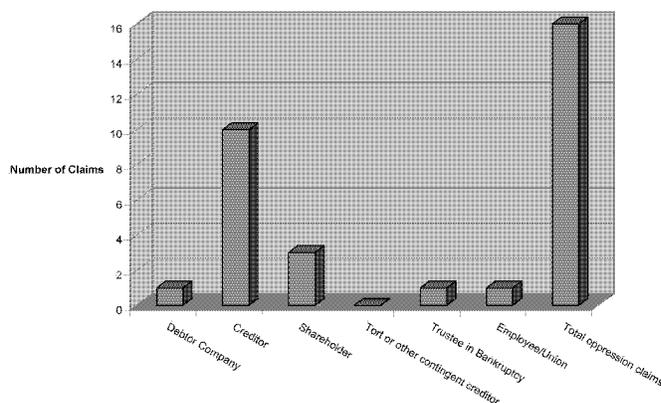
or unfair disregard of the claimant's interest, within the meaning of the statutory provisions.²⁹ The concepts do not represent watertight compartments, and often overlap and intermingle.³⁰ The Court observed that the *CBCA*'s added terms "unfair prejudice" and "unfair disregard" of interests to the original common law concept, make it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within the oppression remedy; that "unfair prejudice" is generally seen as involving conduct less offensive than oppression; and "unfair disregard" is viewed as the least serious of the three injuries, or wrong.³¹

The Supreme Court of Canada's reasoning offers considerable direction on how to approach claims for an oppression remedy going forward and is a starting point for considering principles that should be applied.³² First, however, it is helpful to consider precisely how much oppression has been an issue in insolvency restructuring proceedings.

III. — Empirical Evidence on the Scope of the Issue

A search of the oppression cases in the insolvency context over the past 20 years reveals some interesting data. Graph 1 summarizes all oppression cases for business insolvency proceedings, including bankruptcy proceedings, *CCAA* proceedings, *BIA* proposals, and claims that are related to or arose in the period after insolvency restructuring proceedings, by type of party claiming oppression. There are only 15 cases in which there is a reported claim, a preliminary decision or a final disposition of the claim. While it is possible that there are other claims that were made but never mentioned in a judgment or published order, even with some additional claims, the number of claims overall is miniscule. There were a total of 246,511 business insolvencies during the same period under the *BIA*³³ and the *CCAA*, meaning that the number of documented cases involved only 0.006% of all insolvency cases.

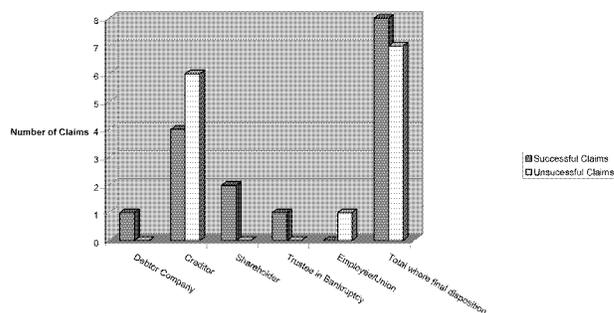
Graph 1
Total Oppression Claims in Insolvency and Bankruptcy by Type of Claimant



As Graph 1 illustrates, allegations by creditors are rare, nine cases in total, and by shareholders and employees even rarer when one examines insolvency and bankruptcy related proceedings. To date, there has not been a tort claimant seeking an oppression remedy during insolvency proceedings.

Turning to the success rates where there has been a determination of the claim, Graph 2 illustrates that in the majority of cases, the claims are not sustained. There have only been 8 successful oppression claims in insolvency and related proceedings in the past 20 years. Creditors are frequently unsuccessful in their claims.

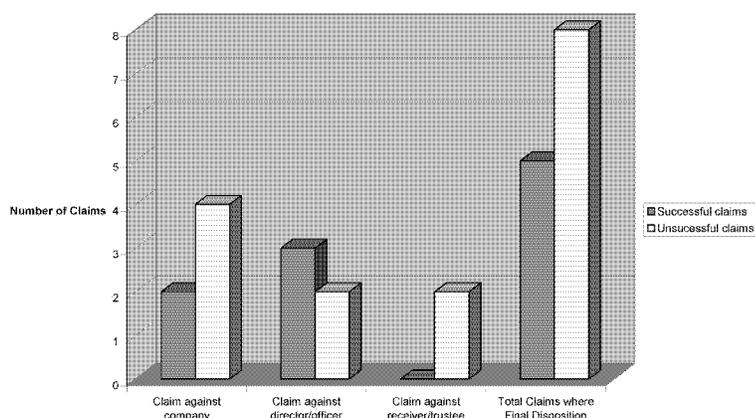
Graph 2
Success of Oppression Claims in Insolvency and Bankruptcy by Type of Complainant



Arguably, the success of the “debtor company” illustrated in the far left column of Graph 2 is a misnomer in terms of the company being an applicant. In *Fiber Connections*, the oppression remedy was used by the court to facilitate approval of a restructuring proposal. The debtor sought a motion to approve an amended proposal under the *BIA* and terminate a unanimous shareholders’ agreement (USA) and terms of a prior proposal.³⁴ The Ontario Superior Court of Justice held that a corporation can qualify as a proper person to make an oppression application under the Ontario *Business Corporations Act* against the corporation where: a shareholder is attempting to oppose the corporation’s proposal under the *BIA* by relying on a USA that requires the shareholder’s consent to amend the share structure; the corporation is a party to the USA; the contemplated restructuring cannot be carried out without a change to the share structure, which requires actions on the part of the corporation; all of the other shareholders and creditors of the corporation consent to the remedy sought in the name of the corporation; and the corporation is a necessary party to the remedy. The Court further held that it is oppressive to a corporation and its stakeholders to permit a shareholder to exercise its veto right under a USA and end the corporation’s prospect for a restructuring when virtually all of the shareholders, directors, creditors and employees believe that the corporation has a future. The Court in *Fiber Connections* held that it cannot be the reasonable expectation of all shareholders of a corporation, whose shares have no economic value, that one shareholder can deprive them of the possibility of achieving some value through a restructuring by employing a veto, the effect of which would put the corporation into bankruptcy.³⁵

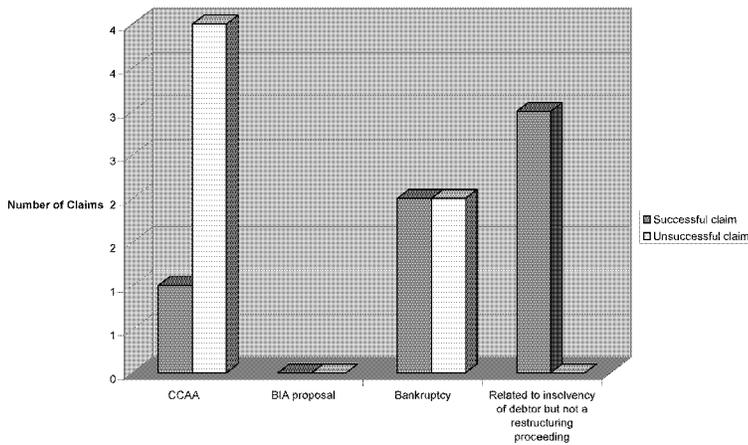
Graph 3 illustrates the claims by success or not against the corporation, directors, officers and insolvency professionals.³⁶ The *Fiber Connections* case was excluded from the success statistics because it did not seek to impugn the actions of the company or its officers. The claims have been largely unsuccessful against corporations and in only three cases has the claim been successful against a director or an officer. In the two cases where oppression was alleged against an insolvency professional, the courts made it clear that such an application could not be brought. Given the large number of insolvency cases, the graph illustrates that the oppression remedy is not of concern for the vast majority of directors and officers or insolvent companies.

Graph 3
Success of Oppression Remedy Claims against Specific Respondents



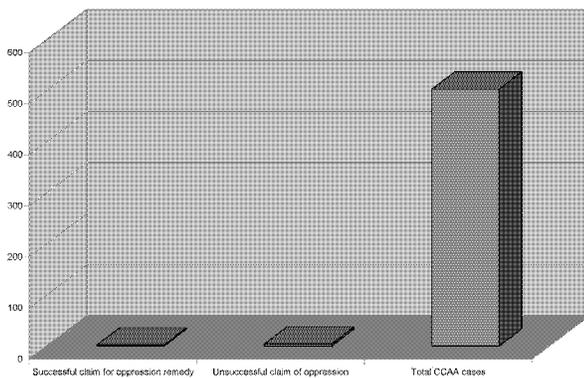
Graph 4 illustrates that the oppression remedy has become an issue and is granted more frequently in bankruptcy and related proceedings than in the context of insolvency restructuring proceedings under the *CCAA* or the *BIA*. It illustrates that both the courts and the stakeholders in a restructuring proceeding are more likely to be focused on a going forward business plan than the prior conduct of the corporation or its principals. It may also illustrate that potentially viable businesses are less likely to have engaged in conduct that is oppressive to their stakeholders.

Graph 4
Success Rate by Type of Proceeding



Graph 5 places the *CCAA* oppression cases in perspective in terms of overall *CCAA* proceedings. Of the 503 cases filed under the *CCAA*, there has been oppression alleged in only six cases, even taking a broad definition of cases related to *CCAA* proceedings or arising after the proceedings were completed. Thus, oppression is simply not a significant issue as it is alleged in 1% of all cases and has been successful in only two of the six cases.³⁷

Graph 5
CCAA Cases



For the most part, creditors appreciate that an insolvency restructuring proceeding is aimed at devising a going forward strategy for the business and that negotiations in respect of claims is the appropriate mechanism. They understand that absent oppressive or unfairly prejudicial conduct, the court is unlikely to grant an oppression remedy. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a “fair manner, commensurate with the corporation’s duties as a responsible corporate citizen”.³⁸

IV. — Availability of the Remedy is Limited by the Statutory Definitions and Reasonable Expectations Test

The oppression remedy is also not particularly an impediment to a successful insolvency workout as its availability is limited at the outset by both who is a proper complainant and who can actually achieve a remedy. It is also limited by the court's determination of reasonable expectations and the scope of the remedy that courts have been willing to grant.

A. — Definitions of Complainant and Who Can Receive a Remedy

The statutory language creates two classes of potential claimants: a defined class where the individual falls within one of the relationships with the corporation defined in the statute, and an undefined class of “any other person” who is in the discretion of the court, “a proper person”.³⁹ Creditors that are not security holders may apply for the oppression remedy by asking a court to exercise its discretion and grant them status as a “complainant”.⁴⁰ The court will decline to grant status where the interest is too remote, where the creditor is not proceeding in good faith, where the complainant was not a creditor at the time of the impugned action, or where the acts complained of have nothing to do with the debt.⁴¹

The Supreme Court of Canada has held that the fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to the exercise of the court's discretion to grant standing to a party as a complainant to bring an oppression remedy claim.⁴² Hence, the definition of complainant should be purposively interpreted.

It has been in some cases. In *Re Sammi Atlas Inc.*, a trade creditors committee in a *CCAA* proceeding sought standing as a proper person to commence an oppression action under the *CBCA* when it discovered that the debtor's assets had allegedly been sold to a US affiliate for more than was actually received by the debtor. The Court found that the committee was a “proper person” within the meaning of the oppression provisions, as the *CCAA* order had granted the committee the ability to bring certain applications on behalf of trade creditors; and the Court lifted the stay so as to permit the committee to commence its action.⁴³ The case subsequently settled.

In *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance*, the Nova Scotia Supreme Court found that the applicant bond holders were registered holders or beneficial owners of securities of the respondents and thus came within the definition of complainant under the Nova Scotia statute.⁴⁴ The Court also found that the definition of “affiliate” for the purpose of bringing an oppression application must be given a broad interpretation, again drawing on the statutory language.⁴⁵

Canadian courts have been fairly rigorous in screening the types of cases for which creditors may bring oppression remedy applications. Creditors, other than security holders, are not given standing as of right, and the courts have generally limited access by restricting who is a “complainant”, often requiring a relationship analogous to a minority shareholder. While this screening process is understandable, given the court’s concern that the oppression remedy not become an alternative debt collection proceeding or be used to gain strategic advantage by requiring directors to personally defend court actions, the court has used the definition of complainant to screen oppression actions when sometimes the issue is not one of meeting the statutory criteria for complainant, but rather, that the situation does not warrant a remedy. The language of most corporations statutes suggests that creditors can be complainants and that the issue is more properly one of when the court should exercise its discretion to grant a remedy. Therefore, it may be more useful to require a detailed pleading of the alleged oppressive acts rather than using “complainant status” as the screen.⁴⁶ Just as the courts have recognized the reasonable expectations of shareholders in determining the scope of oppression remedies, so too could there be more fulsome articulation of what is or is not a reasonable expectation of creditors both outside and in the context of corporate financial distress.

The statutory language also limits the harms for which parties can successfully receive a remedy, narrowing the provision considerably from the broader language of who may be a complainant. The *CBCA* is illustrative:

241. (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is *oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer*, the court may make an order to rectify the matters complained of. [emphasis added]

Hence while the scope of who the court may allow as a complainant is broad, the conduct for which there is a remedy must be conduct of the corporation, its affiliates, directors or officers and

it must be affecting the interests of a security holder, creditor, director or officer, the statutory language serving a further gate-keeping role. Where objecting creditors did not complain of an act or omission of the corporation, the conduct of the corporation's business or affairs or the exercise of "the powers of the directors", but rather complained of the conduct of a receiver on behalf of a secured creditor and of a trustee in bankruptcy, the oppression remedy was found not applicable.⁴⁷

Both the *CCAA* and the *BIA* proposal provisions allows for the compromise of claims against directors that relate to obligations of the company where directors are by law liable, if the court finds the compromise to be fair and reasonable in the circumstances.⁴⁸ However, the compromise cannot relate to claims against the directors for oppressive conduct.⁴⁹ In *Cheng v. Worldwide Pork Co.*, the Court held that the *CCAA* plan and court order had conclusively settled all rights.⁵⁰ The exception under s. 5.1(2) of the *CCAA* relates only to claims against directors; the *CCAA* does not limit a release or a compromise of a claim against a shareholder, and here, the release provisions in the order released all shareholders, which included the Government as shareholder.⁵¹ The Court had given the complainant an opportunity to particularize the complaint against the directors, and subsequently found that he had failed to demonstrate that the directors had conducted themselves in an oppressive manner or that he had sustained any loss as a direct result of their conduct. The Court held that the conduct alleged was not so egregious as to warrant the imposition of personal sanctions against the directors. The Court observed that "mismanagement is not oppressive conduct, nor is a plaintiff's objection to corporate policy, if the policy or management is not designed to oppress a plaintiff" and that "the oppression remedy is not designed to settle every dispute of a corporation, but only those which involve an abuse of the corporate system".⁵²

B. — The Reasonable Expectations Test as Gate-Keeper

The courts, in their determination of reasonable expectations, have also limited the availability of the remedy in the insolvency context.

In *Harbert Distressed Investment Master Fund, Ltd.*, the complainant distressed debt trader had purchased the bonds after having knowledge of the actions that it subsequently claimed were oppressive. The Court held that a security holder's knowledge of the conduct complained of and its decision to become a security holder after obtaining such knowledge is relevant when deciding whether it is a security holder that should be granted relief under the remedy. The Court held that the investor was not entitled to relief as its reasonable expectations had not been harmed; however, other bondholders who had purchased securities prior to knowledge of the oppressive conduct were granted relief.⁵³

The Air Canada Pilots Association (ACPA) sought to bring an oppression action in respect of a restructuring plan.⁵⁴ The debtor's *CCAA* plan had been overwhelmingly approved by Air Canada's creditors, approved by the court and implemented. However, the ACPA argued that it had

not realized that Air Canada did not retain equity in the businesses that were spun off to the holding company ACE and it argued that the impact of the post-*CCAA* Air Canada corporate structure was oppressive.⁵⁵ The Court observed the importance of certainty in *CCAA* proceedings and held that the ACPA had an opportunity to negotiate and vote on the Air Canada *CCAA* restructuring plan, had been an active participant in the proceedings, and the reasonable expectations of ACPA from the plan were being met; hence, the union could not now attempt to unwind the plan and enhance its own self interest.⁵⁶ The union could not amend the plan in a collateral oppression application as it would defeat the certainty and finality in *CCAA* restructuring proceedings.⁵⁷

In a non-insolvency case, the Ontario Court of Appeal granted an oppression remedy against corporate directors in favour of an employee who sued his corporation for wrongful dismissal. Just before trial, the directors re-organized their related corporations so that the corporation that the employee had sued had no assets to satisfy judgment.⁵⁸ The Court held that the directors' disregard for the employee's legitimate expectation that a solvent corporation would remain solvent and able to satisfy judgment was oppressive conduct.⁵⁹ Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the Court held that the conduct complained of need not be undertaken with the intention of harming the plaintiff.⁶⁰ While some degree of bad faith or lack of probity in the impugned conduct may be the norm in such cases, neither is essential to a finding of oppression in the sense of conduct that is unfairly prejudicial to, or that unfairly disregards, the interests of the complainant.⁶¹

C. — The Availability and Scope of the Remedy

Although the scope of remedy available under the oppression provisions is broad,⁶² the courts serve a gate-keeping role in respect of the situations in which the court will grant a remedy and the scope of what that remedy will be. The court has made it clear that it will not allow debt actions to be routinely turned into oppression actions. The court has also determined oppression claims during insolvency restructuring proceedings. In *Re Canadian Airlines Corp.*, Madam Justice Paperny held that when one examines a situation through the lens of an insolvency proceeding, the reduction or elimination of rights of shareholders or creditors may be a function of the insolvency proceeding and not the result of oppressive conduct in the operation of the *CCAA*.⁶³ She held that:

the antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial, it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.⁶⁴

In the circumstances, the Court refused an application for a remedy under the oppression provisions, noting that the shareholders would have received nothing under bankruptcy and liquidation. In dismissing an appeal of this judgment, the Alberta Court of Appeal observed that the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of insolvency legislation; and the court should assess whether complaints that rights or interests have been ignored or extinguished must be analysed as to whether they are a function of the insolvency or of oppressive conduct.⁶⁵ The Court held that the proposed appeal would interfere with the restructuring since the remedy the appellant sought was to set aside the plan as being unfair and unreasonable.⁶⁶ The Court held that if the appeal were allowed, the court could not rewrite the plan, nor remit the matter back to the *CCAA* supervising judge; it must either uphold or vacate the plan; yet that remedy was no longer possible as it was already almost fully implemented and could not be undone.⁶⁷ The Court held that the applicant had not established *prima facie* meritorious grounds.⁶⁸

In *Uniforêt inc.*, the Québec Superior Court observed that a plan under the *CCAA* is a compromise; it cannot be expected to be perfect and it should be approved if it is fair, reasonable and equitable.⁶⁹ The Court held that equitable treatment is not necessarily equal treatment, and that equal treatment may in some circumstances be contrary to equitable treatment. The Court held that the *CCAA* should not be employed to permit a “cranky minority creditor” to frustrate a feasible and fair plan that has been blessed by an overwhelming majority of all the creditors of a debtor.⁷⁰

In the context of an oppression application related to a *CCAA* proceeding, but not arising out of the proceeding itself, an oppression remedy was granted against directors where there had been an absence of significant independent directors when related-party transactions, including a loan for the benefit of a shareholder, were approved by directors who had a conflict of interest.⁷¹ The proceedings arose in the context of continuing litigation involving the Hollinger group of companies. Hollinger Inc. was a public holding company incorporated under the *CBCA*.⁷² Ravelston Corporation Limited, a private company, was Hollinger’s majority shareholder, owning or controlling all of Hollinger’s non-publicly held voting shares.⁷³ Catalyst Fund General Partner I Inc., a non-voting Hollinger shareholder, commenced an oppression remedy application in which it sought, among other relief, an order removing eight of ten directors from Hollinger’s board, on the ground that they had oppressed minority shareholders.⁷⁴ The Ontario Superior Court held that the loan and all of the surrounding circumstances justified imposing the oppression remedy; and the absence of significant independent directors when related-party transactions were approved in the circumstances represented actual conflict of interest.⁷⁵ The Court observed that there must be a reasonable balance between the protection of corporate stakeholders and the ability of management to efficiently conduct the affairs of the business and that director removal is an extraordinary remedy that should be imposed sparingly. However, the Court held that such an

order was appropriate where the continuing presence of the incumbent directors was harmful to the company and the interests of corporate stakeholders, and where the appointment of new directors would remedy the oppressive conduct without a receiver or receiver-manager.⁷⁶ A number of events occurred after the removal order, including a *CCAA* order and receivership order granted in respect of Ravelston, with the objective of placing the debtor company under the control and direction of a court-appointed officer.⁷⁷

Affirming the judgment removing the directors, the Ontario Court of Appeal held that its authority under the oppression provisions must be exercised judicially and in a manner consistent with the scheme and object of the statute.⁷⁸ In fashioning a remedy, judicial interference with the affairs of the affected corporation should be undertaken only to the extent necessary to rectify the oppression in question.⁷⁹ The Court held that the application judge's finding of oppressive conduct by the Ravelston directors, including White, was amply supported by the record.⁸⁰ The decision to permit White to continue in office on the terms imposed by the application judge did not displace the finding of oppression against him and did not require that "fresh" oppression be proven thereafter to warrant his subsequent permanent removal from the board.⁸¹ Nor, in the appellate court's view, did it require that fresh oppression be proven thereafter to warrant White's permanent removal from Hollinger's board of directors.⁸²

The courts have also tried to control the uncertainty of oppression remedy claims by determining the issues within the context of other proceedings.⁸³ Decisions on the issue of convenient forum are discretionary and the court will consider all relevant facts in determining the most appropriate forum to deal with claims.⁸⁴ On finding that there was misconduct within the meaning of the provision, the court has held that it has broad power to make any order it deems appropriate.⁸⁵ Where directors and officers fail to demonstrate that their actions depriving a creditor of a remedy are a reasonable business decision, the court may grant a remedy.⁸⁶

The courts will fashion a remedy appropriate to the circumstances. The remedy should be limited to rectifying the conduct complained of; and numerous judgments have cited the reasons of Justice Farley in *820099 Ontario Inc. v. Harold Ballard Ltd.* that the remedy to correct an oppressive act "should be done with a scalpel, and not a battle axe" and that the task of the court is to "even up the balance, not tip it in favour of the hurt party".⁸⁷

In granting remedies under oppression provisions, the court has sought to craft a remedy that will rectify the particular oppression in the circumstances. In *C.I. Covington Fund Inc. v. White*, a representation by a director that the intellectual property of the firm was held by the company in order to acquire financing, was an action for which the director, who was also the controlling shareholder and the inventor of the intellectual property, was to be held personally liable.⁸⁸

The Court found that the audited financial and other documents provided during the creditor's due diligence process all warranted that the patent rights and related intellectual property were held by the debtor corporation and that these representations were reasonably relied on by the creditor in its decision to advance funds to the debtor.⁸⁹ When the debtor corporation became bankrupt, the intellectual property was found to be owned by the inventor/director, who then proceeded to use the technology in a new company. After the litigation commenced, the director assigned the intellectual property to a third party company that took the assignment as a form of collateral for a loan.⁹⁰ The Court held that the oppression remedy was available to protect the expectations of corporate stakeholders. The Court held that whether a small, closely held company or one that is publicly traded: "Investors and lenders should be able reasonably to rely on public statements of a corporation made in various legal and corporate documents" when making a decision whether to invest in the company.⁹¹ The director's failure to put the patents in the name of the company was found to be analogous to the diversion of assets because it constituted a form of self-dealing.⁹² Here, the director as inventor used the facilities and funds of the corporation, spent 75 per cent of his time on research and development, and yet personally retained the benefit of the technology developed with corporate resources. The director had a fiduciary obligation to act in the best interests of the corporation, which he breached by engaging in self-dealing.⁹³ The Court decided that a monetary award against the director would not adequately protect the interests of stakeholders, given that the director now faced personal financial difficulties and that creditors would be in a better position to recoup some of their funds if the patents were assets of the corporation that could be sold. Accordingly, the Court ordered that the debtor corporation was the beneficial owner of the intellectual property, and thus the patents and patent applications were to be assigned to it. The Court also held that, as a fiduciary of the debtor corporation, the director had an obligation not to personally pursue corporate opportunities available to the corporation, and thus he and the new company through which he had been operating since the bankruptcy were ordered to pay for an accounting of profits from the use of the technology.⁹⁴

Similarly, where a dividend and other corporate transactions render the corporation insolvent and deprive creditors of a realization of their claims, directors can be held personally liable under the oppression provisions of corporations statutes. In *SCI Systems Inc. v. Gornitzki Thompson & Little Co.*, the Court held: "one of the most reasonable of all expectations of those dealing with corporations must be that the directors will manage the company in accordance with their legal obligations. Some of these obligations are specifically prescribed by statute. Others are more generally derived from the common law. However, they essentially add up to the same thing: namely, to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person."⁹⁵ The Court held that the dividend was declared and paid at a time when the directors were fully aware of the liability under the promissory note and knew that the payment rendered the corporation insolvent.⁹⁶ It was not equitable that

the directors paid themselves substantial dividends, while rendering valueless the creditor's claim. The Court held that:

It is a well-recognized rule that the court should not attempt to second-guess the legitimate actions of the management of corporations. This rule avoids intrusion into the day-to-day workings of the corporation and boardroom which would interfere with the conduct of business. However, equally strict is the requirement that directors must fulfil the statutory and common law fiduciary duties and duty of care that have evolved in the light of new corporate concerns and societal expectations. ... They exercised their substantial powers as directors in ways that were in unfair disregard of and prejudicial to the interests of SCI. Accordingly, liability lies directly with them and the other respondents that were used as agents to effect the oppressive result.⁹⁷

In *Danylchuk v. Wolinsky*, the Court granted an oppression remedy for applicant shareholders and creditors of a company in receivership.⁹⁸ Since the directors were being sued in their personal capacity, the Court held that it was irrelevant whether or not the corporation was in existence at the time of the application; and found that the creditors had a legitimate interest in the manner in which the affairs of the company were managed. In dealing with a company in receivership, the Court was satisfied on the affidavit evidence filed that the applicant creditors and shareholders had demonstrated oppression; the directors unfairly disregarded the interests of the applicants, by using the companies that they controlled as their personal bank accounts; by making unauthorized payments of personal expenses or expenses that had no valid corporate purpose; by preferring the interest of some shareholders over the interest of others; by disregarding the interests of some creditors to the advantage of others; by not having regular shareholders' meetings to update the shareholders; and by not providing timely financial statements to the shareholders.⁹⁹ The Court concluded that the equitable remedy was to make the directors jointly and severally liable to the applicants in the amount of one-half of their original investment or advancement.¹⁰⁰

In a recent non-insolvency case, the Ontario Divisional Court held that the oppression remedy is designed to address the imbalance of power between those in control and those who have a genuine stake in the affairs of the corporation but no control over its conduct.¹⁰¹ A creditor to whom the corporation owed an obligation affirmed by judgment but not yet quantified by an assessment of damages, was no less in a vulnerable position *vis a vis* the corporation and had no less of a legitimate stake or interest in the manner in which the affairs of the corporation were conducted than one to whom a liquidation sum was owed. The Divisional Court held that the trial judge was correct in concluding that the creditor became a creditor at the time of the liability determination and that the creditor had a reasonable expectation that funds would be available to it; thus, the thwarting of that expectation constituted oppression.¹⁰² The evidence from the company on the creditor's prior motion for appointment of a receiver was central to the determination of the oppression application, as the director held out that there would be funds available after paying

out encumbrances to pay all of the creditors as required by law. That representation was one factor in the court's consideration to deny the motion to appoint a receiver.¹⁰³ There was no disclosure that there was any intention to pay out all of the net proceeds of the sale, and the motion for the appointment of a receiver was dismissed on the basis that there was no evidence that the defendants were dissipating their assets or removing assets from the jurisdiction.¹⁰⁴ The Court held that the oppression remedy gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted, and it prevents those having power and control over the affairs of a business corporation from exercising that power with impunity.¹⁰⁵ The concept of reasonable expectations is objective and contextual and the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context.¹⁰⁶ The Court held that the conduct was egregious in the extreme as it was a concerted effort to evade payment of the company's obligation to the creditor, including placing misleading statements before the court on the receivership motion.¹⁰⁷

Also in the non-insolvency context, the New Brunswick Court of Appeal held that "it is one matter for directors and shareholders of privately held corporations to arrange their business affairs to reduce the risk of suffering personal financial loss associated with the operation of a business. This is one of the accepted advantages provided by the doctrine of distinct corporate personality. But, it is quite another to arrange the business affairs of one's corporation such that a pre-existing indebtedness will never be collected".¹⁰⁸ The Court held that oppressive conduct and unfairly disregarding the interests of creditors is established where directors of the corporation embarked on a series of otherwise legal transactions with no substantial business purpose other than to defeat the claims of a creditor, and thus a director was held personally liable.¹⁰⁹

A director of a financially distressed corporation was held liable under the oppression provisions of the Ontario *Business Corporations Act* to the landlord for damage caused by the tenant corporation when it removed its equipment from the leased premises. The Court found that the transfer of all of the tenant's assets to another corporation by the sole director/shareholder just prior to the trial of the landlord's action to recover the costs of the repairs to be oppressive and awarded the costs of the repairs against the director personally.¹¹⁰

In another non-insolvency related case, the Ontario Court of Appeal held that the oppression remedy is not a means by which commercial agreements negotiated at arms length by sophisticated parties can be rewritten to accord with a court's after-the-fact assessment of what is "just and equitable" in the circumstances.¹¹¹ It is not the function of the court to relieve a party to a contract of the consequences of an improvident agreement.¹¹² The reasonable expectations of parties to commercial agreements negotiated at arms length must be those reasonable expectations that find expression in the agreements negotiated by the parties.¹¹³ The Court held that the oppression

remedy is not intended to give a creditor after-the-fact protection against risks that the creditor assumed when it entered into an agreement with a corporation.¹¹⁴ The Court held that the position of a creditor who can, but does not, protect itself against an eventuality from which it later seeks relief under the oppression remedy, is much different than the position of a creditor who finds its interest as a creditor compromised by unlawful and internal corporate maneuvers against which the creditor cannot effectively protect itself; in the latter case, there is much more room for relief under the oppression provisions than in the former case.¹¹⁵

Directors were found to have engaged in concurrent oppression and breach of fiduciary duty when they exhibited a continuing failure to differentiate between personal and corporate interests, using company revenue to pay personal bills and obtain an array of benefits to which they were not entitled.¹¹⁶ Their conduct and decisions made in their capacity as officers/directors of the company could not be justified under the business judgment rule, the primary rationale for limiting oppression remedies.¹¹⁷ A proprietary remedy was appropriate; however, a monetary award was preferable given that the defendants' current corporate holdings bore very little resemblance to that at the time of their misappropriation.¹¹⁸

The court has also considered whether claimants could have exerted any influence over the company that would have had the effect of protecting their interests, finding that the involuntary tort creditor, as distinct from secured creditors or major lenders, has few avenues open to ensure that the debtor will not engage in conduct that will eliminate the prospects of recovery.¹¹⁹

Hence the statutory language, the scope of the remedy available and the gate-keeping role of the court all work to limit the circumstances in which an oppression remedy will be granted. The remedy is only available where the corporation, its affiliates, directors or officers engage in conduct that is oppressive, unfairly prejudicial or unfairly disregarding of the interests of a security holder, creditor, director or officer, the statutory language limiting the types of conduct for which a remedy may be available. Most cases are determined on the reasonable expectations test before the court even embarks upon its inquiry into the business judgment of the corporate decision makers or whether they meet the due diligence defence. Many successful applications for the remedy involve directors unfairly appropriating some benefit to themselves to the prejudice of stakeholders or directors undertaking actions to avoid the corporation's obligations to satisfy a stakeholder's legal rights. The cases are decided taking into account a number of factors that determine the reasonable expectations of the parties in light of all the circumstances. The oppression remedy remains an important remedy, but one that is difficult to establish in many circumstances.

V. — The Policy Debate

The above data on incidence of cases and the judgments discussed indicate that the oppression remedy is simply not a threat to viable workouts. However, several scholars and practitioners

have recently argued that the use of the oppression remedy should be limited in insolvency restructuring proceedings.¹²⁰ Stephanie Ben-Ishai and Catherine Nowak have argued for a complete prohibition on the use by stakeholders of oppression claims once a debtor company has entered insolvency restructuring proceedings under the *BIA* or the *CCAA*, on the basis that it could make the court-supervised restructuring process completely ineffective or produce distortions in the process.¹²¹ They argue that creditors could see their interests subordinated to placate those alleging oppression.¹²² Natasha MacParland and Linda Chiasson suggest that “allowing the oppression remedy to be used in *CCAA* proceedings (except in extreme circumstances) may have the negative effect of diluting the *CCAA*’s flexibility and responsiveness for companies in distress”.¹²³ They argue that the *CCAA* regime cannot accommodate the oppression remedy because it is an individual rather than collective remedy, and because it generally results in remedies that are broad and often non-monetary, suggesting that non-monetary relief will impair the ability of the debtor company to restructure. They observe that the very nature of compromise under *CCAA* proceedings is such that there is some prejudice to stakeholders, but that the proceeding offers a comprehensive and truncated process for resolving outstanding claims.¹²⁴ They suggest that resort to oppression provisions in *CCAA* proceedings should not be allowed for creditors, and that creditors as claimants are integrally involved in the *CCAA* process and provable claims are treated fairly; hence to allow such claims increases costs and uncertainty in the process.¹²⁵ The authors note, however, in a footnote, that they are addressing the issue of oppression claims against the debtor company, not oppression claims against directors of *CCAA* debtors.¹²⁶

Hence, four issues have been identified: the tension between the collective remedies of restructuring legislation and individual remedies associated with the oppression remedy; the issue of non-monetary relief; the potential loss of efficiency and flexibility in the proceeding; and the potential for a creditor to use an oppression allegation to highjack or disrupt the restructuring proceeding and gain a veto.

With respect to the first issue, the court is able to accommodate an oppression remedy, where granted, within the context of a *CCAA* or *BIA* proposal proceeding. While a *CCAA* plan or *BIA* proposal is a collective remedy, there are many instances in which the court has granted individual or specific relief within the context of the restructuring proceeding, such as representative counsel for tort claimants in the Red Cross proceeding and for pensioners in the Nortel proceeding, and hardship relief for particular claimants in the third-party asset-backed commercial paper *CCAA* proceeding. It is more accurate to describe the *CCAA* as a collective proceeding that accords specific or tailored remedies within the larger collective proceeding where it is necessary to advance the objectives of the statute. If the remedy under the oppression provision is an individual one, the court would first determine the appropriate remedy in the circumstances. It would then determine whether that most appropriate remedy is affected by the insolvency proceeding.

One instance in which the oppression remedy may be a useful tool in a *CCAA* proceeding is in rectifying a manoeuvre whereby a debtor company under the control of aggressive new distressed debt lenders, seeks to restructure the corporate assets or entities so as to unfairly deprive creditors of their claims. The court has previously held in *Re Lehndorff General Partner Ltd.* that one objective of the *CCAA* is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan that could give an aggressive creditor an advantage to the prejudice of others. Equally, where the debtor company acts aggressively within the proceeding to unfairly or prejudicially harm creditors' reasonable expectations, the oppression remedy may serve to ensure fairness in the negotiations for a workout and in the treatment of creditors' claims.

With respect to the issue of monetary versus non-monetary relief, there may be circumstances in which the remedy calls for non-monetary relief, such as a seat on the corporate board or observance of collective agreement requirements. Where that remedy can be ordered in the context of the workout, the court should be willing to order the most appropriate remedy in the circumstances. However, given the nature of a restructuring proceeding, the court may determine, in balancing the fairness and the prejudice in all the circumstances, that the relief for oppressive conduct must be monetary compensation. The challenge of making these decisions is part of the court's overall supervisory authority and should not be a reason for excluding the oppression remedy in appropriate circumstances.

With respect to the concerns about loss of efficiency or flexibility and the risk of game playing, the broad and flexible jurisdiction of the court allows the court to manage its own process, including determination of any oppression claims. Effective case management, including setting claims bar dates, ordering particulars, and providing a process to determine claims expeditiously, addresses these concerns. Just as the U.S. court in *Muscletech* held that the tort claimants were not being deprived of a constitutional right to due process by being required to have their products liability claims dealt with in the Canadian restructuring proceeding, so too is any challenge likely to survive a creditor's complaint that the oppression claim should not be dealt with in the insolvency restructuring proceeding. While there is a cost to determination of oppression remedy applications, even in the context of the restructuring proceeding, the costs to the integrity of the corporate and insolvency law system if it excluded a fair process to determine such claims would be far too high. In any event, the number of cases indicates that concerns about game playing in alleging oppression have not been a problem.

These policy debates sometimes fail to distinguish between the existence and thus availability of the oppression remedy under corporations statutes and the policy considerations that should inform the exercise of the court's authority to award a remedy in particular circumstances. The Honourable James Farley has suggested that while courts must exercise restraint in granting remedies, the oppression remedy continues to be one that should be utilized in appropriate circumstances.¹²⁷ In addition to the important gate-keeping function of determining whether to grant a creditor standing,

the current reasonable expectation test used by the courts in determining whether a remedy should be granted serves an equally important gate-keeping function in terms of the type of actions that give rise to a remedy. Hence the debtor company and its other stakeholders are protected from frivolous claims.

A prohibition against bringing oppression applications in insolvency restructuring proceedings would appear to violate corporate law rights, particularly in a contest between the *CBCA* and the *CCAA* where there are no paramountcy concerns. Even for provincial statutes offering an oppression remedy, there is no conflict in statutory language and the courts are unlikely to read one into the legislation. Canadian courts have been careful to restrict the availability of the remedy in insolvency restructuring proceedings, as the discussion of cases above illustrates. There is no question that a court, in determining an oppression remedy application in the context of insolvency, needs to define the scope of reasonable expectations of creditors and others in the course of the workout or liquidation of the debtor company, as the court did in *Canadian Airlines*. In most cases, the fairness of the workout will fall within the provisions of the insolvency legislation, negating the need for a separate disposition on the oppression claims. The Supreme Court of Canada has now offered guidance as to what may or may not ground a claim. Hence, rather than prohibit such actions, the courts are more likely to continue to articulate the factors to be applied.

While some commentators have suggested limiting or prohibiting oppression claims against the corporation, not directors,¹²⁸ the reality is that decisions of the corporation are made by directors and officers and thus the claims are often the same or concurrent. Prohibiting claims against the debtor company while allowing them to proceed against directors personally ignores the fact that often in *CCAA* proceedings or *BIA* proposal proceedings, the directors continue to control the corporation and their strategy will include dealing with any claims of potential liability against them. As noted above, oppression claims generally cannot be compromised under the restructuring plan, although as with all actions or applications, the parties can settle the claims. Prohibiting oppression claims against the corporation during insolvency restructuring proceedings may create inappropriate incentive effects in the working out of the corporation's insolvency, with potential harm to other creditors.

In summary, none of the arguments for limiting access to the oppression remedy during insolvency restructuring proceedings are sustainable in light of how the court currently supervises proceedings and in light of the court's approach to such claims. Efficiency must be balanced with fairness and equity and the availability of the remedy in appropriate circumstances is an important public policy. Moreover, the empirical evidence suggests that there is no compelling public policy reason to limit the availability of the remedy.

VI. — A Principled Approach

The Supreme Court in *BCE* has offered direction on assessing oppression claims, and that reasoning can be developed further, along with principles for determining oppression remedy applications. This part commences that conversation, suggesting that the framework and principles should be transparent and fair; yet oppression claims are unlikely to be disruptive to insolvency proceedings.

A. — Principles

It is helpful to set out some basic principles that apply to consideration of oppression claims in the context of insolvency proceedings.

1. The oppression remedy is a broad equitable remedy and courts must show a willingness to grant the remedy where it is just and equitable to do so.¹²⁹
2. The court must recognize that decisions in companies are made by, and affect, individuals with rights, expectations and obligations such that there may be actions by individuals that make it unjust or inequitable to insist on strict legal rights.¹³⁰
3. Creditors' interests increase in relevancy as a corporation's finances deteriorate; a factor relevant to the exercise of the court's discretion to grant standing to bring an oppression remedy claim.¹³¹
4. Expectations of creditors and other stakeholders are not static, and the court should assess decisions or actions with a view to the reasonable expectations that existed at the time of the impugned action or conduct.¹³²
5. To ground an oppression remedy claim, the respondent corporation or its directors or officers must have engaged in conduct that is oppressive, unfairly prejudicial to or unfairly disregards the interests of the complainant, and these are overlapping forms of conduct and run along a continuum of conduct for which a remedy may be granted.
6. Impugned conduct is to be assessed based on the reasonable expectations of the complainant, having regard to the context and facts of the specific case.¹³³
7. Actual unlawfulness is not required to establish the need for an oppression remedy as the remedy is focused on concepts of fairness and equity rather than on lawfulness or legal rights.¹³⁴
8. Bad faith or an intention to harm the complainant is not required to establish the need for an oppression remedy.¹³⁵

9. The court must look to what is fair, given all of the interests involved.¹³⁶

These principles should be borne in mind when the court is called on to determine an oppression remedy claim. Generally, under the unfair prejudice and unfair disregard branches of the oppression remedy, the focus is on the effect on the injured complainant of the conduct, interpreted as conduct that unfairly disregards the complainant's interests, conduct that unjustly or without cause fails to pay attention to, or ignores or treats as of no importance the interests of security holders, creditors, directors or officers.¹³⁷

B. — Framework

It is also helpful to consider a framework for how to proceed when an oppression claim is alleged in connection with an insolvency restructuring or liquidation proceeding. Here is a suggested approach, which can be further developed:

1. The court should consider whether the complainant has status to bring the claim, specifically, whether the complainant can bring the application as a statutory right or is a “proper person” within the meaning of the statute. For example, creditors that hold a debt security such as a bond or note can bring an oppression claim as of right under the statute, but other creditors can be proper persons to bring oppression claims in appropriate circumstances.
2. The assessment of “proper person” should not be used to screen the merits of claims. “Proper person” includes persons that have an interest in how the corporation is being managed.
3. If the complainant is a proper person or is entitled to bring an application as of right, the court should require the complainant to particularize the oppression alleged and the remedy sought, including affidavit evidence in respect of the allegations.
4. The court can then make a preliminary assessment as to whether or not the alleged conduct is a function of the insolvency proceeding and not oppressive conduct, in which case it will dismiss the claim at that point or order that the particular issue be considered within the negotiations for a workout or in the context of the insolvency proceeding.
5. If the claim relates to conduct or decisions that are not a function of the insolvency proceeding, the court must then determine the best means of hearing and determining the oppression claim. Options could include:

- consideration of the application in a hearing before the restructuring supervising judge, with notice to other stakeholders in the restructuring proceeding;
- requesting that another judge of the court conduct a hearing under the umbrella of the insolvency proceedings to determine the claim;
- determining the claim within the *CCAA* or *BIA* claims process if the remedy sought for oppression is a monetary amount;
- determining the claim in the overall assessment of the fairness and reasonableness of a proposed plan if the claim arises in the context of the proposed plan itself; or
- lifting the stay to allow the complainant to pursue an application for an oppression remedy in separate proceedings. This latter avenue may be essential in some limited cases, but the court should assess whether it is first possible to deal with the claim within the parameters of the *CCAA* proceeding or *BIA* proposal proceeding, as was done in *Canadian Airlines*.

6. If the court is determining the complaint, it must consider whether or not the complainant has established that his, her or its expectations were reasonably held and have been violated by the conduct at issue. Factors to consider include:

- general commercial practice;
- the history and nature of the corporation;¹³⁸
- the relationship between the corporation and the parties;
- past practice and expectations, and how they have changed over time based on valid commercial reasons;¹³⁹
- foreseeability of the conduct in question;
- steps the claimant could reasonably have taken to protect itself;
- agreements between the parties, such as contracts, collective agreements, written settlement of disputes or other matters;
- detriment to the complaining party's interests;¹⁴⁰

- the fair resolution of conflicting interests between corporate stakeholders.¹⁴¹
- whether the directors have managed the company in accordance with their legal obligations;¹⁴²
- whether there is a departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of legal rights;¹⁴³
- expectations that have emerged from the personal relationships between the claimant and other corporate actors;¹⁴⁴
- expectations affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications;¹⁴⁵
- assessing beyond legality what is fair, given all of the interests at play;¹⁴⁶ and
- any other factors where a reasonable expectation may arise due to their fact-specific nature.¹⁴⁷

7. The complainant must then establish that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest.¹⁴⁸ The court can make a determination that the conduct falls within one or more of these statutory categories.

8. If conduct is established, the court should consider the due diligence and reasons of the directors, officers, the debtor corporation or its affiliates for engaging in such conduct.

9. The court should consider the most appropriate remedy in the circumstances and then assess the availability of that remedy in the circumstances of the insolvency proceeding.

10. As a general matter, the court should consider setting time parameters for dealing with the oppression claim, bearing in mind the potential impact of the claim on the insolvency proceeding.

The court's role in a *CCAA* proceeding is to serve in an overall supervisory capacity, to make procedural and substantive determinations during the course of the proceedings where required, to ensure that the provisions of the statute are met, and to assess and rule on the fairness and the reasonableness of a proposed restructuring plan. The objective of the statute is to balance the multiple interests at stake in the corporation's future, as well as the public interest more generally. Determination of oppression claims fits neatly within this mandate, as it calls for both procedural and substantive direction, as well as a balancing of interest and prejudice. The timing of the oppression claim will be critically important to how the court determines that it best be addressed. At the plan sanction stage, the court is determining the fairness and reasonableness of the plan, and an oppression claim arising at that point may be part of the court's overall determination of whether or not to sanction the plan.

The caselaw emphasizes that the reasonable expectation test is an objective standard. In respect of creditors, however, the courts need a clearer articulation of how that objective test is to be applied. For example, the court may need to develop principles for application to unsecured and involuntary creditors, recognizing their inability to bargain for protection against oppressive, unfairly prejudicial or unfairly disregarding conduct and what principles operate in granting a remedy to unliquidated and contingent claims in particular circumstances.

For secured creditors, credit card companies and many other types of lender, solvency risk is factored into the price of credit. Hence, the mere condition of insolvency is unlikely to ground any claim of oppression. For secured lenders and some other creditors, there is a contract that sets out many of the expectations, allowing for an expeditious assessment of the reasonable expectations underlying the complaint.

For employees, where the contract is sometimes explicit and sometimes implicit, reasonable expectations must be assessed from the starting point that often the initial employment contract was bargained when the employee had little or no bargaining power or alternatively that the original agreement bears little resemblance to the employment relationship that has evolved over a number of years; and hence the reasonable expectations that have evolved. A long service employee that forfeited other employment opportunities in favour of continuing to assist the employer's wealth generating activities may well have reasonable expectations arising out of that relationship that developed over time. For example, where a corporate group is highly interrelated and an employee has a relationship with one company, but the actions of the affiliated companies have deprived the employee of a remedy, an oppression remedy may be warranted.¹⁴⁹

Where there are collective agreements involved, the reasonable expectations of parties can be read from the terms of the collective agreement, but also the history of bargaining, for example, where particular pension or severance rights were bargained in exchange for particular limits on wages or where long term employment was bargained in exchange for concessions. That bargaining

history also sets the reasonable expectations of the parties, as does their history in the day-to-day administration of the collective agreement, and this history and these representations can be drawn on in assessing director and officer conduct prior to and during insolvency. Insolvency legislation itself now creates some reasonable expectations, in terms of expressly protecting the collective agreement absent particular steps and in codifying the priority of at least some of the claims of employees in the overall proceeding.

Where the relationship with directors, officers and the corporation is largely or purely implicit, or there is an involuntary credit relationship, such as a tort claim, reasonable expectations must be drawn from the history, conduct and relationship of the parties. Here again, the Supreme Court's reasoning assists. The Court held that the "oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others".¹⁵⁰ It recognized that directors make corporate decisions that may conflict in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The Court held that fair treatment, the central theme running through the oppression jurisprudence, is fundamentally tied to reasonable expectations.¹⁵¹ For tort claimants, the contingent nature of the claim is not a bar to the court exercising its discretion to grant status where the claim is not uncertain or speculative.¹⁵²

The reasonable expectation of stakeholders is that the directors act in the best interests of the corporation,¹⁵³ but there are also expectations beyond that baseline. It cannot just be a reliance on "best interests of corporation" alone, as such a mantra could justify conduct that unfairly violates reasonable expectations of stakeholders.

The Court held that commercial practice plays a significant role in forming the reasonable expectations of the parties; and that a departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of legal rights will generally, although not inevitably, give rise to a remedy.¹⁵⁴ It observed that courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.¹⁵⁵ Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors.¹⁵⁶ The courts need to take careful account of the context, the factors that give rise to reasonable expectations, and the specific facts of the case in their determination of oppression claims.

VII. — Conclusion

The oppression remedy is well-established and, as the caselaw demonstrates, is restrictively but appropriately used. The empirical evidence suggests that oppression applications are generally not an issue during insolvency restructuring proceedings. The oppression remedy continues to be an important corporate law remedy that should be available in such proceedings. The oppression

remedy has the necessary flexibility to make it a valuable tool in insolvency situations, and the tests are sufficiently nuanced to ensure that the remedy will not be a barrier to most workouts. If it is a limiting factor, arguably it serves to counterbalance the broad protection afforded to directors and officers by the process. As a matter of principle, there is no reason to prohibit oppression claims from being dealt with in an insolvency restructuring or other proceeding. The point of a restructuring proceeding is to permit the debtor company to deal with its issues as broadly as it needs to, and prohibiting oppression claims would either deprive complainants of a remedy where their claims are meritorious or leave the debtor company vulnerable to having to deal with the oppression claims after it emerges.

The courts have the procedural and substantive authority to determine any claims for an oppression remedy in a timely and expeditious manner. It is evident that in balancing the interests and prejudice in an insolvency workout, such balancing does not give rise to oppression. Equally, however, it is important to encourage corporations and the individuals they act through to act in the best interests of the corporation and not to encourage breach of those obligations by insulating the corporation during insolvency proceedings for previous conduct that has been oppressive, unfairly disregarding or unfairly prejudicial of a complainant's interests.

Footnotes

- * Dr. Janis Sarra, Professor of Law, University of British Columbia Faculty of Law. My thanks to law student Bernard Lau for his research assistance and to reviewers for their very helpful comments.
- 2 See the *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) and the discussion in Part V of this article.
- 3 For example, the oppression remedy under s. 241(2) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (*CBCA*) specifies: the court must be satisfied that any act or omission of the corporation or any of its affiliates effected a result; the business affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer and the court may make an order to rectify the matters complained of. Directors have a defence if they can establish that the exercise of their power was not oppressive, unfairly prejudicial or unfairly disregarded interests.
- 4 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (*BIA*).
- 5 *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, ¶53.
- 6 *Ibid.* at para. 51, citing s. 122(1) (a) of the *CBCA*.
- 7 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶58.
- 8 *Ibid.* at para. 55. The case involved an appeal from a Québec Court of Appeal judgment that overturned the trial judge's approval of a plan of arrangement that contemplated the purchase of the shares of BCE Inc. by a consortium of purchasers by way of a leveraged buyout, financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a \$30 billion debt. The plan of arrangement was opposed by a group of financial and other institutions that held debentures issued by Bell Canada.

The debentureholders sought relief under the oppression remedy provisions of the *CBCA* on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. The plan of arrangement was approved by 97.93 percent of BCE's shareholders. The debentureholders also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA* on the basis that, on completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status. The Supreme Court found that there was no oppression.

- 9 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶55, citing *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.).
- 10 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶56.
- 11 *Ibid.* at para. 45. Other cases have recognized that creditors may bring claims: *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*, [1995] O.J. No. 4048, 25 B.L.R. (2d) 179 (Ont. Gen. Div.); affirmed on issue of oppression remedy (1998), 40 O.R. (3d) 563 (C.A.); *Levy-Russell Ltd. v. Shieldings Inc.* (1998), 41 O.R. (3d) 54 (Gen. Div.). See also *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394, 28 C.B.R. (4th) 294 (Ont. S.C.J.), where the court allowed a trustee in bankruptcy to use the oppression provisions in order to protect creditors. The action was for relief under the reviewable transaction provisions of the *BIA* and for oppression relief under the Ontario *Business Corporations Act*. The trustee challenged a transaction whereby Olympia obtained additional shares in Olympia & York Realty Corporation worth nothing and in return gave up a note worth several millions of dollars in order to obtain additional financing for the company. The Court held that the trustee was entitled to the amount to which the creditors would otherwise have been entitled had it not been for the transaction. The transaction unfairly disregarded the interests of the creditors. The Court held that as a result of the transactions, the OYDL creditors were inappropriately deprived of the value of US\$22 million to which they would otherwise have been entitled; and that the appropriate remedy in such a case would be to put the participants back in the same position as they would have been but for the wrongful act, citing *820099 Ont. Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266 (Ont. Gen. Div.); affirmed [1991] O.J. No. 1082 (Div. Ct.). Thus it was just and equitable to give the trustee the escrowed amount of US\$22 million plus interest.
- 12 *Ibid.* at para. 38.
- 13 *Ibid.* See also *Re Ferguson and Imax Systems Corp.* (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718 (Ont. C.A.).
- 14 *Ibid.* at para. 62.
- 15 *Ibid.* at para. 62.
- 16 *Ibid.* at para. 59.
- 17 *Ibid.* at para. 66.
- 18 *Ibid.* at para. 67.
- 19 *Ibid.* at para. 67.
- 20 *Ibid.* at para. 71.
- 21 *Ibid.* at para. 72.
- 22 *Ibid.* at para. 73, citing *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)); *var'd* (1998), 110 O.A.C. 160 (Div. Ct.). See

also *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161, 200 D.L.R. (4th) 289 (Ont. C.A.); application for leave to appeal dismissed [2002] S.C.C.A. No. 397.

- 23 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶74.
- 24 The Court held that: “Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm’s length shareholders in a widely held corporation”; *ibid.* at para. 75. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), “when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such”, at 727.
- 25 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶76, 77, citing *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.); *aff’d* (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.
- 26 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶78.
- 27 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶80, citing *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.); *aff’d* (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.); *var’d* (1998), 38 O.R. (3d) 749 (C.A.).
- 28 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶81.
- 29 *Ibid.*, observing at para. 89 that “Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable.” “As in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression”; *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶90.
- 30 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶91.
- 31 *Ibid.* at paras. 93, 94. Elsewhere, “oppressive” has been interpreted as meaning burdensome, harsh or wrongful: *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.); *affirmed* (2003), 40 B.L.R. (3d) 88 (Ont. C.A.). See also *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), [2001] O.J. No. 3394, 2001 CarswellOnt 2954, ¶30-31 (Ont. S.C.J. [Commercial List]); additional reasons at (2001), 2001 CarswellOnt 4739 (Ont. S.C.J. [Commercial List]); *affirmed* (2003), 68 O.R. (3d) 544 (Ont. C.A.); *Scottish Cooperative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324. “Unfairly prejudicial” has been held to mean “acts that are unjustly or inequitably detrimental”; and “unfairly disregards” has been held to mean unjustly or without cause, ignore or treat as of no importance the interests of security holders, creditors, directors or officers: *Piller Sausages & Delicatessens Ltd.*, *ibid.* A successful application for the oppression remedy does not require bad faith, although it may be a factor leading a court to grant a particular remedy: *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 2005 CarswellNS 342, [2005] N.S.J. No. 317, ¶116-117 (N.S. S.C.).
- 32 Discussed in Part VI of this article.
- 33 Source, S. Cavanaugh, Office of the Superintendent of Bankruptcy, November 2009.
- 34 *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 2005 CarswellOnt 1963 (Ont. S.C.J.); leave to appeal granted (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]). Motion allowed in part; leave to appeal was required and was granted, the Court of Appeal finding that “The issues were significant to bankruptcy practice and ought to be considered and addressed by the court. If leave were not granted, the companion appeal to the Divisional Court would be rendered moot. It would be unfair to effectively frustrate the shareholder’s right of appeal in respect of the oppression remedy. A unanimous shareholder agreement is allowed under Canadian corporations statutes to allow shareholders to remove some powers from the directors and vest those decision

making powers, duties and liabilities in the shareholders themselves. See for example, section 146 of the *CBCA*. There is no reported decision on the merits of the oppression claim.

- 35 *Ibid.* (Superior Court judgment), which held that since shareholders under a USA assume directors' duties to the extent that the USA allows them to exercise the powers of directors, the Court was, in effect, ruling on whether or not the exercise of the veto was in the best interests of the corporation. In the event it was found in error in respect of the ability to find a corporation a complainant oppressed under the *OBCA*, the Court held that it has the jurisdiction under the *BIA* to set aside the USA and approve the proposal in order to prevent one shareholder, with no economic interest, from blocking a restructuring that is in the best interests of the stakeholders.
- 36 A claim against directors by both shareholder and creditors in one proceeding is counted as one claim for purposes of Graph 2, whereas they were counted as separate claims for purposes of Graph 1.
- 37 One case being *Fiber Connections*, as discussed above.
- 38 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶82.
- 39 In some cases, as in the *Alberta Business Corporations Act*, the definition of complainant under the oppression remedy provisions explicitly includes creditors, subject to exercise of the court's discretion; *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, section 242. 242(1) See also *Bull HN Information Systems Ltd. v. L.I. Business Solutions Inc.* (1994), 23 Alta. L.R. (3d) 186, ¶2 and 26 (Q.B.).
- 40 *Peoples Department Stores Ltd. (1992) Inc.*, [2004] 3 S.C.R. 461, ¶51 (S.C.C.).
- 41 *Jacobs Farms Ltd. v. Jacobs*, [1992] O.J. No. 813 at 12-14 (Gen. Div.); *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86, ¶12 (Ont. Gen. Div.).
- 42 *Peoples Department Stores Ltd. (1992) Inc.*, [2004] 3 S.C.R. 461, ¶49 (S.C.C.).
- 43 *Re Sammi Atlas Inc.* (1998), 36 B.L.R. (2d) 318, 49 C.B.R. (3d) 165 (On. Gen. Div. [Commercial List]). The Court held: "I am of the view that it could reasonably be described as an 'unincorporated organization'. Even if I am wrong here, I would rely on the alternative of the definition being an inclusive one, i.e. without being limited to the list set out. Under that view, it would appear to me that this Committee (the TCC) could be considered to be a person", at para. 5.
- 44 *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 2005 CarswellINS 342, [2005] N.S.J. No. 317, ¶116-118 (N.S. S.C.). The term security is not defined in the Nova Scotia *Companies Act*, although it is defined in the *CBCA* and other statutes.
- 45 See Part 2 of this part for a discussion on the merits of the case.
- 46 For a discussion, see Janis P. Sarra and Ronald B. Davis, *Director and Officer Liability in Corporate Insolvency*, 2d. edition, (Toronto: Butterworths, forthcoming 2010).
- 47 *Re Graham Mining Ltd.*, [2001] O.J. No. 2160, 26 C.B.R. (4th) 28, ¶73; appeal dismissed [2002] O.J. No. 1550, 34 C.B.R. (4th) 37 (Ont. C.A.). See also *Toronto-Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Gen. Div.).
- 48 For example, section 5 of the *CCAA* specifies: "5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."
- 49 Section 5.1(2) of the *CCAA* specifies: "(2) A provision for the compromise of claims against directors may not include claims that (a) relate to contractual rights of one or more creditors; or (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors."

- 50 *Cheng v. Worldwide Pork Co.*, [2009] S.J. No. 277, 54 C.B.R. (5th) 86, ¶38, 47 (Sask. Q.B.).
- 51 *Ibid.* at para. 54. The Agriculture Food and Equity Fund ("AFEFE") was a fund administered by the Agricultural Credit Corporation of Saskatchewan ("ACS") that provided financing through the purchase of \$1 million in preferred shares in the defendant company. The shares were subsequently converted into a demand loan for \$1.5 million.
- 52 *Ibid.* at paras. 13, 15.
- 53 *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 7 B.L.R. (4th) 276, ¶180 (N.S. S.C.).
- 54 *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.* (2007), 28 C.B.R. (5th) 163 (Ont. S.C.J.); additional reasons at (2007), 2007 CarswellOnt. 3443 (Ont. S.C.J.); affirmed (2008), 208 CarswellOnt 3801 (Ont. C.A.).
- 55 *Ibid.*
- 56 *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.* (2007), 28 C.B.R. (5th) 163, ¶40 (Ont. S.C.J.); additional reasons at (2007), 2007 CarswellOnt. 3443 (Ont. S.C.J.); affirmed (2008), 208 CarswellOnt 3801 (Ont. C.A.). The Court found that for the purposes of the oppression remedy, the ACPA was not a complainant as it was neither creditor nor employee of Air Canada nor a party to its registered pension plans as the pension obligations were being met; the ACPA acquired the maximum amount of equity, sold its shares on closing of the restructuring and thus had no direct claim.
- 57 *Ibid.*
- 58 *Downtown Eatery (1983) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.); application for leave to appeal dismissed [2001] S.C.C.A. No. 397.
- 59 *Ibid.*
- 60 *Ibid.* at para. 56.
- 61 *Ibid.* citing *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 at 57 (Alta. Q.B.).
- 62 The court's general power to rectify oppressive and unfair consequences by any order it thinks fit is bolstered by a lengthy list of specific remedial powers the court can exercise, from enjoining the corporation to ordering its dissolution and liquidation. For example, s. 248(3) of the Ontario *Business Corporations Act* specifies that the court may make any order it thinks fit, including but not limited to: an order restraining the conduct complained of; an order appointing a receiver or receiver-manager; an order to regulate the corporations' affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement; an order directing an issue or exchange of securities; an order appointing directors in place of or in addition to any or all existing directors; an order directing the corporation or any other person to pay a security holder any part of the money paid by the security holder for securities; an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract; an order requiring a corporation, within the time specified, to produce to the court or an interested person financial statements or an accounting in such other forms as the court may determine; an order compensating an aggrieved person; an order directing rectification of the registers or other records of the corporation; an order winding-up the corporation; an order directing an investigation; an order requiring the trial of any issue.
- 63 *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1, ¶145 (Alta. Q.B.); leave to appeal refused *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46 (Alb. C.A.).
- 64 *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1, ¶145 (Alta. Q.B.); leave to appeal refused *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46 (Alb. C.A.).

- 65 *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46, ¶31 (Alb. C.A.).
- 66 *Ibid.* at para. 29.
- 67 *Ibid.* at para. 30.
- 68 *Ibid.* at paras. 32, 57.
- 69 *In the matter of the Arrangement of Uniforêt inc. c. Richter & Associés*, [2003] Q.J. No. 9328, 43 C.B.R. (4th) 254 (Que. S.C.); leave to appeal refused [2003] Q.J. No. 9709 (Que. C.A.); leave to appeal refused (2004), CarswellQue 237 (S.C.C.). The Court held that it does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A creditor that has stepped into the breach on several occasions to keep the debtor company afloat in the four years preceding the filing of the plan warrants special treatment. The Court observed that there are serious risks associated with any attempted sale of an insolvent enterprise over an unspecified period of time, and in the circumstances, it was not appropriate to attempt a sale for a small and unlikely possible gain, *ibid.* at paras. 28, 29. The Court held that the debtor deserved a chance to prove to its stakeholders that it can both survive and return to profitability. The Court concluded that only four of the six opposing creditors would sustain a real loss if the plan was approved and that the minority group of secured creditors had not been materially oppressed by the behaviour of the majority, at para. 33.
- 70 *Ibid.* at para. 33.
- 71 *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.); affirmed *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2006] O.J. No. 944, 79 O.R. (3d) 288 (Ont. C.A.).
- 72 *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2006] O.J. No. 944, 79 O.R. (3d) 288, ¶2 (Ont. C.A.). 12% of its voting common shares were owned by members of the public.
- 73 *Ibid.*
- 74 *Ibid.* at para. 6. The director that appealed, White, had arranged the Ravelston loan in his then capacity as co-chief operating officer of Hollinger, but signed the loan documentation on behalf of Ravelston, at paras. 15-16. White did not seek or obtain the prior approval of Hollinger’s independent directors before arranging the Ravelston loan or advancing the funds loaned, at para. 16. By the time of the oppression application, Black had been ordered to pay U.S. \$15 million pursuant to a summary judgment granted in civil proceedings in the United States involving various Hollinger companies. Black arranged for this judgment to be paid and thereafter took the position with Hollinger’s board of directors that he was entitled to set-off the Ravelston loan against the amount of the summary judgment that had been satisfied. Ravelston was facing liquidity problems at that time, *ibid.* at para. 24.
- 75 *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.); affirmed *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2006] O.J. No. 944, 79 O.R. (3d) 288 (Ont. C.A.).
- 76 *Ibid.*
- 77 *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2006] O.J. No. 944, 79 O.R. (3d) 288, ¶37 (Ont. C.A.).
- 78 *Ibid.*, citing *Re Stelco Inc.* (2005), 75 O.R. (3d) 5, “However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to “make any interim or final order it thinks fit”, including (s. 241(3) (e)) “an order appointing directors in place of or in addition to all or any of the directors then in office” ... para. 47: “This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief.”
- 79 *Ibid.* at para. 55.

- 80 *Ibid.* at para. 106. It also affirmed that the director was unable to make out a claim for indemnification. Given the situation that existed, the director had no business resisting the removal motion; and the Court held that even if the director did so in the subjective belief that he was acting in the best interests of the company, it did not assist in establishing a basis for an indemnity.
- 81 *Ibid.* at para. 60, an order containing such a term was only to be made in exceptional circumstances.
- 82 *Ibid.* at para. 69.
- 83 *BNP Paribas (Canada) v. BCE Inc.*, 2007 CarswellOnt 4962, 2007 ONCA 559, 33 C.B.R. (5th) 163, 43 C.P.C. (6th) 242, 227 O.A.C. 102, 159 A.C.W.S. (3d) 818 (Ont. C.A.); affirming *BNP Paribas (Canada) v. BCE Inc.* (2006), 24 C.B.R. (5th) 233, 33 C.P.C. (6th) 180, 2006 CarswellOnt 4982 (Ont. S.C.J.). *Chow v. Bresea Resources Ltd.* involved an appeal from an order appointing an interim receiver-manager, directing the receiver to make an immediate assignment into bankruptcy, *Chow v. Bresea Resources Ltd.*, [1997] A.J. No. 1210 (Alb. C.A.); supplementary judgment [1998] A.J. No. 125 (Alta C.A.). The order was made in the context of a shareholders' oppression action against the respondent company that was closely related to the Bre-X companies. The debtor had failed to provide a plan of arrangement under the *CCAA* and its protection under that statute failed. The appeal was allowed, the Court finding that the judge of first instance erred in concluding that the respondent was insolvent on the basis of the filing for relief under the *CCAA*. The Court held that the uncontradicted evidence was that the respondent was not insolvent at the time of the order. The appointment of an interim receiver and manager is a remedy contemplated in oppression proceedings and the appellate court observed that the debtor's affairs were in a state of suspension; it was not carrying on an active business and its assets were highly liquid and therefore vulnerable. The claims against the company, primarily by shareholders, are substantial. The appointment of a receiver/manager will not interfere with any current operations of the company and acts as some protection for its assets, at least on an interim basis. The Court held that the interim receiver and manager "will obviously need the power to commence and defend legal proceedings on behalf of the company", at para. 4. There is no reported decision on the merits of the oppression claim.
- 84 In *BNP Paribas (Canada)*, *ibid.*, the appellants/defendants alleged that the motion judge erred in finding that Ontario was the convenient forum for trial of a multi-million dollar action arising out of the insolvency of Teleglobe Inc. The defendants were BCE Inc., the former parent company of Teleglobe, and several of the former directors of Teleglobe. The action by the plaintiff/respondent lenders to Teleglobe was for damages for breach of contract and oppression, alleging that the defendants arranged BCE's affairs to minimize BCE's exposure in the event of Teleglobe's insolvency, unilaterally withdrew BCE financial support to Teleglobe, and failed to honour a previous financial commitment, and sought damages for breach of fiduciary duty and oppression. The oppression claim against BCE and the Teleglobe directors focused on the management and control of Teleglobe by BCE and the directors and involved similar issues to those in the breach of contract claim, at para. 6. The actions were precipitated by Teleglobe's insolvency and commencement of a *CCAA* proceeding. After the initiation of the *CCAA* proceedings, the Syndicate members, including the respondent, brought an action seeking a finding of oppression against BCE in relation to the way it caused Teleglobe to conduct its affairs. BCE brought a motion to stay the Syndicate action on the basis that the Ontario court lacked jurisdiction to try the case and on the basis of *forum non conveniens*. Farley J. dismissed that motion, *ibid.* at para. 8. The appellate court found that the judge had considered both the facts and relevant legal principles.
- 85 In *Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.*, the Ontario Court of Appeal held that the conduct of the corporation and its director/sole shareholder was unfairly prejudicial to or unfairly disregarded the interests of the creditor; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*, [1995] O.J. No. 4048 (Gen. Div.); 131 D.L.R. (4th) 399; affirmed on oppression issue (1998), 40 O.R. (3d) 563 (C.A.) at para. 5, varied on the bulk sale question. This oppression action was brought by a judgment creditor against the corporation and its sole shareholder, director and officer. The respondent corporation had failed to renew a letter of credit, which was to be security for a judgment debt owing to the plaintiff. All other creditors' claims had been met and the sole director and shareholder had benefited from the lapse because he had used the assets pledged to secure the letter of credit to relieve his exposure under a personal guarantee. The Court held that the director's conduct had unfairly prejudiced or unfairly disregarded the plaintiff creditor's interests within the meaning of the oppression provisions of Ontario's corporations statute, and thus the director was personally liable. Since the corporation no longer had assets, the Court held that it was appropriate to rectify the matter by requiring the director to personally compensate the creditor for the loss. The Court held: "Lawyers and judges tend to worry and fuss a great deal about whether or not a given set of circumstances permits the piercing of the "corporate veil". They do so for legitimate reasons pertaining to corporate law. While personal liability of a director in an oppression remedy situation may be founded upon such a base — as it was in the authorities referred to above — the issue, in my view, is not so much one of piercing the corporate veil as it is a question of the overall application of s. 248(2) of the *OBCA* and the interplay between its various provisions. When "oppressive" conduct (in the broad

sense), has been found to have occurred under s. 248, the court has a very broad discretionary power to “make an order to rectify the matters complained of”. That broad discretionary power, under s. 248(3) is to “make any interim or final order it thinks fit”. See also *Canadian Opera Company v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (H.C.J.); appeal dismissed (1990), 75 O.R. (2d) 720 (O.C.G.D. (Div. Ct.)). *Prime Computer of Canada Ltd. v. Jeffrey* (1991), 6 O.R. (3d) 733 (Gen. Div.).

- 86 In *Adecco Canada Inc. v. J. Ward Broome Ltd.*, the Ontario Superior Court of Justice held a director personally liable for foreclosure transactions that had caused unfair prejudice and had unfairly disregarded the interests of unsecured creditors; *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 21 C.B.R. (4th) 181 (Ont. S.C.J. (Commercial List)). As the directing mind of both the old and new companies, the director stood to benefit if Newco foreclosed on the assets of Oldco, because the surplus generated after accounting for the old company’s secured debt would accrue to the benefit of Newco instead of the unsecured creditors, allowing the latter to continue in business without the burden of old debts. *Ibid.* at para. 12, citing s. 245(c), *OBCA*. The Court held that an unsecured creditor had status to bring a claim under the oppression provisions of the *OBCA* and the oppression remedy is to protect the reasonable expectations of creditors. The Court held that an unsecured creditor would reasonably expect that the secured creditor would have proceeded to collect the accounts receivable rather than foreclose, and that even if it had chosen to foreclose, the creditor could have reasonably expected the debtor to object to the foreclosure during the notice period. The Court found that the respondents failed to demonstrate that the foreclosure was a reasonable business decision, rather than a form of self-dealing at para. 25. The Court held that the director had caused unfair prejudice to and had unfairly disregarded the interests of the unsecured creditor. The director was held personally liable and was ordered jointly and severally liable with Newco to pay the sum of the value of assets in excess of the amount owing on the bank loan. Given that there were other unsecured creditors as well as the applicant Adecco, the Court ordered that the sums to be paid by the director and Newco should be made available to satisfy the claims of all creditors, not just the applicant at para. 28-30.
- 87 *820099 Ontario Inc. v. Harold Ballard Ltd.*, *supra*, note 8
- 88 *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (S.C.J. (Commercial List)); appeal dismissed [2001] O.J. No. 3918 (S.C.J. (Div. Ct.)).
- 89 The director had certified that the representations were true. *Ibid.*
- 90 *Ibid.* The principal of that company was a former director of the debtor corporation.
- 91 *Ibid.* at para. 34.
- 92 *Ibid.* at para. 42.
- 93 *Ibid.* The Court held that no steps were taken by the corporation to assert an ownership interest in the intellectual property because the inventor was also the director and owner of the small closely held company, and it was in his personal interests not to assign the ownership to the corporation. The Court rejected the argument that the third party company had good title to the intellectual property on the basis that its principal was aware of the litigation prior to assignment of the patents.
- 94 *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589, ¶46-49 (S.C.J. (Commercial List)); appeal dismissed [2001] O.J. No. 3918 (S.C.J. (Div. Ct.)).
- 95 *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300, ¶36 (Ont. Ct. (Gen. Div.)); var’d (1998), 110 O.A.C. 160 (Div. Ct.).
- 96 *Ibid.*, at para. 52 of the trial judgment. On appeal, in *SCI Systems Inc. v. Gornitzki Thompson & Little Co.*, [1998] O.J. No. 2299 (Ont. C.J. (Gen. Div.)) (Div. Ct.), the Court held that “self-dealing of the nature, as here, outside the ordinary course of business is beyond reasonable expectations since the direct result was a frustration of any chance of repayment of the soon-to-be-due debt — while the directors directly and indirectly benefited. The course of conduct engaged in here was to denude GTL Co. of any material assets without justification with the result that the directors got all the truly realizable assets while recognizing the looming SCI obligation would not be satisfied ... 5 We would not interfere with the discretion exercised by Justice Epstein in fashioning a remedy against

the three directors. However, in our view, the remedy against these individual affiliates must be tempered with the consideration that the affiliates have only “benefited” in varying and lesser degrees than the award against them. In our view, the remedy against them should be adjusted to reflect the amount of money or money’s worth received by them from GTL Co ... 7 In the end result the appeal is dismissed except as to the adjustment as to the remedy against the affiliates as set out above”.

- 97 *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)); var’d (1998), 110 O.A.C. 160, ¶59, 60, 66 (Div. Ct.). The proper way to rectify this result is to require the respondents to compensate the applicant for the amount of the outstanding indebtedness of GTL Co., \$882,241.79, together with accrued interest.
- 98 *Danylchuk v. Wolinsky*, [2007] M.J. No. 80 (Man Q.B.); appeal dismissed *Danylchuk v. Wolinsky* (2007), 38 C.B.R. (5th) 173 (Man. C.A.); leave to appeal refused [2008] S.C.C.A. No. 63. On appeal, the Court of Appeal held that the judge did not commit a palpable or overriding error in considering the affidavits filed by the plaintiffs and respondent directors, and concluding there was no issue requiring a trial. There were few disputed facts as opposed to potential disputed inferences. Undisputed evidence showed that the conduct of the directors was unfairly prejudicial to and unfairly disregarded the interests of the plaintiffs. Many of the alternate remedies for oppression were not available, where the company was in receivership. A monetary remedy was available despite the lack of a trial. The judge did not err in principle and did not award an unjust remedy. Both directors were clearly implicated. Although the remedy was significant, so were the losses incurred by the plaintiffs. Even if their conduct was not illegal, the directors owed more to their shareholders and creditors; and their conduct prevented them from managing their investments in an informed and knowledgeable manner.
- 99 *Ibid.* at para. 66.
- 100 *Ibid.* at para. 68.
- 101 *1413910 Ontario Inc. (c.o.b. as Bulls Eye Steakhouse & Grill) v. McLennan*, [2009] O.J. No. 1828 (Ont. S.C.J.) (Div. Court). The Court held at para. 6: “Between the judgment of February 13, 2004 declaring wrongful termination of a lease and the judgment of June 30, 2006 quantifying damages with interest and costs, the plaza was sold and within days, the entire net proceeds of the sale after paying out the registered mortgage and executions and various sums to lawyers were paid out to the appellant and were put into her personal bank account. There were no assets remaining to satisfy Bulls Eye’s judgment when its damages were quantified in June, 2006.”
- 102 It concluded that the creditor became a creditor when it obtained a summary judgment in its favour, and although it was not yet a judgment creditor in that it did not have a legal right to enforce execution of a judgment for a specific sum of money, *1413910 Ontario Inc. (c.o.b. as Bulls Eye Steakhouse & Grill) v. McLennan*, [2009] O.J. No. 1828 (Ont. S.C.J.) (Div. Court) at para. 6.
- 103 *1413910 Ontario Inc. (c.o.b. as Bulls Eye Steakhouse & Grill) v. McLennan*, [2009] O.J. No. 1828 (Ont. S.C.J.) (Div. Court) at paras. 9, 10.
- 104 *Ibid.* at paras. 21, 22.
- 105 *Ibid.* at para. 31.
- 106 *Ibid.* at para. 37.
- 107 *Ibid.* at para. 34.
- 108 *ADI Ltd. v. 052987 N.B. Inc.*, [2000] N.B.J. No. 467, ¶65, 66 and 72 (C.A.); application for leave to appeal dismissed [2001] S.C.C.A. No. 48.
- 109 *Ibid.*

- 110 *Novacrete Construction Ltd. v. Profile Building Supplies Inc.* (2000), 7 B.L.R. (3d) 248 (Ont. S.C.J.).
- 111 *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2008] O.J. No. 958, 41 B.L.R. (4th) 51, ¶60 (Ont. C.A.). The comments were made *in obiter*. The case involved an appeal by an assignee of lease from a tenant, from judgment in favour of the landlord, JSM, for unpaid rent. The appeal was dismissed; the landlord and tenant relationship does not provide the landlord with an oppression remedy against the assignee, which was a corporate entity that created the tenant shell corporation.
- 112 *Ibid.*, citing *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] S.C.J. No. 55, ¶34.
- 113 *Ibid.* at para. 62. Having negotiated a detailed lease that did not bind any other entity, J.S.M. could not argue that it reasonably expected that some other corporate entity would be liable if Brick Ltd. breached the original lease.
- 114 *Ibid.* at para. 66.
- 115 *Ibid.*, citing *S.C.I. Systems, Inc. v. Gornitzki Thompson & Little Co. Ltd.* (1997), 147 D.L.R. (4th) 300 (Gen. Div.); var'd on other grounds (1998), 110 O.A.C. 160 (Div. Ct.).
- 116 *Capobianco v. Paige*, [2009] O.J. No. 2442, ¶377 (Ont. S.C.J. [Commercial List]). There was no reasonable expectation that their conduct was in the best interests of the company. They deliberately acted against the company's interests in a manner intended to deprive it of its value. The Court held that where wrongdoing has caused changes in expectations from their own misappropriation, the wrongdoers cannot be permitted to rely on those changes in expectation to limit the remedies available to sanction their egregious conduct.
- 117 *Ibid.* at para. 376.
- 118 *Ibid.* at para. 375.
- 119 *Levy-Russell Ltd. v. Shieldings Inc.* (1998), 41 O.R. (3d) 54 (Gen. Div.).
- 120 Natasha MacParland and Linda Chiasson, "Narrowing the Lens: Limiting the Use of Oppression in CCAA Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 407-429.
- 121 Stephanie Ben — Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations", in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429-454 at 430-431 and 436.
- 122 *Ibid.* at 440.
- 123 MacParland and Chiasson, *supra*, note 119 at 408.
- 124 *Ibid.* at 409.
- 125 *Ibid.* at 427.
- 126 *Ibid.* at 408.
- 127 The Honourable James Farley, "The State of the Oppression Remedy in Canada Today", paper presented to the UBC National Centre for Business Law speakers' series, Vancouver, 2007, later published at (2007) 33 *Advocates Quarterly* 261.
- 128 MacParland and Chiasson, *supra*, note 119 at 408.

- 129 Stanley Beck wrote in 1982: “The oppression remedy, as it appears in section 234 of the *Canada Business Corporations Act* and in section 247 of Bill 6, an *Act to Revise the Ontario Business Corporations Act*, is, beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. It is unprecedented in its scope. It is being applied to a wide variety of situations in both public and private companies, and, most importantly, the courts have shown a willingness to carry out the mandate that the legislatures have given them to fashion remedies for shareholders who complain that they have been dealt with unfairly”; Stanley M. Beck, “Minority Shareholders’ Rights in the 1980’s” Special Lectures of the Law Society of Upper Canada, 1982 at 312.
- 130 *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (H.L.), Lord Wilberforce held at 499-501: “The foundation of it all lies in the words ‘just and equitable’ and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure ... The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”
- 131 *Peoples Department Stores Ltd. (1992) Inc.*, [2004] 3 S.C.R. 461, ¶49 (S.C.C).
- 132 *820099 Ontario Inc. v. Harold Ballard Ltd.*, *supra*, note 8.
- 133 *Peoples Department Stores Ltd. (1992) Inc.*, *supra*, note 129 at para. 62.
- 134 *Ibid.* at para. 71.
- 135 *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.); leave to appeal refused (2002), 2002 CarswellOnt 246, [2001] S.C.C.A. No. 397 (S.C.C.). See also *Ferguson v. Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 at 727 (Ont. C.A.); leave to appeal refused (1983), 2 O.A.C. 158 (note), 52 N.R. 317 (note) (S.C.C.); *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.); *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 3579 (Ont. S.C.J. [Commercial List]); affirmed (2004), 2004 CarswellOnt 691, [2004] O.J. No. 636 (Ont. C.A.).
- 136 *Ibid.* at para. 71.
- 137 *Nystad v. Harcrest Apartments Ltd.* (1986), 1986 CarswellBC 123, [1986] B.C.J. No. 3145, ¶24 (B.C. S.C.); *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.); affirmed (2003), 40 B.L.R. (3d) 88 (Ont. C.A.); *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 2005 CarswellNS 342, [2005] N.S.J. No. 317 (N.S. S.C.); *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), [2001] O.J. No. 3394, 2001 CarswellOnt 2954, ¶30-31 (Ont. S.C.J. [Commercial List]); additional reasons at (2001), 2001 CarswellOnt 4739 (Ont. S.C.J. [Commercial List]); affirmed (2003), 68 O.R. (3d) 544 (Ont. C.A.).
- 138 *BCE Inc. v. 1976 Debenture Holders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560; *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 2005 CarswellNS 342, [2005] N.S.J. No. 317, ¶116-117 (N.S. S.C.).
- 139 *BCE Inc. v. 1976 Debentureholders*, *ibid.* at paras. 76, 77; *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.); aff’d (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.
- 140 *Harbert Distressed Investment Master Fund Ltd.*, *supra*, note 137.
- 141 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶72.

- 142 *SCI Systems Inc.*, *supra*, note 94.
- 143 *Ibid.* at para. 73, the Court finding that where there is a departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of legal rights will generally, although not inevitably, give rise to a remedy. See also *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161, [2001] O.J. No. 1879 (Ont. C.A.); leave to appeal refused [2002] 2 S.C.R. vi.
- 144 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶75.
- 145 *Ibid.* at para. 80.
- 146 *Ibid.*
- 147 *Ibid.* at para. 71.
- 148 *Ibid.* at para. 70.
- 149 *Downtown Eatery*, *supra*, note 21. The Court held: "36 However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common and important one — he is a man who had a job, with a salary, benefits and duties. He was fired — wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees. 37 A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets."
- 150 *Ibid.* at para. 64.
- 151 *Ibid.* at paras. 62-64.
- 152 *A. E. Realisations (1985) Ltd. v. Time Air Inc.* (1994), 127 Sask. R. 105, ¶23 (Q.B.); affirmed (1995), 131 Sask. R. 249 (C.A.). Some courts have declined to grant status to complain under the oppression provisions where the claim is contingent, see Sarra and Davis, *supra*, note 45.
- 153 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶66.
- 154 *Ibid.* at para. 73, citing *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)); *var'd* (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289; leave to appeal refused [2002] 2 S.C.R. vi.
- 155 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, ¶74.
- 156 *Ibid.* at para. 75.

Mostcash plc & Others v. Fluor Limited

Case No: A1/2002/0135

A1/2002/0901

Court of Appeal (Civil Division)

11 July 2002

Neutral Citation No: [2002] EWCA Civ 975**2002 WL 1311119**Before: Lord Justice Waller , Lord Justice
Chadwick and Mr Justice Douglas Brown

Thursday 11th July, 2002

AnalysisOn Appeal from the Technology &
Construction Court

(His Honour Judge Thornton QC)

Representation

- Mr R ter Haar QC (instructed by Lovells , London) for the Defendants/Appellants.
- Mr M Lerego QC & Mr N Collings (instructed by Jarmans , Kent) for the Claimants/Respondents.

JUDGMENT

Lord Justice Chadwick :

These two appeals are against orders made on 11 January 2002 and 19 April 2002 by His

Honour Judge Thornton QC, in the Technology and Construction Court, when determining preliminary issues in proceedings brought by Mostcash plc (formerly known as UK Paper Plc, and now in liquidation) and others against Fluor Limited (formerly known as Fluor Daniel Limited) and others. For reasons which will appear in the course of this judgment it is necessary to describe, in some detail, the circumstances in which those orders came to be made.

The underlying facts

The proceedings arise out of an agreement (“the EPCM agreement”), dated 1994 but not signed until September 1996, between UK Paper and Fluor for the design, procurement and construction management of a paper recycling facility at Kemsley Mill, near Sittingbourne. The EPCM agreement provided that Fluor, in consideration of a lump sum price of £3.08 million and certain re-imbursable costs, was to perform the design, engineering, procurement, construction management and other services (“the Services”) set out in section 1.2. The construction of the recycling facility had been completed and handed over to UK Paper in or about October 1995; that is to say, before the EPCM agreement was signed. But it is common ground that Fluor had been providing the services contemplated by the EPCM agreement from 1994 or thereabouts and throughout the period of construction.

Litigation — but not the present proceedings — followed soon after completion and handover. The parties to that litigation — which arose

out of a dispute in relation to the construction of piping services and the supply of piping materials — were UK Paper, Fluor, Capper Engineering Services Limited (the piping services contractor) and Trouvay & Cauvin (the supplier of piping materials). In those proceedings UK Paper claimed against Fluor damages for breach of contract and in tort (for negligence) in relation to (amongst other matters) (i) failure to give adequate advice, (ii) failure to issue drawings on time, (iii) failure to manage the supply of materials from Trouvay & Cauvin to Capper Engineering, (iv) failure to expedite the supply of materials and (v) failure to report adequately or timeously on costs. Fluor counterclaimed against UK Paper for sums said to be due under the EPCM agreement.

That litigation was compromised — at least as between UK Paper and Fluor — shortly before trial upon terms set out in a letter dated 15 January 1998 from Lovell White Durrant (the solicitors for Fluor) to the Jarman Partnership (the solicitors for UK Paper). The compromise provided for the payment by Fluor to UK Paper of £100,000 and for the issue by Fluor of credit notes in respect of the invoices upon which its counterclaim was founded. The letter of 15 January 1998 referred to the litigation then current — “the Main Action” (1996 ORB 1288) and “the Trouvay & Cauvin Action” (1995 U 664). Paragraph 1 of the terms of settlement provided:

“This agreement is between UK Paper plc and their successors or assignees (“your clients”) and Fluor Daniel Limited and their successors or assignees (“our clients”) and is in full and

final settlement of all claims and in satisfaction of all causes of action between our respective clients arising out of or in connection with your client's paper deinking and recycling plant at Kemsley (“the Project”) including but not limited to all matters in dispute in the Main Action and the Trouvay & Cauvin Action and excluding only any cause of action that may in future accrue to UK Paper plc

- (a) for any latent defect arising from our client's design (to the extent, if at all, it is not excluded by the terms of the Engineering, Procurement, Project and Construction Management Agreement between our respective clients in respect of the Project); or
- (b) in connection with any personal injury claim brought against UK Paper plc relating to accident or bodily injury suffered during the construction of the Project by any contractor, servant or agent.”

The present proceedings

The present proceedings were commenced in January 2001. The claim is in respect of damage arising from defects in the design of the cladding to the buildings. Put shortly, it is said that Fluor is in breach of contract — alternatively liable in negligence — in that, knowing that the processes carried out in the course of recycling paper release into the internal atmosphere considerable heat, humidity and acidic and

alkaline elements, it failed to take those factors into account in preparing or procuring designs and specifications under the EPCM agreement.

Fluor took the point that any cause of action in contract, for breach of the EPCM agreement, must have accrued to UK Paper before 15 January 1998; and so was barred by the compromise embodied in the letter of that date. It took the further point that the EPCM agreement itself precluded a claim for damages for breach of contract; and precluded a claim in tort.

The exclusion of claims by the terms of the EPCM agreement itself

The contention that the EPCM agreement itself precludes the claims in these proceedings is founded upon provisions in Article V of that agreement, read in conjunction with provisions in Article XI. Article V sets out the warranties and guarantees given by Fluor. Sections 5.1 and 5.3 are in these terms:

Fluor Daniel's Services

“5.1 Fluor Daniel warrants and guarantees that it will perform the Services in accordance with the standards of care and diligence normally practiced by recognized engineering and construction firms in performing services of a similar nature. Fluor Daniel shall properly perform, at its own costs, upon the written request of Owner at any time within a one (1) year period from the date the Facilities, or any unit thereof, are transferred to Owner pursuant to Section 9.2, all corrective Services within the

original scope of Services necessary to conform to the foregoing guarantee.

5.2 ...

Limitations

5.3 The obligations contained in this Article V are Fluor Daniel's sole warranty and guarantee obligations and Owner's exclusive remedy in respect of quality of the Services. Owner's failure to properly maintain the Facilities or allow Fluor Daniel to promptly make such tests and perform such remedial services as both parties jointly deem appropriate shall relieve Fluor Daniel of its guarantee relative to the subject of such test or service.”

In that context “Owner” means UK Paper; and “Facilities” means “the physical properties to be constructed as part of the Project”. The “Project” means the design, engineering, procurement and furnishing of materials and equipment and construction management for and construction of the recycling facility described in an exhibit attached to the EPCM agreement.

It is said that the effect of the words “The obligations contained in this Article V are Fluor Daniel's sole warranty and guarantee obligations” in the first sentence of section 5.3 is that Fluor's only obligation in relation to its own services is that set out in the first sentence of section 5.1; that is to say “that it will perform the Services in accordance

with the standards of care and diligence normally practiced by recognized engineering and construction firms in performing services of a similar nature”. Further, that the effect of the words “The obligations contained in this Article V are ... Owner's exclusive remedy in respect of quality of the Services” — in that first sentence of section 5.3 is that the only remedy available to UK Paper in the event that Fluor fails to perform the Services in accordance with normally recognised standards of care and diligence is that provided by the second sentence of section 5.1; that is to say, UK Paper's only remedy is to require Fluor to perform corrective services necessary to conform to the obligation in the first sentence of section 5.1.

Article XI of the EPCM agreement contains what are described as “General Provisions”. Although contained in Article XI, they are set out — curiously — as sections 10.1 to 10.14. Sections 10.7, 10.8 and 10.14 are in these terms, so far as material:

Representations and Remedies

“10.7 Fluor Daniel makes no representations, covenants, warranties or guarantees, express or implied, other than those expressly set forth herein. The rights and remedies with respect to the Services, whether in contract or otherwise, are limited to those expressly set forth in this Agreement.

Damages

10.8 Fluor Daniel shall in no event be responsible or held liable for consequential

damages, including without limitation, liability for loss of use of the Facilities or existing property, loss of profits, loss of product or business interruption however the same may be caused ...

...

Interpretation

10.14 ...

(d) This Agreement sets forth the above complete understanding of the parties as at the date first above stated, supersedes any and all agreements and representations made or dated prior hereto, and may be amended only by a writing signed by an officer of each party.”

It is said that the effect of the second sentence of section 10.7 — and, in particular, the words “whether in contract or otherwise” — limit the rights and remedies of UK Paper in respect of the Services to those expressed in the EPCM agreement; and so exclude any claim for damages in tort arising out of a failure by Fluor to perform in accordance with any non-contractual duty of care to which it might otherwise be subject. That conclusion is reinforced, it is said, by the first sentence of section 10.7 and by the “entire agreement” clause in section 10.14(d).

The identification of preliminary issues

It was in those circumstances that, before serving a substantive defence, Fluor sought and obtained an order for the trial of preliminary issues. On 8 June 2001 His Honour Judge Havery QC directed that the following issues be tried in these proceedings as between UK Paper and its co-claimants (“the Claimants”) and Fluor (“the First Defendant”):

- “(i) Is the claim against the First Defendant barred by the settlement agreement of 15 January 1998 on the ground that the Claimants' cause of action against the First Defendant accrued on or before that date?
- (ii) Is the First Defendant's liability limited to the warranty and guarantee given in article V of the Engineering Procurement and Construction Management Agreement between UK Paper plc and the First Defendant?”

Judge Havery directed that Fluor should serve a defence limited to those preliminary issues. He fixed a date in November 2001 for the hearing of those issues.

A statement of defence was served on 18 June 2001. It took the points that I have already identified. UK Paper and its co-claimants served a reply on 5 July 2001. The claimants' response on the first preliminary issue is set out in paragraph 5 of that reply:

- “(a) The claims in the action against the First Defendant are made in respect of defects arising from the First Defendant's design and are not excluded by the terms of [the EPCM] Agreement.
- (b) Those defects were latent at the date the Settlement Agreement was made.
- (c) Upon its true construction, the Settlement Agreement, and in particular the words “excluding only any cause of action that may in future accrue to UK Paper plc”, excluded from the settlement any causes of action that came to the knowledge of UK Paper plc after 15 January 1998.
- (d) The causes of action against the First Defendant that are the subject of the claim had not come to the knowledge of the Claimants on 15 January 1998.
- (e) Alternatively, it is not admitted that the Claimants' cause of action in tort against the First Defendant had accrued by 15 January 1998.”

The claimants took four main points in relation to the second preliminary issue. They may be summarised as (i) points on the construction of the EPCM agreement, (ii) a claim for rectification of the EPCM agreement, (iii) reliance on the Unfair Contract Terms Act 1977 in relation to the terms in the EPCM agreement on which Fluor relied to exclude claims and (iv) an assertion that Fluor was estopped, by a common assumption underlying the compromise of 15 January 1998, from

asserting that the EPCM agreement had the effect for which Fluor was now contending.

The construction points are set out in paragraphs 9 and 10 of the reply. There were three points under that head. First, that “Services” was defined in terms apt to include only services that Fluor had performed; that the claim was in respect of matters which Fluor had failed to perform; and that, accordingly, section 5.1 of the EPCM agreement had no application. Second, that neither section 5.3 nor section 10.7 of the EPCM agreement excluded the term implied into that agreement by section 13 of the Supply of Goods and Services Act 1982 or implied conditions as to merchantable quality and fitness for purpose. Third, that neither section 5.3 nor section 10.7 of the EPCM agreement excluded UK Paper's right to claim damages for breach of contract.

The case on rectification is set out in paragraphs 11 to 13 of the reply. Paragraph 11 contains the assertion that the EPCM agreement should be rectified by the addition of a term that:

- “(i) Fluor Daniel will carry out the Services to be performed under this Agreement with reasonable care and skill;
- (ii) The Facilities will be of merchantable quality and reasonably fit for their purpose;
- (iii) Nothing in clause 5.3 or 10.7 of this Agreement excludes or limits the right to sue for damages for breach of (i) or (ii).”

The factual basis of that claim to rectification appears in paragraph 12 of the reply. Put shortly, it is said that UK Paper relied on the discussion and negotiation between the parties in relation to sections 5.3 and 10.7 in the course of an interchange of successive drafts of the EPCM agreement; and, in particular, on what had been said or understood by Mr Moccock (of UK Paper) at and following a meeting with Mr Williams (of Fluor) on 19 April 1996. As a result of discussion and negotiation the words “implied warranties of merchantability and fitness for a particular purpose are specifically excluded” — which had appeared in section 10.7 of Fluor's first draft of the agreement — had been deleted. It is said that Mr Moccock understood that the effect of section 5.3, in conjunction with section 10.7 (if those words were deleted), was that Fluor was accepting that UK Paper's rights in respect of breaches of the terms that would usually be implied as to the quality of services and the merchantability and fitness for purpose would not be excluded or limited by the agreement; and that Mr Williams knew that that was Mr Moccock's understanding.

Paragraph 13 of the reply contains an assertion which is, I think, founded on observations of Lord Justice Stuart-Smith in *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 280B–D. The paragraph is in these terms:

“It is inequitable and unconscionable for the First Defendant to rely on the terms of the [EPCM] Agreement for the effect contended

for in the Defence because the First Defendant knew of Mr Moccock's understanding of the effect of the changes to The First Defendant's Original Draft Contract and intended that UK Paper plc should understand the changes that way. It would be just and equitable for the [EPCM] Agreement to be performed in accordance with the term set out in paragraph 11 above.”

The Unfair Contract Terms Act point is made in paragraphs 14 to 16 of the reply. In the form to which it was amended in the course of the hearing in November 2001 paragraph 14 contains the assertion that section 2 of the Act applies to the EPCM agreement in the circumstances (i) that Fluor entered into that agreement in the course of its business and (ii) that the agreement contained express and implied terms that Fluor would take reasonable care and exercise reasonable skill. It is said, in paragraph 15 of the reply, that terms in the EPCM agreement which purport to exclude Fluor's liability for breach of the duty to take care and exercise skill — and, in particular, sections 5.3 and 10.7 of that agreement — fail to satisfy the requirement of reasonableness under the 1977 Act. Accordingly, as it is put in paragraph 16 of the reply:

“... the First Defendant cannot by reference to those terms exclude or restrict its liability to the Claimants and the Claimants' remedies consequent on such breach ...”

The fourth point — estoppel — is pleaded at paragraph 17 of the reply:

“Further or alternatively, UK Paper plc and the First Defendant entered into the Settlement Agreement acting upon the common assumption that under the [EPCM] Agreement the First Defendant could be liable after 15 January 1998 in respect of latent defects falling within (a) [of paragraph 1 of the letter of that date]. The First Defendant is therefore estopped from contending (as it does in paragraph 10 of the Defence) that the true meaning and effect of the terms of the [EPCM] Agreement are such as to prevent any such liability from arising.”

UK Paper served a witness statement made by the solicitor who had countersigned the letter of 15 January 1998. Fluor responded with a witness statement made by the solicitor who had sent that letter. Fluor applied for a ruling that those statements were not admissible in relation to the construction of that letter (the first issue). That application came before Judge Havery on 12 October 2001. He made the order sought. There was also before Judge Havery on that day an application by UK Paper to re-amend its particulars of claim to rely on the term pleaded in paragraph 11 of the reply; that is to say, the term as to care and skill, merchantable quality and fitness for purpose which UK Paper was seeking to have included

in the EPCM agreement by way of rectification. The judge gave permission to re-amend and directed that “the question whether such a term existed should be heard in the hearing of the preliminary issues”. The effect of his order of 12 October 2001 was to add a third issue to the two which had been identified in the earlier order of 8 June 2001. That was reflected in an increase in the time estimate for the hearing that was to fixed to commence on 5 November 2001.

When the preliminary issues came before the court for hearing on 5 November 2001 the formal position was that there were three issues to be determined: (i) whether the claim made against Fluor in the proceedings was barred by the terms of compromise set out in the letter of 15 January 1998 (on the ground that UK Paper's cause of action against Fluor accrued before that date); (ii) whether, on the true construction of the EPCM agreement as executed, Fluor's liability in respect of the recycling project was limited to the warranty and guarantee given in article V of the EPCM agreement; and (iii), if so, whether the EPCM agreement should be rectified to include the term as to care and skill, merchantable quality and fitness for purpose set out in paragraph 11 of the claimants' reply.

We were told, however, that, although that may have been the formal position, it did not reflect the common understanding of the parties and their counsel. Nor, it was said, did that formal position reflect the understanding and intention of Judge Havery following the hearing on 12 October 2001. What was understood and intended was that, in addition

to a determination of the three issues which the judge had ordered to be heard as preliminary issues, there should be a determination of the other issues raised by the reply; that is to say, (iv) the Unfair Contract Terms Act point and (v) the estoppel point. If that were the common understanding of the parties and their counsel — and there was no suggestion in this Court that it was not — then it was unfortunate, as it seems to me, that they did not co-operate in putting before the judge by whom the preliminary issues were to be heard an agreed statement of the issues which they were asking him to decide.

The failure to co-operate in the formulation of an agreed statement of issues — to the extent that the issues were not defined by the existing orders — was doubly unfortunate in the circumstances (a) that, in the event, the preliminary issues were not heard by Judge Havery — so that, whatever understanding and intention may be attributed to him, there was no reason why another judge should appreciate that the issues were not limited to those identified in the orders which he had made — and (b) that the judge to whom the matter was transferred, Judge Thornton, raised at the outset of the hearing on 5 November 2001, in express terms, the question “Have the parties defined what the current issues are, and if not ought we to attempt a definition of them before we start the evidence.” The response, by counsel for Fluor, was that “I am sure we could at some convenient moment draw up an extra couple of questions”. But no moment was found to be convenient until the conclusion of the evidence. And when, eventually, counsel were able to find a moment or moments

that were convenient (after the evidence had been completed) they were unable to reach agreement on what a list of issues should contain.

The parties' inability to agree the issues which they wished the judge to decide was the result, in part at least, of the extent to which the judge allowed — indeed, encouraged — the submissions made on behalf of the claimants to range outside the issues which were properly the subject of the hearing in November 2001. The following passages at the outset of his final submissions, after the close of evidence, [transcript of proceedings, 7 November 2001] give some indication of the difficulties faced by Mr Ter Haar QC, counsel for Fluor:

“MR TER HAAR: My Lord, it has been an interesting couple of days because with my Lord's assistance we have analysed a number of aspects of this contract and of the facts around the settlement agreement, which were not adumbrated at all in the skeleton arguments. It is also clear that my learned friend, assisted by some of my Lord's thinking, has undergone quite a transformation in his way of seeing this case

I would, however, emphasise the way in which these issues have come before the court. ... Until [Mr Lerego, QC, counsel for the claimants] stood on his feet to make his submission this morning, the position of UK Paper has been that clause 5.1 does not provide a basis for a claim for damages.” ... [transcript, page 69 lines 26 to 33, page 70 lines 5 to 8]

“MR TER HAAR: ... what is important is the way in which the preliminary issues were ordered and the pleadings which followed that. It is also significant, if it is said now that it is blindingly obvious clause 5.1 confers a claim for damages, I am entitled to say it is not blindingly obvious because it is completely the contrary of the way in which the case has been presented.

What I am saying is that you should treat with a great deal of caution any hint that it is obvious to everybody that clause 5.1 in itself confers a remedy in damages, because that is the complete opposite to the way in which the case has been understood by the claimants themselves until this morning.” [transcript, page 71 lines 1 to 8 and lines 32 to 37]

“MR TER HAAR ... in relation both to estoppel and in relation to rectification, the debate between my Lord and my friend this morning has moved in various directions exploring the issues, but in both cases the pleaded case is very clear and some of the variants upon it, which we discussed this morning, are not what is put forward and are not what I have come to face and should not be considered. Can I give an example?

My Lord suggested to my learned friend at one point this morning that maybe there was a common [mistake] in relation to contract which would give rise to a claim for rectification. This is not a case which is pleaded against me. My Lord then said ‘I have not heard

from the lawyers on Fluor's side', with the implication that perhaps you could draw some inference. My Lord, with the greatest of respect you cannot possibly do that, if I put it in that way, because I cannot be held to be bound by not having called a witness in respect of a case that has never been pleaded against me. Similarly in relation to estoppel. There was some exploration about whether the estoppel by convention would in some sense assist construction of the 1996 Agreement. That is not the way in which the case is put. So one does need to concentrate on the way in which the case has been brought and pleaded and look at it in that light.

My Lord, it is because of the way in which the case is understood by both parties that the preliminary issues are framed as they have been ...” [transcript, page 72 line 14 to page 73 line 5]

A full examination of the transcript indicates that there is force in all those points. But they were ignored or overridden by the judge.

Subsequent attempts to redefine the issues

Such attempts as were made, following completion of the evidence, to agree a list of issues were unsuccessful. In the event, rival lists of issues were prepared and put before the judge after he had reserved his judgment. Fluor's list of issues preserved the two issues identified by Judge Havery's order of 8 June

2001; but set out, under each of those issues, a number of sub- issues:

Is the Claim against the First Defendant barred by the Settlement Agreement of 15 January 1998 on the ground that the cause of action accrued on or prior to the date.

- (a) Does the construction of the Settlement Agreement preclude all claims save any that (i) accrues after the 15 January 1998 and (ii) is for a latent defect and (iii) arises out of Fluor's design?
- (b) Had any cause of action for breach of contract accrued as at 15 January 1998?
- (c) Are Fluor estopped from contending that the only cause of action which could arise under the Contract was one in contract?

Is the First Defendant's liability limited to the warranty and guarantee given in Article V of the Engineering Procurement Project and Construction Management Agreement between UK Paper plc and the First Defendant.

- (a) Does the construction of the contract limit the ambit of any claim in contract to that which could be brought within the express terms of the contract?
- (b) Does the construction of Sections 5.3, 10.7 and 10.14 of the Contract exclude a common law duty of care in tort or, alternatively, any claim for breach of a duty of care in tort?
- (c) Should the following terms be implied into the contract:

- (i) Fluor Daniel will carry out the Services to be performed under this Agreement with reasonable skill and care;
 - (ii) The Facilities will be of merchantable quality;
 - (iii) The Facilities will be reasonably fit for their purpose; and
 - (iv) Nothing in clause 5.3 or 10.7 of this Agreement excludes or limits the right to sue for damages for breach of (i) or (ii) or (iii).
- (d) Should the contract be rectified to incorporate the terms in para 2(c) above?
 - (e) Do the terms in Sections 5.3 and/or 10.7 and/or 10.14(c) satisfy the requirement of reasonableness in UCTA 1977.
 - (f) Did the Claimants fail to satisfy the pre-conditions in Section 5.3 such that Fluor are released from their warranty?"

The claimants' list of issues relegated the first issue to paragraph 8 and contained no express reference to the second of the issues ordered by Judge Havery. Instead, the claimants advanced a reformulation under the first seven paragraphs:

"1. What is the correct construction of Article V of the [EPCM] Agreement?

2. Does the [EPCM] Agreement contain the term set out in section 13 of the Supply of Goods and Services Act 1982 ?

3. What (if any) duty of care was owed by Fluor to [UK Paper]?

4. Should the [EPCM] Agreement be rectified and, if so, in what form?

5. Is Fluor estopped from contending that the claims made in this action are barred by Article V?

6. Does UCTA apply to the [EPCM] Agreement?

7. If so, do the exclusions and restrictions in sections 5.3 &/or 10.7 &/or 10.14 (c) of liability under section 5.1 of the [EPCM] Agreement &/or s13 of the 1982 Act &/or any duty of care satisfy the requirement of reasonableness?

8. Is the claim against the First Defendant barred by the Settlement Agreement of 15 January 1998 on the ground that the causes of action accrued on or prior to that date?"

It should have been recognised that it was not appropriate to pose questions in such general terms as those posed by paragraphs 3 and 4 of that list for determination as preliminary

issues; *a fortiori* to pose those questions after the completion of the evidence.

In the event, Judge Thornton — in the absence of the assistance which he had requested and was entitled to expect, and upon the provision of which he ought to have insisted — chose to define the issues for himself. The potential for error and confusion, already inherent in the failure to provide — and the failure to insist upon there being provided — an agreed list of issues in advance of the evidence, was compounded by the fact that, as appears from the transcript of proceedings on 11 January 2002 (when his judgment was handed down in a form which he was later to amend), the judge, when defining the issues for himself, seems to have been unaware of (or to have overlooked) the order made by Judge Havery on 8 June 2001. The transcript records the following exchange between the judge and Mr Ter Haar QC, leading counsel for Fluor, (transcript of proceedings, 11 January 2002, page 4 line 22 to page 6 line 25):

“JUDGE THORNTON: But is it suggested that the issues that I have sought to answer are not the issues that I was asked to answer?”

MR TER HAAR: Yes, it is, because they go wider and further than was, in our submission, necessary and wider than had been ordered by Judge Havery ...

JUDGE THORNTON: ... At the very least I should try and arrive at a position at which all the parties and the court agree what the

issues are and any potential further argument is simply confined to whether I answered the exam paper correctly, and not as to whether I even embarked on the right exam. That is why I invited the parties to seek to agree the issues. They were unable to do so before the hearing and I am now, with I hope the parties' assistance, trying to arrive at a position where we can now arrive at unanimity what I was trying to decide.

...

MR TER HAAR: ... The position is, in our submission, clear as to what has happened procedurally. Judge Havery ordered certain issues to be determined. Those issues were then supplemented, not substituted, by matters which were discussed before Judge Havery at the directions hearing in October because the matter had expanded to deal with [*UCTA*], *estoppel*, etc. Before my Lord, my Lord found the formulation of those issues unsatisfactory. My Lord then went into somewhat wider questions.

JUDGE THORNTON: You say there is already an order from Judge Havery?

MR TER HAAR: Yes.

...

JUDGE THORNTON: I could not find it.

MR TER HAAR: Are you talking about the 8 June order, because that was certainly before my Lord?

JUDGE THORNTON: Could you show me the order that you say enshrines the issues that I was to determine on day one as the trial opened?

... (Bundle handed to the court)

JUDGE THORNTON: I do not recall ever seeing this order.”

The draft judgment handed down on 11 January 2002

The issues formulated by the judge, in the draft judgment which he handed down on 11 January 2002, and the answers which he gave to those issues, were these:

“Issue 1: Does the Agreement contain the terms set out in section 13 of the Supply of Goods and Services Act 1982 ?

Answer: No.

Issue 2 : What (if any) tortious duty of care was owed by Fluor to UK Paper?

Answer: None.

Issue 3: Assuming that all the facts pleaded in the particulars of claim are established, do Sections 5.1, 5.3, 10.8 and 10.14(d) of the Agreement on their true construction separately or collectively exclude UK Paper's claim for damages?

Answer: No.

Issue 4: What claims and causes of action were fully and finally settled and satisfied by the settlement agreement?

Answer: any claim for any defect arising out of Fluor's design to the extent, if at all, it is not excluded by the terms of the Agreement and which UK Paper did not first become aware of until after the settlement agreement was entered into.”

Nevertheless, following submissions made on 11 January 2002, (see transcript of proceedings, 11 January 2002, page 20 lines 2–19), the judge was persuaded that his order should address the issues which had been ordered on 8 June 2001. He directed that, in the light of the draft

judgment which he had handed down, the first of two issues which had been identified in the order made by Judge Havery on 8 June 2001 should be answered in the negative; and that the second preliminary issue should be answered in the following terms:

“Yes, but on the true construction of the [EPCM] agreement between UK Paper plc and the First Defendant, sections 5.1, 5.3, 10.8 and 10.14 (d) do not exclude the Claimant's claim for damages.”

That was reflected in the order which he made on 11 January 2002. The judge did not, in that order, determine the question of rectification raised by Judge Havery's order of 12 October 2001. The reason appears from the final paragraph of the draft judgment which he handed down on 11 January 2002 :

“Since I have decided that UK Paper's claims are not excluded by the Agreement or the settlement agreement, the issues based on rectification, estoppel and UCTA do not arise. It is inappropriate to decide them since they depend on the erroneous assumption that each of these two agreements exclude or preclude UK Paper's current claims.”

Further consideration of the draft judgment after 11 January 2002

The judge refused permission to appeal from his order. On 21 January 2002 Fluor lodged an appellant's notice, seeking permission to appeal and a stay of the proceedings in the action until that application (and any subsequent appeal) had been determined. The order of 11 January 2002 had not then been perfected or entered; but, plainly, Fluor's advisers took the view that a stay of proceedings had been refused by the judge.

On 28 January 2002 the judge sent to both parties' solicitors a copy of his “approved judgment”. That incorporated typographical and other minor editorial corrections which had been agreed between the solicitors and set out in a composite list. It included, also, two additional paragraphs (then numbered 85 and 86) in which the judge expanded his reasoning in relation to the construction of the word “defect” in the settlement agreement. In an accompanying note the judge directed that “the earlier draft should be destroyed and replaced with this judgment which is to be regarded as published to the parties and in open court on 11 January 2002”. He expressed agreement with the terms of the draft order agreed between solicitors “save that the proposed first issue becomes the second issue and vice versa”. He further directed that, if an appeal were to be pursued, he would be given the opportunity to “draft a judgment setting out my findings of fact and conclusions on the three further grounds pursued by UK Paper for consideration in the Court of Appeal if necessary.”

Fluor's solicitors responded, by faxed letter dated 30 January 2002. They pointed out that

they could not destroy all copies of the earlier draft judgment because passages from that judgment had been referred to and cited in the skeleton argument already lodged with this Court in support of the appellant's notice. They indicated, also, that they resisted the suggestion, in the judge's note of 28 January 2002, that the order of the preliminary issues should be reversed. They pointed out that the order in which those issues appeared in the draft order of 11 January 2002 was consistent with the order made by Judge Havery on 8 June 2001, had been adopted by both parties in the course of submissions on 11 January 2002, and was reflected in the appellant's notice and skeleton argument already lodged in this Court.

The judge replied on the same day. The first of his faxed letters of 30 January 2002 directed that the matter be relisted "for further discussion and directions" under five heads. A second note from the judge, also dated 30 January 2002, enclosed a draft of a proposed addition to his judgment "to take account of my concern as to the order in which the issues of interpretation are considered or referred to in the procedural order giving effect to my judgment". Those additional paragraphs were in these terms:

"24. During the hearing, it became clear that there was a difference of view as to which of the two principle issues I should resolve first. These two issues were firstly as to the content and true meaning of the Agreement and secondly as to the meaning of the settlement agreement. UK Paper contended that I should first resolve what terms were to be implied into the Agreement and, in

the light of that decision, then interpret the Agreement. Only then should I interpret the settlement agreement, taking into account as part of its background the true meaning and effect of the underlying Agreement. Fluor, on the other hand, contended that I should first interpret the settlement agreement without taking into account the meaning and effect of the underlying Agreement and I should only consider and interpret that Agreement at all if I reached the conclusion that the settlement agreement did not bar the claims that UK Paper is now seeking to advance.

25. I am firmly of the view that UK Paper's suggested approach is the correct one. This is because the settlement agreement was negotiated and concluded by lawyers against the background of the Agreement and they are to be taken to have had in mind the terms of that Agreement when finalising and agreeing to the wording and terms of the settlement agreement. Moreover, the wording of the settlement agreement is ambiguous and the meaning and effect of the Agreement is therefore to be resorted to as an aid to the interpretation of that later agreement. Finally, as I see it, effect can only be given to the recent and significant decision of the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL (E) if the order in which these two issues of contractual interpretation are resolved is by taking the Agreement issue first. This is because Mahmud's case reaffirms the strict approach that is to be taken to the interpretation of settlement agreements. These must be interpreted so as not to exclude claims of which a party is unaware unless this conclusion is

required by clear words of the agreement. In this case, as I see the position, it is necessary, in order to give effect to that strict approach, first to discern whether the present claims could have arisen under, or were excluded by, the terms of the underlying Agreement before deciding whether the wording of the settlement agreement is clear enough to bar them even though, on UK Paper's case, they were not known about at the date of the settlement agreement.

26. At the hearing, therefore, I invited the parties to argue the Agreement issue first and to treat the meaning and effect of that Agreement as part of the background or matrix of the settlement agreement. I, too, have decided the Agreement issue first and have used that decision as part of the material I have taken into account when subsequently deciding the settlement agreement issue. I have, in consequence, reversed the order in which I have decided those issues from the order in which they were set out by the terms of the procedural order that was made by Judge Havery when directing that these issues should be resolved as preliminary issues. I am satisfied that Judge Havery did not intend, by the wording of his procedural order, to dictate the order in which the issues should actually be argued, decided or set out in the judgment or as to whether it be correct or not as a matter of law to have resort to the meaning of the Agreement as an aid to the interpretation of the settlement agreement.”

The judge's reference, in the new paragraph 25, to *Mahmud v Bank of Credit and Commerce*

International SA [1998] AC 20, is, I think, an error. The decision of the House of Lords to which he must have intended to refer is that in *Bank of Credit and Commerce SA v Ali and others* [2001] UKHL/8, [2002] 1 AC 251.

In the event, no further hearing took place. The parties' solicitors, in response to a third faxed letter from the judge, reached agreement as to the further amendments which should be made to the judge's judgment, to the form of the order of 11 January 2002, and to the application for a stay to be dealt with on paper. The application was refused; and that refusal was recorded in a new paragraph (paragraph 4) of the order as sealed.

It is plain, from the material before this Court, that the order was sealed on or after 1 February 2002 (which was a Friday); and there is no reason to doubt that (as the index to the Joint Core Bundle suggests) the order was, in fact, sealed on 6 February 2002. I find it surprising — and a matter of concern — that the court seal bears the date “11 Jan 2002”. A document of record, sealed by the court, ought to be a true record of the matters which it purports to record. If those matters include the date upon which the document was sealed, then that date must be a true date. To affix, on 6 February 2002, a court seal which bears a date which is not 6 February 2002 must, as it seems to me, require some conscious decision that the date should not be a true date. It is not clear why that decision was taken.

The order of 19 April 2002

Permission to appeal from the order of 11 January 2002 and a stay of proceedings pending appeal were granted on paper by this Court (Lord Justice Dyson) on 28 February 2002. In those circumstances Judge Thornton, as he had indicated in his note of 28 January 2002 and without further argument, prepared a further judgment on the issues which he had not decided in his earlier judgment. That judgment was handed down on 19 April 2002. The order made that day is in these terms, so far as material:

“It is ordered and declared that:

- 1. If the First Defendant's contentions as to the construction of the EPCM Agreement are correct:

- 1.1 The EPCM agreement is rectified by:

- 1.2

- (a) inserting the word “guarantee” in front of the word “remedy” in Section 5.3 and the word “remedies” in Section 10.7;
 - (b) adding the following words to section 10.7:

“For the avoidance of doubt, the remedy of damages for any breach of the warranties contained in section 5.1 is expressly set forth in the Agreement”.

- 1.2 If the EPCM Agreement is not so rectified, the First Defendant is estopped from relying on the exclusion and limitation provisions of Sections 5.3, 10.7 and 10.14 (d).
 - 1.3 If the First Defendant is not so estopped, these provisions do not satisfy the requirement of reasonableness in the Unfair Contract Terms Act 1977.”

It may be noted that the rectification which the judge ordered is not — and bears no relation to — the rectification claimed in the re-amended particulars of claim.

The judge gave permission to appeal from that order of 19 April 2002. He also took the opportunity, by that order, to give UK Paper the opportunity to cross-appeal from his earlier order in the terms set out in sections 4 and 6 of a respondent's notice served on its behalf on 20 March 2002.

The relevance of the circumstances in which the orders of 11 January and 19 April 2002 were made

I have set out the circumstances in which the orders of 11 January 2002 and 19 April 2002 came to be made in much greater

detail than would otherwise be necessary or appropriate for two reasons. First, in order to explain why there are before this Court appeals from two orders which, on their face, go well beyond the preliminary issues ordered by Judge Havery on 8 June 2001. And, second, because those circumstances provide the basis for an application by Fluor — made, we were told only after anxious consideration by leading counsel and his instructing solicitor (both of whom have extensive experience in construction disputes and, in particular, in the conduct of litigation in the Technology and Construction Court) — that, whatever the outcome of this appeal, this Court should direct that these proceedings should not continue to be heard by Judge Thornton.

For my part I am satisfied that that is not an application which can be dismissed as an attempt to avoid further hearings before a judge who, in the past, has taken an unfavourable view of the merits of the case advanced by Fluor. I accept that the application has been made only after proper consideration of the implications which would follow from such a direction; and that it must be addressed on that basis. But, before addressing that application, I think it appropriate to decide the issues which arise on the appeals.

The first issue: whether the claim made against Fluor in these proceedings is barred by the agreement made in the letter of 15 January 1998?

In my view this issue — whether it would be contrary to the agreement reached on 15

January 1998 for the claims made against Fluor in these proceedings to be pursued — was correctly identified, in the order of 8 June 2001, as the first issue to be determined. I accept, of course, that (as Judge Thornton pointed out in paragraph 26 of his judgment) Judge Havery is not to be taken to have intended that his order of 8 June 2001 should dictate the order in which the issues should be argued or decided. But, for reasons which I shall explain, I have no doubt that that order of 8 June 2001 does, properly, reflect the manner in which the questions should be approached.

The starting point, as it seems to me, is to ascertain, from the claimants' pleaded case, what claim or claims are made against Fluor in these proceedings. The case is now pleaded in re-amended particulars of claim served on or about 30 October 2001. As I have said, the claim is in respect of damage arising from defects in the design of the cladding to the buildings. Particulars of those defects are set out under paragraph 34 of the re-amended particulars of claim. In summary, it is said that the cladding to the buildings in which the de-inking and recycling processes are carried on — which is provided by a double skin profiled steel sheeting system — is unsuited to the conditions to which it is exposed; that is to say, to conditions which result from the internal atmosphere of the process buildings and to the external conditions of the coastal location of the site. Further, that the cladding to the adjacent waste paper warehouse and the office block — a single skin profiled steel cladding system — is inadequate to prevent the internal atmospheric conditions in the process buildings from penetrating and affecting parts

of those adjacent buildings. There is a further complaint of water penetration at roof level in the office building. Paragraph 35 of the re-amended particulars of claim contains the allegation that “the matters particularised at paragraph 34 above have been caused by breaches of contract and/or negligence” on the part of Fluor. As I have already indicated, it is said that Fluor knew or ought reasonably to have known that the processes carried out in the course of recycling paper release into the internal atmosphere considerable heat, humidity and acidic and alkaline elements; that it failed to take those factors into account in preparing or procuring designs and specifications in respect of the roof and wall cladding system; that it should have specified a different system, different fixings and different materials; and that (in so far as the designs and specifications were prepared by other contractors) Fluor failed to advise that those designs and specifications were deficient, inadequate and ought to be rejected.

The contractual duties relied upon in the pleaded case — and in relation to which Fluor is said to be in breach of contract — are set out in paragraphs 8, 9 and 10 of the re-amended particulars of claim. In paragraph 8, the claimants plead reliance on the full terms and effect of the EPCM agreement. Those terms are said to include the additional term in respect of care and skill, merchantable quality and fitness for purpose — which I have already set out — which it is sought to introduce by way of rectification. Paragraph 9 contains the allegation that “in addition to the terms set out in the [EPCM] Agreement above there were, *inter alia*, the following express alternatively

implied terms in the [EPCM] Agreement”; and there are then set out, as terms of the EPCM agreement, obligations to advise UK Paper in relation to, or itself to reject, design proposals, designs or drawings produced by other contractors. Paragraph 10 is in these terms:

“To the extent that the said terms are to be implied they are to be implied to give efficacy to the [EPCM] Agreement and/or by custom and/or as a matter of law and/or to give effect to the obvious but unexpressed intentions of the parties.”

The duty in tort is set out in paragraph 11 of the re-amended particulars of claim:

“Further the First Defendant owed the First Claimant a duty of care at common law in the performance of the Services to exercise the degree of skill, care and diligence to be expected of reasonably competent engineering and construction firms with specialist expertise and knowledge of facilities for the recycling of paper and manufacturing pulp.”

The judge, at paragraph 18 of his first judgment, described that as a “make-weight claim in tort”. He said this:

“It can be seen that this claim is entirely co-extensive with UK Paper's contractual claim and it would only have relevance, if a

tortious relationship survived the terms of the Agreement at all, if UK Paper's contractual claims were barred by limitation and it needed to rely on the fact that a tortious cause of action accrued at a later time to its equivalent contractual cause of action and that the relevant limitation period within which a claim may be brought, unlike its equivalent contractual period, could be linked to the discovery of latent damage.”

It had been made clear to the judge, in the course of the hearing in November 2001, that UK Paper placed no reliance on the claim in tort — see the exchange between Mr Lerego QC, counsel for UK Paper, and the judge in the course of Mr Lerego's closing submissions (transcript of proceedings, 7 November 2001, page 23 line 23 to page 24 line 20):

“MR LEREGO: ... When the contract is subsequently entered into, the duty in so far as it relates to quality of design, becomes subjected to Article V and if your Lordship accepts our argument as to construction of Article V then, from the point in time when we signed up to the contract, our remedy, if the services were not carried out properly, was to have recourse to the warranty in the first sentence of Section V(i). From that point on we no longer have a remedy in relation to tort ...

JUDGE THORNTON: If you accept that there is no duty in tort as a result of Article V

whatever construction of the article that I adopt, does that not preclude a claim in tort?

MR LEREGO: Yes. Each party is contending that no claim in tort could arise, or does, on the proper construction of the contract, arise.

...

JUDGE THORNTON: My instinctive caution in entering into the interesting field of whether *Henderson v. [Merrett]* and all sorts of other cases is no longer particularly good law in this field does not arise?

MR LEREGO: It does not arise, if your Lordship accepts our point under construction, no.

JUDGE THORNTON: It can only arise if I accepted a different construction to that contended for by either party.

MR LEREGO: Yes.”

In this Court Mr Lerego did not seek to resile from the position which he had adopted in that exchange. But it is pertinent to note (i) that the tortious claim was advanced in the original particulars of claim; it was relied upon

in the reply of 5 July 2001; it was preserved in the re-amended particulars of claim; and it has not, so far as I am aware, been deleted by any subsequent amendment; (ii) that it is by no means obvious or unarguable that (absent any provision of the EPCM agreement which precludes such a claim) there could not be a tortious claim which was co-extensive with the contractual claim under that agreement (as the judge recognised in the exchange which I have just set out); and (iii) that if there were a tortious claim — albeit “entirely co-extensive” with the contractual claim — there could be circumstances in which the cause of action in tort would accrue at a later time than the cause of action in contract (as the judge recognised at paragraph 18 in his first judgment).

The next step is to ask whether the claims made against Fluor in these proceedings are within the class of claims in respect of which the parties intended the agreement of 15 January 1998 to be in “full and final settlement” and “satisfaction”. The answer to the question “in respect of what claims did the parties intend the agreement to be full and final settlement” is to be found in paragraph 1 of the letter which records that agreement. Subject to the proviso introduced by the words “excluding only” the parties intended their agreement to be in full and final settlement of “all claims” and in satisfaction of “all causes of action” between them “arising out of or in connection with [UK Paper's] paper deinking and recycling plant at Kemsley (“the Project”)”. They made it clear, in express terms, that those claims and causes of action included, but were not limited to, the matters in dispute in the two actions which were then about to come on for trial.

In my view it is beyond argument that, but for the proviso introduced by the words “excluding only”, the claims made in the present proceedings would fall squarely within the description “all claims and ... all causes of action ... arising out of or in connection with [the] paper deinking and recycling plant at Kemsley”; and beyond argument that that is the effect that the parties intended that the words which they used in their agreement should have.

At paragraph 75 of his judgment of 11 January 2002 the judge reminded himself of the observation in the speech of Lord Bingham of Cornhill in *Bank of Credit and Commerce International SA v Ali and others* [2001] UKHL/8 , [2002] 1 AC 251 , 259H, at paragraph 9:

“A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware, even claims which could not on the facts known to the parties have been imagined if appropriate language is used to make plain that that is his intention.”

Lord Bingham went on, in the same paragraph, to refer with obvious approval to the observation in the judgment of Sir Richard Scott, Vice-Chancellor, in his judgment in this Court in the *Ali* case, at [2000] ICR 1410 , 1415:

“The law cannot possibly decline to allow parties to contract that all and any claims, whether or not known, shall be released. The question in a case such as the present is to ascertain, objectively, whether that was the parties' intention or whether, in order to correspond with their intentions, a restriction, and if so what restriction, should be placed on the scope of the release.”

Lord Bingham described that observation as “both good law and good sense”. He pointed out that it was no part of the court's function to frustrate the intentions of the contracting parties once those have been objectively ascertained.

There are observations to the same effect in the speech of Lord Nicholls of Birkenhead in the *Alicase* — see at paragraph 27, [2002] 1 AC 251, 265 F–H:

“The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release.

The risk that further claims might emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made.”

But, although the mere fact that the parties were unaware of the particular claim is not, of itself, sufficient reason to exclude it from the scope of a general release, Lord Nicholls went on to explain that it was not every such claim that would be within the scope of a release which, on its face, extended to future claims. He said this, at paragraph 28 and 29:

“28. This approach however should not be pressed too far. It does not mean that, once the possibility of further claims have been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed ...”

29. This approach, which is an orthodox application of the ordinary principles of

interpretation is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates.”

It was, I think, that “orthodox [and well established] application of the ordinary principles of interpretation” which Lord Bingham had in mind when he said, at paragraph 10 of his speech:

“But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware”.

The principles are not, I think, open to doubt. The reason why the House of Lords reached the decision that they did in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL/8 was that they took the view (Lord Hoffmann dissenting) that, on the very

particular facts in that case, the claim which the former employee was seeking to advance was a claim which could not have been in his contemplation, as releasor, at the time when the release was given. As Lord Nicholls put it, at paragraph 35, [2002] 1 AC 251 , 268E–F:

“... I consider these parties are to be taken to have contracted on the basis of the law as it then stood. To my mind there is something inherently unattractive in treating these parties as having intended to include within the release a claim which, *as a matter of law* , did not then exist and whose existence could not then have been foreseen. ... The ambit of the release should be kept within reasonable bounds. Mr Naeem cannot reasonably be regarded as having taken upon himself the risk of a retrospective change in the law. A claim arising out of such a change cannot be regarded as having been within the contemplation of the parties.”

Lord Bingham, with whom Lord Browne-Wilkinson expressly agreed, made the same point, at paragraph 19, [2002] 1 AC 251 , 264C–D:

“Neither the bank, ..., nor Mr Naeem could realistically have supposed that such a claim lay within the realm of practical possibility. On a fair construction of this document I cannot conclude that the parties intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. If the parties had sought to achieve so extravagant a result they should in my opinion have used language which left no

room for doubt and which might at least have alerted Mr Naeem to the true effect of what (on that hypothesis) he was agreeing.”

Lord Clyde, also, referred to the stigma claim which the employee was seeking to advance as one “which neither party could have contemplated even as a possibility as the law stood at the time when the agreement was made” — see, at paragraph 86, [2002] 1 AC 251, 284C.

By contrast, the claims in the present proceedings are just the sort of claims that may be expected to be within the contemplation of parties to a construction contract, or to a contract for the provision of design, procurement and construction management services. It must be a matter of common experience amongst those who commission, design and manage the construction of commercial buildings that defects come to light after — perhaps years after — the contract has been performed and the building handed over. The books are full of such cases; and the difficulties to which latent defects give rise in the context of limitation. And, plainly, the parties did have such claims in contemplation when they entered into the agreement on 15 January 1998; as appears from the proviso to paragraph 1 of the letter — “excluding only any cause of action that may in future accrue to UK Paper plc (a) for any latent defect arising from our client's design”. Unless, therefore, the effect of the proviso is to exclude from the compromise in the earlier part of paragraph 1 of the settlement letter the claims

made against Fluor in these proceedings, the question “are the claims made against Fluor in these proceedings within the class of claims in respect of which the parties intended the agreement of 15 January 1998 to be in full and final settlement?” must receive an affirmative answer.

I turn, therefore, to consider the effect of the proviso. The opening words — “excluding only” — are themselves indicative of an intention that what has gone before should include all claims and causes of action which are not expressly excluded by what follows. What, then, is excluded by the proviso? Two requirements can be identified: (a) the claim must be founded on a cause of action which has not already accrued to UK Paper at the date of the settlement letter (15 January 1998) and (b) the claim must be founded on a cause of action either (i) in respect of any latent defect arising from Fluor's design (not being a claim which is, in any event excluded by the terms of the EPCM agreement) or (ii) arising in connection with any personal injury claim brought against UK Paper relating to injury suffered during the construction of the project by any contractor servant or agent.

The expression “any cause of action that may in future accrue to UK Paper” may aptly be described as “lawyers' terminology”. The date upon which a cause of action accrues is of importance in the context of construction disputes because — *prima facie*, at least — it is the date from which periods of limitation are to be reckoned for the purposes of the Limitation Act 1980 : see, for example, section

2 (actions founded on tort) and section 5 (actions founded on simple contract). And, in that context, the basis upon which that date is to be ascertained has been explained by the courts in decisions which are well-known and not in question — see, for example *Pirelli General Cable Works v Oscar Faber and Partners* [1983] 2 AC 1 . In particular, it may be taken as well known — at least to any lawyer with experience in construction disputes — that the date on which a cause of action accrues (either in contract or in tort) is not postponed until the date that the claimant first knows that he has suffered damage. The potential injustice to which that may give rise was, of course, addressed (in relation to an action for damages for negligence) by section 14A of the Limitation Act 1980 — introduced, following the decision in the *Pirelli* case, by section 1 of the Latent Damage Act 1986 .

It is not in dispute that, if the expression “any cause of action that may ... accrue to UK Paper” is given the meaning which it would bear in the context of, say, a limitation defence, the claims in the present proceedings — at least in so far as they are brought in contract — are not within the proviso to paragraph 1 of the settlement letter. A cause of action in contract accrues at the date of the breach — see, for example, *Midland Bank Trust Company Limited v Hett, Stubbs and Kemp* [1979] Ch 384 . The breaches of contract relied upon in the present proceedings occurred (if at all) during the period of construction and (in any event) before 15 January 1998. We have heard little argument on the question whether the position would be the same in relation to the claims which are pleaded in tort. Mr Lerego,

in advancing his submissions as to the true construction of the proviso, was concerned — for obvious reasons — to distance himself from the claims in tort. Indeed, as I have said, he maintained the position which he had adopted before the judge — that the EPCM agreement had excluded any claim in tort. Mr Ter Haar, for different reasons, was equally concerned to argue that the effect of the second sentence in section 10.7 of the EPCM agreement was to limit the remedies available to UK Paper to claims in contract under that agreement. For my part — for reasons which will become apparent in this judgment — I do not find it necessary to decide whether the claims in tort, *as pleaded* , had accrued before 15 January 1998. I have some doubt whether, on the facts pleaded, it is possible to decide that question.

The judge accepted that the expression “any cause of action that may ... accrue to UK Paper” should not be given what he described as its technical meaning; that is to say, he accepted that the word “accrue” should not be construed in the sense familiar to a lawyer with experience of construction disputes. He reached the conclusion, expressed at paragraph 103 of his judgment dated 11 January 2002 (in the form revised and approved on 30 January 2002), that the exceptional class of case not compromised, satisfied or released by the settlement letter of 15 January 1998 “consists of contractual claims based upon latent defects arising out of Fluor's design, *namely defects which UK Paper did not first know about until at least 16 January 1998* ” [my emphasis]. He accepted, at paragraph 102 of his revised judgment, that the word “accrue” when used in conjunction with the phrase “cause of action”

usually bears the meaning of “crystallises” or “becomes effective”; but he went on to say this:

“In the context of this settlement agreement, the word is still being used in the sense of “becomes effective” since the causes of action that the settlement agreement refers to, being ones that “may in future accrue”, are those which were existing latent causes of action before the settlement, which were then settled by the agreement, but which might be subject to a subsequent exception which would enable them again to become effective on ceasing to be latent.”

The judge was led to the conclusion which he reached by a process of reasoning which is set out in detail in his revised judgment (at paragraphs 94 to 102). That reasoning may, I think, fairly be summarised as follows: (i) the phrase “all causes of action” — which appears in paragraph 1 of the settlement letter — should be construed to mean “all existing causes of action”; to give that phrase the meaning “all existing and future causes of action” would be inconsistent with the reasoning of the House of Lords in *Bank of Credit and Commerce International SA v Ali and others* [2001] UKHL/8 because the parties should not be taken to have intended to compromise future unknown claims; (ii) the phrase “any cause of action ... for any latent defect” — which appears in the proviso to paragraph 1 — should be construed to mean “any existing cause of action based on any latent defect”; (iii) the causes of action within the phrase “any cause of

action ... for any latent defect” are, necessarily, causes of action in contract; the parties must be taken to have appreciated that “no claims in tort can possibly arise out of the [EPCM] Agreement” — see paragraphs 99 and 101.4; and (iv) the phrase “that may in future accrue to UK Paper” — which appears in the proviso — should be construed to mean “that may in future become known about by UK Paper”; to give the word accrue its “technical” meaning would be to defeat the obvious purpose of the proviso because the parties must be taken to have appreciated that all contractual claims would have accrued (in the technical sense) before the date of the settlement letter.

I am satisfied that the judge's reasoning is flawed in two respects. First, for the reasons that I have already set out, I think that he was wrong to take the view that *Bank of Credit and Commerce International SA v Ali and others* [2001] UKHL/8 requires the court to approach the settlement letter on the basis that the parties did not intend their compromise to extend to future causes of action of which they would not have had knowledge at the date of that letter. The particular — and, to my mind, crucial — feature in the *Ali* case was that the cause of action which the claimant was seeking to pursue was one which was not known to the law at the time of the release and so could not have been within the contemplation of the parties. In the present case the possibility that there might be claims based on latent defects in design — which had not been identified at the date of the settlement letter — was in contemplation. That is plain from paragraph (a) of the proviso itself. The question, in the present case, is not whether the parties intended

that their compromise should make provision for claims which had not been identified at the date of the settlement letter. The question in the present case is as to the provision which — by the words which they used — they did make for such claims.

Second, I think that the judge was wrong to approach the settlement letter on the basis that the parties must be taken to have appreciated that there were no circumstances in which a claim in tort could arise in respect of any latent defect arising from Fluor's design. There was no evidence that that was their common understanding at the date of the settlement letter; and an assumption that it was is inconsistent with the claims actually made and still pursued by the claimants in these proceedings — which include claims in tort. It may well be that Fluor had intended, by section 10.7 of the EPCM agreement, to confine its obligations to those expressly set out in that agreement; and that, on 15 January 1998, Fluor had some confidence that the EPCM agreement had achieved that result. There is some indication of that in the qualifying words which appear in parenthesis in paragraph (a) of the proviso itself — “(to the extent, if at all, it is not excluded by the terms of the [EPCM] Agreement between our respective clients in respect of the Project)”. But there is no reason to assume that UK Paper shared that view; and no reason to think that Fluor did not intend to cover the position that would arise if its view were wrong. It must be kept in mind that it is a feature of compromise that parties may take wholly different views as to the existence and strength of the claims which each may have against the other. The purpose

of compromise is to avoid a determination as to whose view is correct. In circumstances in which parties intend to compromise claims under or in relation to an existing contract, it is, to my mind, wrong in principle to construe their settlement agreement by first construing that existing contract and then attributing to each, as at the date of the compromise, knowledge of what the court has subsequently held to be the true meaning and effect of that existing contract. That would be to defeat the purpose of the compromise.

The settlement letter of 15 January 1998 was drawn and accepted for the parties by lawyers who may be taken to be experienced in disputes arising from construction or construction management contracts. The solicitors were acting for the parties in existing litigation arising from the construction of the recycling plant which was the subject of the EPCM agreement. The phrase which they used — “any cause of action that may in future accrue ... for any latent defect” — has, to a lawyer experienced in this field, a well recognised meaning. I can see no reason why the phrase should not be given that meaning in the settlement letter which they agreed on behalf of their respective clients. I think that the judge was wrong to hold otherwise. It follows that I would hold that the contractual claims made against Fluor in these proceedings are barred by the settlement letter of 15 January 1998.

The second issue: whether Fluor's liability is limited to the warranty and guarantee given in Article V of the EPCM agreement

Although posed in terms which might appear to invite the court to go beyond the claimants' pleaded case, it is plain that the second issue must be addressed in the context of the claims that are actually made in these proceedings. Further, the second issue must be addressed in the light of the answer to the first issue. If, as I would hold, the contractual claims made against Fluor in these proceedings are barred by the settlement letter of 15 January 1998, it is unnecessary to decide whether those claims would, in any event, have been excluded by the EPCM agreement. In particular, it is unnecessary to decide (i) whether the EPCM agreement should be rectified in the manner for which the claimants contend in their re-amended particulars of claim and in paragraph 11 of the reply served on 5 July 2001 or (ii) whether comparable terms should be implied into that agreement. Whatever additional terms are introduced into the EPCM agreement by rectification, or are to be implied, a claim based on those terms — being a claim in contract — will be barred by the settlement letter of 15 January 1998.

If the contractual claims made against Fluor in these proceedings are barred by the settlement letter of 15 January 1998, then the only question remaining under the second issue, as it seems to me, is whether the effect of the second sentence in section 10.7 of the EPCM agreement — “the rights and remedies with respect to the Services, whether in contract or otherwise, are limited to those expressly set forth in this Agreement” — is to preclude any claim in tort in relation to Fluor's responsibility for the performance or non-performance of the services which it had undertaken to, or did,

provide. As I have said, it has been common ground on this appeal that that question should be answered in the affirmative. That is the conclusion reached by the judge on 11 January 2002 — see paragraphs 39 to 42 of the revised judgment of that date. On the basis that Fluor is not prevented from relying on the second sentence of section 10.7 of the EPCM agreement in relation to the exclusion of any tortious duty of care either (i) by some estoppel or (ii) by the provisions of the Unfair Contract Terms Act 1977, I can see no reason to differ from the view adopted by both parties and endorsed by the judge. If it were necessary for this Court to determine the point (which, as it seems to me, it is not) I would hold that view to be correct.

The judge answered the second preliminary issue in the affirmative; but he qualified that answer by declaring that on the true construction of the EPCM agreement, “sections 5.1, 5.3, 10.8 and 10.14(d) do not exclude the Claimants' claim for damages.” In the light of his conclusion at paragraph 42 of his judgment of 11 January 2002 it is clear that the only claim for damages which he could have had in mind, in that context, was a claim for damages under the EPCM agreement. He was concerned to make it clear that he had rejected Fluor's contention that the only remedy available to UK Paper (as “the Owner”) in respect of the quality of the services to be provided under the EPCM agreement was to require Fluor to perform corrective services — see paragraph 70 of his judgment of 11 January 2002. In the circumstances that there can be no claim for damages under the EPCM agreement — by reason of the compromise reached on 15

January 1998 — the qualification is otiose. For my part, I would dispense with that qualification; on the ground that (in the light of the answer which I would give to the first issue) it is potentially confusing. But I should not be taken to disagree with the judge's conclusion, at paragraph 70 of his judgment of 11 January 2002, that the only realistic and commercial meaning to be given to section 5.3 of the EPCM agreement is that it is intended to confine the remedy in respect of Fluor's guarantee to the performance of corrective services; but is not intended to exclude a claim for damages for breach of the warranty contained in section 5.1.

As I have indicated, the conclusion that the second preliminary issue should be answered in the affirmative rests on the premise that Fluor is not prevented from relying on the second sentence of section 10.7 of the EPCM agreement in relation to the exclusion of any tortious duty of care either (i) by some estoppel or (ii) by the provisions of the Unfair Contract Terms Act 1977. In that context it is necessary to consider the effect of the order which the judge made on 19 April 2002. He directed that, if (contrary to what he had held on 11 January 2002) Fluor's contentions as the construction of the EPCM agreement were correct, then the EPCM agreement be rectified by the addition of a sentence to section 10.7 in these terms: "For the avoidance of doubt, the remedy of damages for any breach of the warranties contained in Section 5.1 is expressly set forth in the Agreement." He went on to order (i) that, if the EPCM agreement were not so rectified, Fluor was estopped from relying on the exclusion and limitation provisions of (inter alia) section 10.7 and (ii) that if Fluor were not so estopped, then

those provisions did not satisfy the requirement of reasonableness in the 1977 Act. I have difficulty in understanding how, given the conditional order for rectification which he had made, there could be any case for estoppel or for the application of the 1977 Act; but it may be that the judge was seeking to anticipate any possible conclusion which this Court might reach. Be that as it may, the order of 19 April 2002 might, on its face, suggest that (one way or another) Fluor was not to be entitled to rely on the second sentence of section 10.7 of the EPCM agreement even in relation to the exclusion of any tortious duty of care.

I am satisfied that that was not the judge's intention. To hold, on 19 April 2002, that Fluor was not entitled to rely on section 10.7 to exclude any tortious duty of care would be inconsistent with the conclusion which he had reached in his judgment of 11 January 2002; and there is nothing to suggest that he had resiled from his earlier conclusion. Further, as it seems to me, the point that he was concerned to address on 19 April 2002 was whether Fluor could rely on the second sentence of section 10.7 (in conjunction with sections 5.3 and 10.14(d)) as a defence to a claim for damages in contract. He was not concerned to revisit the question whether a tortious duty of care had been excluded.

The third issue: whether the EPCM agreement should be rectified

As I have said, the order made by Judge Havery on 12 October 2001 added a third issue to the two which, on 8 June 2001, he had ordered

to be determined at the hearing in November 2001. The third issue was whether the EPCM agreement should be rectified to include the term as to care and skill, merchantable quality and fitness for purpose pleaded in paragraph 11 of the claimants' reply served on 5 July 2001 and incorporated as paragraph 8 of the particulars of claim by the re-amendment for which permission was given on 12 October 2001.

Judge Thornton did not decide that issue. The order for rectification which he made — at paragraph 3 of his order dated 19 April 2002 — was for rectification of the EPCM agreement by inserting the word “guarantee” in front of the words “remedy” and “remedies” in sections 5.3 and 10.7 of the agreement; and by adding to section 10.7 the words “For the avoidance of doubt, the remedy of damages for breach of the warranties contained in Section 5.1 is expressly set forth in the Agreement.”.

We were taken to the evidence given at the trial of the preliminary issues. There is, to my mind, much force in the submission made on behalf of Fluor that there was no evidential foundation for rectification of the EPCM agreement, either as sought by the claimants or in the form ordered by the judge on 19 April 2002. A passage from the cross-examination of Mr Moccock (transcript of proceedings, 6 November 2001, page 14 line 4 to page 16 line 10) illustrates the point:

“Q. The state of play at this stage [April 1996] was that you wanted the terms that you had put forward, the express warranties in the contract,

Fluor had indicated that they wanted to exclude any warranties.

A. Yes.

Q. So you knew there was a difference between you as to what should go into the contract?

A. Yes.

Q. You also knew that unless you could get those warranties into the contract you would not be able to rely upon them because of the effect of the entire contract clause?

A. Yes.

Q. In the event they came back in a letter of 29 April, with a revised proposal ... The one thing that Fluor were not going to do was to accept the warranties that you wanted put in the contract. That is right, is it not?

A. That is right.

...

Q. But as to 10.7, is this the position, you realised that you were not going to get Fluor to accept the warranties you want put in the

contract, and there was no point in fighting any further for it?

A. That is right.

Q. And this contract was dealt with on the basis that Fluor would not give the warranties that you wanted, you just had to accept that?

A. Yes effectively, yes.

...

Q. Is this a fair way of putting it, that at the end of it it might not have every aspect that you would have wanted in the contract, but you regarded the contract overall as fair and reasonable?

A. Yes. It was a bit of a bloody draw.

Q. And there was certainly nothing left that you felt worth fighting for?

A. No, there was not.

Q. If there had been, you would have continued to fight.

A. Yes.

In the light of that evidence a claim that the EPCM agreement should be rectified in the manner sought by the claimants in their pleadings could not succeed; and the only answer that could have been given to the issue which Judge Havery had ordered on 12 October 2001 was “No”.

For the reasons which I have already given it was unnecessary for Judge Thornton to make the order for rectification which he did make on 19 April 2002: first, because he had been correct to hold, on 11 January 2002, that section 10.7 of the EPCM agreement (in conjunction with sections 5.3 and 10.14(d)) did not exclude a contractual remedy for damages for breach of warranty; and, second, because the true effect of the settlement letter of 15 January 1998 is to preclude all contractual claims for damages under the EPCM agreement. But I should add that, in any event, a judge should be very slow, on the hearing of preliminary issues, to make an order for rectification in a form which had not been sought in the pleaded case. On that ground alone, I think that the judge was wrong to do so in the present case.

The order to be made on this appeal

For the reasons that I have set out I would set aside paragraph 1 of the order of 11 January 2002. In my view the first of the preliminary

issues ordered by Judge Havery on 8 June 2001 should be answered in these terms:

“Save to the extent (if at all) that claims in tort made by the claimants against the first defendant in these proceedings accrued after 15 January 1998, the claims made by the claimants against the first defendant are barred by the settlement letter of that date.”

I would vary paragraph 2 of the order of 11 January 2002 by deleting the qualification to the judge's affirmative answer. I would set aside the whole of paragraph 1 of the order of 19 April 2002.

Further conduct of the proceedings

The effect of the order which I would make on this appeal would be, as it seems to me, that the claim against Fluor in these proceedings should be dismissed. But, as we were told, that would not bring these proceedings — or Fluor's involvement in these proceedings — to an end. The proceedings would (or might) be continued against other defendants; and Fluor is said to be a defendant to contribution claims made against it by those other defendants under CPR Part 20 . In those circumstances Fluor's application that this Court should direct that these proceedings should not continue to be heard by Judge Thornton has to be addressed.

For my part, I would accede to that application and make the direction sought. I accept that, in the circumstances which I have set out at some length earlier in this judgment, the concerns that Fluor have expressed through solicitors and counsel are genuinely held. That is not, of course, to suggest that Fluor would not, in fact, receive a fair trial in proceedings before Judge Thornton. But it must, I think, be recognised that, if further issues were decided against Fluor by Judge Thornton in these proceedings, Fluor would or might be left with a sense of injustice which could not be dismissed as fanciful. I am not persuaded that the direction needed to avoid that situation arising — that is to say, a direction that the proceedings should continue before another judge of the Technology and Construction Court — will give rise to undue administrative or case management difficulties.

Douglas Brown J:

I agree.

Waller LJ:

I also agree.

The cost's order is in the form of a separate judgment.

Crown copyright

2002 WL 1311119

The Law of Releases in Canada

Fred D. Cass

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that "most people . . . would regard this as overkill". He spoke in favour of the modern English tradition of avoiding the "grosser excesses of verbiage" and suggested that the outcome of the majority decision might be to encourage added verbiage where comprehensiveness is the desired result.²⁹

The concerns expressed by Hoffmann L.J. carry some force. If general words are not sufficient to convey the intention that unknown claims are within the scope of a release, the drafter of the document is left with the difficult task of coming up with specific words to capture something that is unknown. This is apt to result in verbosity, because the drafter will be uncertain which particular formulation of words will ultimately be considered to bring within the scope of the release a claim that is not known when the drafting takes place. Under this approach, simplicity and completeness tend to become incompatible goals. Also, the more the drafter of the release departs from simplicity in an effort to achieve completeness, the more likely it becomes that the wording of the release will be frowned upon because of its complexity or prolixity. As an American court has observed, when the drafter of a release is caught between the need for simplicity and the need for completeness, it seems that, in the result, "no release is immune from attack".³⁰

The conclusion of Bingham and Nicholls L.JJ. that parties can contract for a release of unknown claims, perhaps seems largely theoretical, because they also suggested that it will be very difficult for the drafter of a release to achieve the correct formulation of words to capture unknown claims. However, the subsequent decision of the English Court of Appeal in *Mostcash plc v. Fluor Ltd.*³¹ reveals how the reasoning of the majority of the House of Lords can be applied in a way that brings unknown claims within the scope of a release. In *Mostcash*, the Court of Appeal disagreed with the view expressed by a lower court judge that *Bank of Credit and Commerce* required the court to approach a settlement on the basis that the parties did not intend their compromise to extend to future causes of action of which they could not have had knowledge at the date of the settlement.

The decision of the Court of Appeal was delivered by Chadwick L.J. He referred to a number of the points from the speeches of Bingham and Nicholls L.JJ. in *Bank of Credit and Commerce* and said: "The principles are not, I think, open to doubt." It appears that, when he made this statement,

²⁹ *Bank of Credit and Commerce*, *supra*, at pp. 975, 982.

³⁰ *National & International Brotherhood of Street Racers v. Superior Court*, 264 Cal. Rptr. 44 (1989, Ct. App.), at p. 46.

³¹ [2002] EWCA Civ. 975.

Chadwick L.J. accepted the following propositions as being free from doubt:³²

(1) a party may agree to release claims of which that party is unaware, including even claims which on the known facts could not have been imagined, if appropriate language is used to make plain that intention;

(2) this does not mean, though, that, once the possibility of future claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release; however widely drawn the language, the circumstances may suggest that the parties intended that the release should only apply to claims, known or unknown, relating to a particular subject matter; and

(3) in the absence of clear language, the court will be slow to infer that a party intended to surrender rights of which that party was unaware and could not have been aware.

Lord Chadwick went on to give his understanding of the House of Lords' reasons in reaching the decision that it did in *Bank of Credit and Commerce*. According to him, the majority of the higher court took the view that, "on the very particular facts" of *Bank of Credit and Commerce*, the claim which the releasor was seeking to advance "was a claim which could not have been in his contemplation, as releasor, at the time when the release was given". He added that the cause of action the claimant was seeking to pursue in *Bank of Credit and Commerce* was one not known to the law at the time of the release and so could not have been within the contemplation of the parties. By contrast, he said, the claims in *Mostcash* — those being claims for damages arising from defects in the design of a building — were "just the sort of claims that may be expected to be within the contemplation of parties to a construction contract".³³

The decision of the English Court of Appeal brings out an important nuance of *Bank of Credit and Commerce*. There are many authorities indicating that the general words of a release must be limited by reference to what was in the contemplation of the parties.³⁴ However, limiting a release to what was in the contemplation of the parties is not the same as limiting it to claims that were known to the parties at the time when the release was signed. As illustrated by the decision in *Mostcash*, it may, in fact, be within the contemplation of the parties (objectively determined) that a release will capture unknown claims. Specifically, the parties to the settlement agreement in *Mostcash* had in their contemplation future claims arising from latent defects when they entered into the agreement. Thus, while

³² *Supra*, at paras. 48-52.

³³ *Supra*, at para. 53.

³⁴ See discussion in Chapter 4 under heading "Limiting General Words of a Release".

Bingham and Nicholls L.J.J. recognized that with appropriate language a release can be made to extend to unknown claims, this does not mean that a general release will be interpreted so as to go beyond what was in the contemplation of the parties.

Notwithstanding the statement to the contrary in *Tongue v. Vencap Equities Alberta Ltd.*,³⁵ Canadian authorities also recognize that a release can be worded so as to bring unknown claims within its scope. Thus, in *Bank of Montreal v. Irwin*, the court gave full effect to a release of all claims "whether known or unknown, suspected or unsuspected".³⁶

While the principles enunciated in *Bank of Credit and Commerce* may be "free from doubt", it is not so clear how the drafter of a release who seeks to express an intention that unknown claims are within the scope of the document should be guided by the decision of the House of Lords. The decision indicates to the draftsman that the desired objective is attainable, but that the broad words of a general release are not sufficient to accomplish this goal. One hopes that it is not to be expected that the release will catalogue with specificity all possible claims, or areas of claims, that are not known at the time of the release's preparation, but that are to be treated as falling within the scope of the document. Presumably, if it is the intention of the parties that a release extend to unknown claims, the drafter of the document should strive for clear and unequivocal language to express the intention of the parties to bring to a final conclusion claims beyond those that are known to them at the time of the release. In addition to wording which states the parties' intention that the release will extend to both known and unknown claims,³⁷ the drafter might consider wording which makes clear that the release will cover all claims, even if not known to the parties, within a particular area or subject-matter, and that the release will cover claims based on facts not known to the parties.

PRE-EXISTING CLAIMS AND FUTURE CLAIMS

When a general release fails to mention a pre-existing claim, each party may contend that the other bears the responsibility for any uncertainty about the scope of the document. However, subjective arguments about the parties' motivations for allowing a pre-existing claim to go unmentioned in a general release do little to advance a determination of whether the claim is captured by the release. In a case concerning the application

³⁵ [1994] 5 W.W.R. 674 (Alta. Q.B.), affd [1996] 6 W.W.R. 761 (Alta. C.A.). See footnote 7, *supra*.

³⁶ (1995), 124 D.L.R. (4th) 73 (B.C.C.A.). This characterization of *Irwin* was given by the British Columbia Court of Appeal in *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 145 D.L.R. (4th) 729 (B.C.C.A.), at p. 737.

³⁷ As in *Bank of Montreal v. Irwin*, *supra*.

Most Negative Treatment: Not followed

Most Recent Not followed: *Rahim v. Canada* (Minister of Citizenship & Immigration) | 2007 FC 310, 2007 CarswellNat 652, 310 F.T.R. 243 (Eng.), 156 A.C.W.S. (3d) 438, 62 Imm. L.R. (3d) 91 | (F.C., Mar 22, 2007)

1964 CarswellNat 351
Exchequer Court of Canada

Buckerfield's Ltd. v. Minister of National Revenue

1964 CarswellNat 351, [1964] C.T.C. 504, [1965] 1 Ex. C.R. 299, 64 D.T.C. 5301

BUCKERFIELD'S LIMITED, GREEN VALLEY FERTILIZER & CHEMICAL CO. LTD., WESTLAND ELEVATORS LIMITED, and BURRARD TERMINALS LIMITED, Appellants, and MINISTER OF NATIONAL REVENUE, Respondent

Jackett, P.

Judgment: October 13, 1964

Proceedings: on appeal from assessments of the Minister of National Revenue

Counsel: *H. H. Stikeman*, Q.C., and *James Grant*, for the Appellant.
F. J. Cross and *D. G. H. Bowman*, for the Respondent.

Headnote

Income tax --- Special rules — Relationships — Associated corporations

Income tax --- Corporations — Associated corporations

Income tax — Federal — Income Tax Act, R.S.C. 1952, c. 148 — Section 39(2), (4)(b) — "Associated corporations" — Meaning of "control" — Meaning of "group".

In issue was whether "Buckerfield's" and "Green Valley" were "associated corporations" on the one hand and, on the other, whether "Westland" and "Burrard" were "associated corporations". All four appeals were heard together, the considerations being similar.

One-half of the shares of Buckerfield's belonged to Pioneer Grain Co. Ltd. and one-half to Federal Grain Co. The latter companies also each owned one-half of the shares of Green Valley. These shares were acquired under an agreement in which "Pioneer" and "Federal" would nominate equal numbers to the boards of directors, would co-operate in the management of the companies, and would each have the right of first refusal in respect of the shares owned by the other. The facts relating to "Westland" and "Burrard" were similar, except that there one-third of the shares were

owned by each of Pioneer Grain Co., Alberta Pacific Grain Co. (1943) Ltd. and Searle Grain Co. Ltd.

It was contended for the appellants that the word "group" did not include any number of persons less than four and that the word in Section 39 (4) implied a group which came together to take advantage of the low rate of tax under Section 39 and not a group which came together for any other purpose.

HELD:

- (i) That "control" within the meaning of Section 39(4)(b) contemplated that right of control that rested in ownership of such number of shares as carried with it the right to a majority of the votes in the election of the board of directors
- (ii) That when a single person did not own sufficient shares to have control in that sense, it became a question of fact whether any "group of persons" did own such number of shares;
- (iii) That "group" could refer to any number of persons from two to infinity and there was nothing in Section 39(4) to suggest any intention to omit any of them; moreover, any such omission of particular numbers would be an obvious gap in the legislative scheme;
- (iv) That "group", as used in Section 39(4), did not imply a group that came together specifically to take advantage of the low rate of tax;
- (v) That the appeals be dismissed.

Table of Authorities

CASES REFERRED TO:

British American Tobacco Co. v. C.I.R., [1943] 1 All E.R. 13;

M.N.R. v. Wrights' Canadian Ropes Ltd., [1947] A.C. 109, [1947] C.T.C. 1.

Words and phrases considered:

CONTROL

Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* [R.S.C. 1952, c. 148] to a corporation. It might, for example, refer to control by "management", where management and the board of directors are separate, or it might refer to control by the board of directors. The kind of control exercised by management officials or the board of directors is, however, clearly not intended by Section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of Section 39). The word "control" might conceivably refer to de facto control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in Section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco Co. v. C.I.R.*, [1943] 1 All E.R. 13, where Viscount Simon, L.C., at page 15, says:

The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

See also *M.N.R. v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109 . . . per Lord Greene, M.R., at pages 118, 6, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within Section 6 of the *Income War Tax Act*.

CONTROLLED

The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares . . . in section 39 of the *Income Tax Act* [R.S.C. 1952, c. 148], the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors.

GROUP OF PERSONS

The word "group" in its ordinary meaning . . . can refer to any number of persons from two to infinity.

Jackett, P.:

1 I shall deliver a single set of reasons for judgment in *Buckerfield's Limited v. Minister of National Revenue*, *Green Valley Fertilizer & Chemical Co. Ltd. v. Minister of National Revenue*, *Westland Elevators Limited v. Minister of National Revenue* and *Burrard Terminals Limited v. Minister of National Revenue*

2 These four appeals in each case are appeals against the assessments of the respective appellants under the *Income Tax Act* for the 1961 taxation year. The appellant in each case challenges the assessment on the ground that the Minister erred when, in making the assessment, he assumed that the appellant and another company were "associated with each other" in 1961 within the meaning of these words in subsection (2) of Section 39 of the *Income Tax Act*.

3 As the Minister's assumption was that Buckerfield's Limited (hereinafter referred to as "Buckerfield's") was associated with Green Valley Fertilizer & Chemical Company Limited (hereinafter referred to as "Green Valley"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together. Similarly, as the Minister's assumption was that Burrard Terminals Limited (hereinafter referred to as "Burrard") was associated with Westland Elevators Limited (hereinafter referred to as "Westland"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together.

4 The argument submitted in support of the appeal is the same in all four cases.

5 In 1961, one-half of the issued shares of Buckerfield's belonged to Pioneer Grain Company Limited (hereinafter referred to as "Pioneer") and one-half belonged to Federal Grain Company (hereinafter referred to as "Federal"). The same two companies each owned one-half of the issued shares of Green Valley. The shares in Buckerfield's were acquired by Pioneer and Federal under written agreement dated December 24, 1951, under which they agreed in effect,

- (a) that their share holdings in Buckerfield's were to be maintained at the same level,
- (b) that, notwithstanding the number of shares held or controlled by either of them, each of them was to have "an equal voice ... in the control and operation of Buckerfield's",
- (c) that each of them was to be entitled to nominate 50 per cent of the board of directors of Buckerfield's,
- (d) that "the management of Buckerfield's ... shall be such as shall at all times ... be acceptable to both parties", and
- (e) that each of them should have a right of first refusal in respect of the other's shares in Buckerfield's.

The parties had verbally agreed to the same terms in relation to Green Valley. Buckerfield and Green Valley were controlled in accordance with the respective agreements.

6 The basic facts in respect of Burrard and Westland were in substance the same as the basic facts that I have just recited in relation to Buckerfield's and Green Valley except that, in the case of Burrard, its shares were held one-third by Pioneer, one-third by The Alberta Pacific Grain Company (1943) Limited (a wholly owned subsidiary of Federal hereinafter referred to as "Alberta Pacific") and one-third by Searle Grain Company Limited (hereinafter referred to as "Searle"), and, in the case of Westland, its shares were held one-third by Federal, one-third by Pioneer and one-third by Searle.

7 Buckerfield's and Green Valley were each carrying on a business unrelated to the businesses of their shareholders. They both sold, among other things, fertilizer, and were in active competition with each other. There seems to have been no reason for acquisition of their shares by Pioneer and Federal except that the shares were regarded as a good investment. Burrard and Westland, on the other hand, operated terminal elevators and had facilities which, at certain seasons of the year, were of some considerable importance to the three companies which had acquired their shares.

8 Apart from their mutual interests in the appellant companies, the evidence is that Pioneer, Federal and Searle are vigorous competitors. They are each in the grain business in Western Canada and operate completely independently of each other. The evidence is further that, in three cases at least, the management of the appellants is left to the officers employed for the purpose and that

there is, in fact, no control exercised over the management of the appellants by Pioneer, Federal or Searle or by any one or more of them acting in combination.

9 On these facts, the question to be determined in each appeal arises under Section 39 of the *Income Tax Act* as applicable to the 1961 taxation year. That section reads in part as follows:

"39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided,

(a) 18% of the amount taxable, if the amount taxable does not exceed \$35,000, and

(b) \$6,300 plus 47% of the amount by which the amount taxable exceeds \$35,000, if the amount taxable exceeds \$35,000.

(2) Where two or more corporations are associated with each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 47% of the amount taxable for the year.

.....

(4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,

.....

(b) both of the corporations were controlled by the same person or group of persons,"

The question in the one set of appeals is simply whether Buckerfield's and Green Valley are "controlled by the same ... group of persons" within the meaning of those words in Section 39(4) (b) and the question in the other set of appeals is whether Burrard and Westland are "controlled by the same ... group of persons" within the meaning of those words in Section 39(4)(b).

10 Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the board of directors are separate, or it might refer to control by the board of directors. The kind of control exercised by management officials or the board of directors is, however, clearly not intended by Section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of Section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in Section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco Co. v. C.I.R.*, [1943] 1 All E.R. 13, where Viscount Simon, L.C., at page 15, says:

"The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

See also *Minister of National Revenue v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109, [1947] C.T.C. 1, per Lord Greene, M.R., at pages 118, 6, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within Section 6 of the *Income War Tax Act*.

11 Where, in the application of Section 39(4), a single person does not own sufficient shares to have control in the sense to which I have just referred, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

12 In these appeals, there is no doubt that Pioneer and Federal, in the one pair of appeals, and Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle, in the other pair of appeals, have control of the two appellants. If Pioneer and Federal are, in relation to the ownership of the shares of Buckerfield's and Green Valley, aptly described by the words, "group of persons", Buckerfield's and Green Valley are "associated with each other" within the meaning of those words in Section 39(2). Similarly, if Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle are, in relation to the ownership of the shares of Burrard and Westland, aptly described by the words "group of persons", Burrard and Westland are "associated with each other" within the meaning of those words in Section 39(2).

13 The applicable sense of the word "group" as defined by the *Shorter Oxford English Dictionary* (1959) is

"2. gen. An assemblage of objects standing near together, and forming a collective unity; a knot (of people), a cluster (of things). In early use there is often a notion of confused aggregation."

The only other sense that might be applicable is

"3. A number of persons or things in a certain relation, or having a certain degree of similarity."

14 Counsel for the appellants referred to other dictionary definitions but I do not find any conflict among them. Apart from the argument on these appeals, the phrase "group of persons" is apt to encompass the companies holding the shares of Buckerfield's and Green Valley or the companies holding the shares of Burrard and Westland, within my understanding of the meaning of that phrase whether or not I seek the aid of dictionaries.

15 Counsel for the appellants, however, put forward two submissions. These two submissions, as I understand them, are

(a) that the word "group" in its ordinary sense does not include any number of persons less than four; and

(b) in Section 39(4), the word "group" means a group of persons who come together to take advantage of the low rate of tax under Section 39 and not a group of persons who come together for any other particular common purpose.

16 In support of the first of these two submissions, as I understand him, counsel submitted that, if Parliament had intended to include two, reference would have been made to a couple or a pair and, if it had intended to include three, reference would have been made to a trio. I cannot accept this submission. The word "group" in its ordinary meaning, as I understand it, can refer to any number of persons from two to infinity. There is nothing in Section 39(4) to suggest that there is any intention to omit any of them. Any omission of particular numbers would be, moreover, an obvious gap in the legislative scheme.

17 I have equal difficulty in appreciating the force of counsel's other submission. It is that, in Section 39(4) "group" means a group of persons who come together to take advantage of the low rates of tax under Section 39. I have difficulty in conceiving of a group of shareholders holding shares in two or more companies having joined together in their share holdings in order to get the benefit of the lower tax rate in Section 39. The course of action that Section 39 has been designed to discourage is the multiplication of corporations carrying on a business in order to get greater advantage from the lower tax rate. If a group were a party to such activity, presumably it would, as a group, have controlled a single company carrying on the business before the business was divided among a number of companies each controlled by the group. In such a case, the group would not have come together for the purpose of getting the low rate under Section 39. Indeed, I can conceive of no case in which the group would have come together for that purpose. In any event, I am unable to appreciate the cogency of the argument in support of the submission that such an artificial limitation should be read into Section 39(4) so as to cut down the ambit of the clear words of that subsection.

18 The appeals are dismissed with costs.

Judgment accordingly.

2001 CarswellOnt 3833
Ontario Superior Court of Justice

McKay-Cocker Construction Ltd. v. McMurdo

2001 CarswellOnt 3833, 109 A.C.W.S. (3d) 245

**McKay-Cocker Construction Limited, Plaintiff
and Robert McMurdo, Defendant and Gary
Wilson and Pensa & Associates, Third Parties**

Cavarzan J.

Heard: October 17, 2001
Judgment: October 29, 2001
Docket: Hamilton 31745A/99

Counsel: *Michael G. Emery*, for Defendant/Responding Party
Ross F. Earnshaw, for Third Parties/Moving Parties

Headnote

Corporations --- Directors and officers — Liabilities — Miscellaneous issues

Third parties brought motion for leave to amend their statement of defence to include defence based upon s. 134 of Ontario Business Corporations Act — Motion granted — Language of s. 134(3) of OBCA is both prospective and retrospective — Former directors and officers of corporation are equally affected by language of s. 134(3) — Former directors and officers cannot contract out of liability for breach of duty imposed by s. 134(3) while they held such position — Amendment did not raise defence which was untenable in law — Defendant did not argue that he would be prejudiced if leave granted to amend pleading — Business Corporations Act, R.S.O. 1990, c. B.16, s. 134.

Practice --- Summary judgment — Availability of summary judgment — General

Third parties moved under Rule 20 of Ontario Rules of Civil Procedure for summary judgment against defendant dismissing part of third party claim — Motion dismissed — Motion for summary judgment under Rule 20 misconceived as it was doubtful whether summary judgment which third parties sought came within meaning of summary judgment dismissing part of claim in statement of claim as envisaged by rule 20.01(3) — Claim in third party claim was for contribution and indemnity for amounts which might be found owing to plaintiff — Statement of defence to third party claim denied that defendant was entitled to contribution and indemnity in whole or in part — Relief which third parties sought was not in fact summary judgment dismissing part of claim but rather determination of issue of law in order to defeat part of defendant's pleading — Ontario. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 20, 20.01(3).

Table of Authorities

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 134 — considered

s. 134(1) — referred to

s. 134(1)(a) — referred to

s. 134(3) — considered

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — considered

R. 20.01 — referred to

R. 20.01(3) — considered

R. 20.04(2) — considered

R. 20.04(4) — considered

R. 20.09 — referred to

R. 21 — referred to

R. 21.01 — considered

R. 21.01(1) — considered

R. 21.01(2) — considered

R. 26.01 — referred to

Cavarzan J.:

1 The third parties bring this motion for leave to amend their statement of defence to include a defence based upon section 134 of the *Ontario Business Corporations Act* (the *OBCA*). If leave is granted, then the third parties seek summary judgment against the defendant dismissing a part of the third party claim.

Background

2 The third parties are a law firm and one of its partners. Pensa & Associates had been retained to represent the plaintiff corporation (McKay-Cocker) in a share purchase and a corporate reorganization. Gary Wilson is the partner who did the requisite legal work.

3 Robert McMurdo, the defendant, was a director and the president of McKay-Cocker until he resigned on June 28, 1991 in order to retire. In his responding affidavit on this motion McMurdo deposes that on June 28, 1991:

...McKay-Cocker reorganized to borrow money from Roy-Nat to finance the purchase of shares in several holding companies through which my wife and I, along with two other directors and their wives held shares in McKay-Cocker after which those companies amalgamated as a reorganized McKay-Cocker.

4 The agreement for the purchase and sale of shares dated June 28, 1991, did not provide for the purchaser, McKay-Cocker, to release or indemnify the vendors of the shares and, in particular, Robert McMurdo as an officer and director of any of the McKay-Cocker companies, from any liability which he may have incurred as a result of that status.

5 McKay-Cocker commenced an action in 1999 against Robert McMurdo claiming the right to be indemnified by McMurdo for all amounts paid in settlement of claims asserted by the Ontario New Home Warranty Programme (ONHWP) in another action. In the alternative, McKay-Cocker sought damages for negligence, breach of fiduciary obligation and breach of duty.

6 ONHWP had claimed against McKay-Cocker in 1998 under a contract of guarantee signed by McMurdo on its behalf on April 3, 1986. Pursuant to that guarantee, McKay-Cocker and one John Rodgers jointly and severally agreed to indemnify ONHWP in respect of any loss or expense suffered by reason of default by Rodger's company, 657622 Ontario Inc. under the *Ontario New Home Warranties Plan Act*.

7 657622 Ontario Inc. (657) was the owner and developer of a residential condominium project in London, Ontario. 657 had approached Jock Tindale, then a director and the vice-president of McKay-Cocker with a request that McKay-Cocker be a guarantor of 657 to register under the ONHWP. Tindale presented the guarantee to McMurdo, as president, for signature by him on behalf of McKay-Cocker.

8 The guarantee was delivered by Tindale to 657 which submitted it, in turn, to ONHWP on April 4, 1986. Later in 1986, the directors of McKay-Cocker decided that McKay-Cocker would not participate in the construction project for which the guarantee had been given for the obligations of 657. Although Rodgers had been informed of this decision and had written a letter to ONHWP advising that the McKay-Cocker guarantee had been withdrawn, it appears that that letter was never received by ONHWP.

9 Following completion of the condominium development in 1988, claims were made against ONHWP as a result of the defective construction of the residential units. McKay-Cocker was notified in 1992 that claims were being made against it under the warranty programme. ONHWP issued its statement of claim against McKay-Cocker on June 2, 1998, on the basis of the guarantee signed by McMurdo.

10 In March, 1999, a settlement was reached in the ONHWP action whereby McKay-Cocker agreed to pay to ONHWP the sum of \$330,000.00 plus GST for a total of \$353,100.00. In June of that year the main action against McMurdo was commenced by McKay-Cocker alleging negligence and breach of fiduciary duty, and claiming indemnity from McMurdo for all amounts paid in settlement of the ONHWP claim.

11 In September, 1999, McMurdo issued his third party claim. On September 1, 2000, the main action was settled when McMurdo agreed to pay the all-inclusive sum of \$70,000.00 to McKay-Cocker.

The Issues

12 In order to provide a proper context for the issues raised by this motion, I will set out here the text of paragraph 8 of the third party claim, the proposed amendments to the statement of defence to the third party claim, and section 134 of the *OBCA*. Paragraph 8 of the third party claim provides as follows:

8. Wilson and Pensa breached their duty of care to the Defendant by not obtaining a Full and Final Release in favour of the Defendant from the Plaintiff, its affiliates and related corporations, or an agreement from the Plaintiff, its affiliates and related corporations to release him or to indemnify and hold him harmless from any claims which they or any third party may have or might bring against him for any act or occurrence which happened when he was an officer, director or shareholder in any of those corporations. Wilson and Pensa also breached their duty of care by not advising the Defendant to require the Plaintiff, its affiliates or related corporations to purchase or continue officer and director liability insurance for him to cover such claims.

The proposed amendments are embodied in paragraphs 25 and 26 of the proposed amended statement of defence:

25. With respect to the allegations at paragraph 8 of the Third Party Claim, the Third Parties state that even if the Third Parties had obtained a release from the Plaintiff in favour of the Defendant, such a release would not have been effective to bar the Plaintiff's claim against the Defendant. Any release obtained in June of 1991 would not have included the specific

matters at issue in the main action because neither the Plaintiff nor the Third Parties were aware of the alleged breach by the Defendant until at least September 1992.

26. The Third Parties state that the Defendant could not contract out of the duties and obligations imposed by section 134 of the Ontario Business Corporations Act, R.S.O. 1990, c.B.16 ("the OBCA"), and that a release of the type suggested at paragraph 8 of the Third Party Claim would not have constituted a defence to the Plaintiff's claim against the Defendant. The Third Parties plead and rely upon section 134 of the OBCA.

Section 134 of the *OBCA* provides that:

134.(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

(3) Subject to subsection 108(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

13 The responding party opposes both branches of the third parties' motion

Analysis

14 The first branch of the motion in which leave is sought to amend the statement of defence, is opposed on the basis that the amendment sought raises a defence which is untenable in law. There is authority for the proposition that notwithstanding the mandatory language of rule 26.01, leave to amend under this rule should not be granted where the amendment sought is not tenable in law. See *Keneber Inc. v. Midland (Town)* (1994), 16 O.R. (3d) 753 (Gen.Div.) in which there is cited with approval *Vaiman v. Yates* (1987), 60 O.R. (2d) 696 (H.C.J.).

15 The defendant/responding party argues that the third parties seek to rely on subsection 134(3) of the *OBCA* which, given the plain meaning of the words used by the legislature, applies only to incoming or current directors or officers. It was submitted that the word "*relieves*" relates to the words "*to act*" in that they are used in the present or future tense.

134(3) Subject to subsection 108(5) [re: unanimous shareholder agreements], no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty

to act in accordance with this Act and the regulations or relieves him or her from liability for the breach thereof. [underlining added]

16 In my view, the language of subsection 134(3) is both prospective and retrospective. It is retrospective inasmuch as it refers to "*liability for the breach thereof*". The policy of the legislation is to regulate the conduct of directors and officers of the corporation whenever they served in either capacity. Former directors and officers are equally affected by the language of subsection 134(3). It is not open to them, for example, to contract out of liability for the breach of the duty imposed by subsection 134(3) while they held such a position with the corporation. It follows that the amendment sought does not raise a defence which is untenable in law.

17 McMurdo does not argue that he would be prejudiced if leave is granted to amend the pleading. Indeed, subsection 134(1) was pleaded against McMurdo in the main action by McKay-Cocker in paragraphs 10 and 11 of its statement of claim. Paragraph 12 of McMurdo's statement of defence contains the following sentence: "*At all material times he acted honestly and in good faith with a view to the best interests of the Plaintiff*". That wording is from subsection 134(1)(a) of the *OBCA*.

18 There will be an order, therefore, granting leave to amend the statement of defence as proposed by the third parties.

19 The second branch of the motion is for summary judgment dismissing a part of the defendant's claim against the third parties. It is opposed on two grounds. It is opposed on the technical or procedural ground that the relief sought is properly the subject matter of a motion under Rule 21 for the determination, before trial, of a question of law. It is opposed as well on the substantive ground that subsection 134(3) of the *OBCA* does not have the effect in law claimed for it by the third parties. The defendant argues that an effective release could have been obtained which would have protected him against the claim by McKay-Cocker.

20 In my view the motion for summary judgment under Rule 20 is misconceived. The third parties have invoked subrules 20.01(3), 20.04(2), 20.04(4) and 20.09:

20.01(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.04(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, the court shall grant summary judgment accordingly.

20.04(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly...

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

21 In the first place, it is doubtful that the summary judgment sought here comes within the meaning of "*summary judgment dismissing part of the claim in the statement of claim*" as envisaged by the terms of subrule 20.01(3). The claim in the third party claim is for contribution and indemnity for any and all amounts which may be found to be owing to the plaintiff (McKay-Cocker Construction Limited) by the defendant (Robert McMurdo). The statement of defence of the third parties denies that the defendant is entitled to the contribution and indemnity claimed in whole or in part.

22 There is case law supporting the proposition that summary judgment on all or part of the claim under subrule 20.01 is not confined to a case where there is more than one separate and distinct claim. Judgment is available on part of a single claim where there is no genuine issue for trial. See *Krieger v. Krieger Estate* (1991), 45 C.P.C. (2d) 92, a decision of Master Clark citing with approval the reasons of Saunders J. in *Re Skye Resources Ltd. and Camsky Holdings Inc.; Royter & Co. v. Skye Resources Ltd.* (1986), 6 C.P.C. (2d) 296 (Ont. H.C.)

23 The issue in both the *Krieger* and the *Skye Resources Ltd.* cases was the value of shares in a company. In each case the court found admissions in the pleadings as to the minimum value of the shares. It was held that there was no genuine issue for trial with respect to that minimum value. Summary judgment was awarded in each case for that part of the claim, leaving it to the trial proceedings to determine the ultimate value of the shares in question and to make the necessary adjustment in the final award, taking into account the partial judgment already rendered.

24 In this case, the third parties deny any liability to pay the sums claimed. In his oral submissions, counsel for the third parties emphasized that whether or not the third parties owed a duty of care to the defendant and, if yes, whether or not they breached that duty of care, are genuine issues for trial. The motion for summary judgment is brought, nevertheless, on the basis of an admission made only for purposes of the motion. Listed among the grounds for the motion is the following:

3. On a without prejudice basis, the Third Parties are willing to admit, for the purposes of this Motion only, that the Third Parties owed a duty of care to the Defendant, and that this duty was breached by their failure to obtain a Full and Final Release from the Plaintiff in favour of the Defendant. [underlining in original text]

25 The relief sought is not summary judgment dismissing part of the claim. Whether or not the motion is successful the defendant's claim remains one for the full amount paid by him to the plaintiff. In reality, the third parties are seeking to have a legal issue determined in order to defeat a part of the defendant's pleading.

26 Paragraph 8 of the third party claim quoted above alleges that the third parties breached their duty of care to the defendant in three ways: by failing to obtain a full and final release; by failing to obtain an agreement indemnifying the defendant and holding him harmless; and by not advising the defendant to require the plaintiff to purchase or continue officer and director liability insurance.

27 The relief requested in paragraph 2 of the Notice of Motion is for summary judgment dismissing that part of the third party claim based upon the first two ways in which it is alleged that the third parties breached their duty of care. If successful, the result would be that the third way remains as a triable issue and a basis for claiming the full amount paid by the defendant to the plaintiff. In addition, paragraph 9 of the third party claim alleges breach of fiduciary duty, conflict of interest, and failure to advise the defendant to seek independent legal advice.

28 This motion for summary judgment must fail because it does not meet the criteria in any of subrules 20.01(3), 20.04(2) and 20.04(4). The summary judgment sought would not dismiss part of the claim. The existence of a duty of care and whether or not that duty of care was breached are, admittedly, genuine issues for trial. The court is not satisfied that the only genuine issue in this case is a question of law as required by subrule 20.04(4).

29 A motion under rule 21.01 for the determination of a question of law before trial may have been more appropriate in the circumstances here. Rule 21.01 provides, in part, as follows:

21.01(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

30 Having determined that this is not a proper case for summary judgment, I need not address the alternative substantive ground on which the defendant resists this motion. The intriguing question as to whether or not an effective release could have been crafted in the circumstances here may have to be answered on another occasion.

Conclusion

31 The moving parties are entitled to an order granting them leave to amend their statement of defence as requested. Their motion for summary judgment is dismissed. The summary judgment sought would not dismiss part of the claim in the statement of claim.

32 It is a misuse of the procedure under Rule 20 to maintain, on the one hand, that there is a genuine issue for trial, while conceding for the purposes of a motion under Rule 20 that no such genuine issue exists.

33 If the parties are unable to agree on the matter of costs of this motion, I may be spoken to.
Motion for leave to amend pleading granted; motion for summary judgment dismissed.

1993 CarswellNat 1888
Supreme Court of Canada

Rhône v. Peter A.B. Widener

1993 A.M.C. 1697, 1993 CarswellNat 1376, 1993 CarswellNat 1888, [1993] 1 Lloyd's Rep. 600, [1993] 1 S.C.R. 497, [1993] S.C.J. No. 19, 101 D.L.R. (4th) 188, 148 N.R. 349, 38 A.C.W.S. (3d) 618, 58 F.T.R. 239 (note), J.E. 93-510, EYB 1993-67287

Great Lakes Towing Company, Appellant v. The Owners and Operators of the MV Rhône, Vinalmar S.A. of Basle, Switzerland, the MV Rhône, Respondents and The MV Peter A.B. Widener, the owners and operators of the MV Peter A.B. Widener, Seaway Towing Inc. and North Central Maritime Corporation, Respondents and between

Great Lakes Towing Company, Appellant v. The MV Peter A.B. Widener,
the owners and operators of the MV Peter A.B. Widener, Seaway
Towing Inc. and North Central Maritime Corporation, Respondents

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Judgment: May 26, 1992
Judgment: February 25, 1993
Docket: 21886; 21885

Proceedings: On Appeal from the Federal Court of Appeal

Counsel: *Marc Nadon* and *George J. Pollack*, for the appellant.
Edouard Baudry, for the respondents.

Headnote

Maritime Law --- Navigation — Negligent navigation — Presumption of fault for breach of rules
Maritime Law --- Practice and procedure — Limitation of liability under Canada Shipping Act
— Entitlement to limitation

Maritime Law --- Practice and procedure — Limitation of liability under Canada Shipping Act
— Actual fault or privity

Collision with ship at wharf.

Four tugs were towing a barge into port. The lead tug had the flotilla travelling too fast and made a crucial turn too early. The barge went out of control. The barge captain failed to drop anchor and the barge hit a ship moored nearby. Owner of the barge obtained judgment against tug owners for breach of towing contract. Shipowner sued tug owners and barge owner in negligence and

obtained judgment with liability apportioned 20% to the barge and 80% to the lead tug and a second tug. The lead tug was liable because the captain had failed to properly prepare for and organize the voyage. The second tug was liable because its owners had failed to adduce evidence to rebut the presumption against them. Defendants appealed. Held, the appeal was allowed in part. The judgment was confirmed except with respect to the second tug. The trial Judge erred in his belief that there was a presumption operating against the second tug.

Flotilla — Extent of liability — Unit of limitation — Canada Shipping Act, R.S.C. 1970, c. S-9, s. 647(2).

All the vessels within a flotilla belonging to an impugned shipowner need not be taken into account in determining the extent of that shipowner's liability. The intent of s. 647(2) of the Act is to limit liability for navigational errors according to the tonnage of those vessels causing the alleged damage. Apart from the vessel responsible for the overall navigation of a flotilla, only those vessels of the same shipowner which physically caused or contributed to the resulting damage form the unit for which liability is limited.

Shipowner's entitlement to limitation of liability for collision caused by captain's negligence — Canada Shipping Act, R.S.C. 1970, c. S-9, s. 647(2).

A barge collided with a ship while being towed by four tugs. All four tugs were being led by the captain aboard the tug owned by defendant. Barge owner and shipowners sued defendant. Defendant counterclaimed to limit its liability in both actions under s. 647(2) of the Act. The Federal Court of Appeal upheld the trial Judge's dismissals of defendant's counterclaims on the ground that the captain was a directing mind of defendant and, as such, defendant was not entitled to limit its liability since the damage did not occur without its actual fault or privity. Defendant appealed. Held, the appeal was allowed. Navigational errors committed by a ship's master, in the course of his duties, did not in themselves give rise to actual fault or privity on the part of the shipowner in the absence of a breach of its duty to supervise the management and navigation of its vessel which was causally linked to the resulting damage. The captain was not a directing mind of defendant but rather he exercised the level of authority normally associated with a captain of his expertise. Accordingly, s. 647(2) was applicable to limit defendant's liability.

The judgment of La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by Iacobucci J.:

1 These appeals require this Court to consider the limitation of liability provisions within the *Canada Shipping Act*, R.S.C. 1970, c. S-9, allowing a shipowner to limit its liability for damages caused to other vessels occurring without the shipowner's actual fault or privity. More specifically, this Court must determine whether the appellant is entitled to limit its liability for the negligence of its employee in directing the navigation of a flotilla and, if so, the appropriate unit of limitation.

I. Facts

2 On November 7, 1980, the moored ship, *Rhône*, owned by the respondent Vinalmar S.A. ("Vinalmar"), was struck by the barge, *Peter A.B. Widener* ("*Widener*"), at the Port of Montréal. The *Rhône* sustained damages in the agreed amount of \$88,357.89, while the damages to the *Widener* were set at \$49,200.

3 The *Widener*, owned by the respondent North Central Maritime Corporation ("North Central"), is a "dumb" barge, so called because it relies on tug boats for its movements. At the time of the casualty, the *Widener* was commanded by Captain Lyons and was being towed by four tugs. Two of these, the *South Carolina* and the *Ohio*, were owned by the appellant, Great Lakes Towing Company ("Great Lakes"). Two others, the *Ste. Marie II* and the *Rival* were owned by the respondent North Central, and McAllister Towing & Salvage Ltd., respectively.

4 The towage of the *Widener* had been arranged through an oral contract between North Central and Great Lakes and involved its towage from Duluth, Minnesota, to the Port of Montréal. Captain Kelch, master of the Great Lakes' tug *Ohio*, acted as *de facto* master of the flotilla.

5 On the day of the collision in question, the *Ohio* was in front of the *Widener*, the *South Carolina* and the *Ste. Marie II* were on either side, and the *Rival* was at the rear. Owing to navigational errors made by Captain Kelch relating to the speed at which the flotilla was travelling and the point at which they turned around St. Helen's Island and proceeded up river against the St. Mary's current, the *Widener* began to move off course as the flotilla entered the Port of Montréal. The tugs attempted to compensate for this but the *Ohio's* towing apparatus malfunctioned and the *Widener* began to drift towards the *Rhône*. Despite attempts to correct the *Widener's* angle of drift, the *Widener* collided with the *Rhône*.

6 As a result of this mishap, two actions were commenced. In the first, the owners of the *Rhône*, the respondent Vinalmar, sued everyone involved — the barge owner and tug owners — for damaging their ship. In the second, the owners of the *Widener*, the respondent North Central, sued the appellant Great Lakes for breach of its contract of towage. Great Lakes denied liability in both actions and counterclaimed for limitation of liability pursuant to s. 647(2) of the *Canada Shipping Act*.

7 The two actions were joined for trial. In the action commenced by the owners of the *Rhône*, Denault J. apportioned 80 percent of the liability to Great Lakes, based on the negligence of the *South Carolina* and the *Ohio*, and 20 percent to the respondent, North Central, based on the negligence of Captain Lyons, captain of the *Widener*, for failing to drop the *Widener's* own anchor to stop its slide into the *Rhône*. In the action instituted by North Central, Denault J. ordered Great Lakes to pay all of the damages incurred by the *Widener*. Great Lakes' counterclaims for limitation of liability in both actions were dismissed.

8 Great Lakes appealed both decisions. North Central, the owners of the *Widener*, also cross-appealed the trial judge's finding of fault against the *Widener*. Although the Federal Court of Appeal disagreed with certain findings made by Denault J., it nevertheless maintained his overall finding with respect to both the negligence and the apportionment of liability as between Great Lakes and North Central. It agreed with Denault J. that Captain Kelch was a directing mind of Great Lakes, at least for the purpose of carrying out Great Lakes' obligations in relation to the tow of the *Widener*. As such, it found Great Lakes was not entitled to limit its liability since the damage did not occur "without [its] actual fault or privity".

9 As both appeals to this Court involve the same parties, facts, issues, and reasons in the courts below, I propose to deal with both through a single set of reasons. In both actions, the appellant, Great Lakes, challenges the denial of its counterclaims to limit its liability under s. 647(2) of the *Canada Shipping Act* submitting that Captain Kelch was not a directing mind of the company. It therefore contends that it should be entitled to limit its liability on the basis of the tonnage of the tug *Ohio*. However, if this Court finds the courts below erred in holding the resulting damage to the *Widener* and *Rhône* did not occur "without [the] actual fault or privity" of Great Lakes, the respondents submit that s. 647(2) is of no avail to Great Lakes in any event or, alternatively, that liability should be limited according to the combined tonnage of its tugs, the *Ohio* and *South Carolina*.

II. Relevant Statutory Authority

10 *Canada Shipping Act*, R.S.C. 1970, c. S-9

647. ...

(2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely,

.....

(d) where any loss or damage is caused to any property, other than property described in paragraph (b), or any rights are infringed through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(ii) any other act or omission of any person on board that ship;

liable for damages beyond the following amounts, namely,

.....

(f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

649.(1) Sections 647 and 648 extend and apply to

.....

any person acting in the capacity of master or member of the crew of a ship and to any servant of the owner or of any person described in paragraphs (a) to (c) where any of the events mentioned in paragraphs 647(2)(a) to (d) occur, whether with or without his actual fault or privity.

(2) The limits set by section 647 to the liabilities of all persons whose liability is limited by section 647 and subsection (1) of this section arising out of a distinct occasion on which any of the events mentioned in paragraphs 647(2)(a) to (d) occurred apply to the aggregate of such liabilities incurred on that occasion.

(Now R.S.C., 1985, c. S-9, ss. 575(1)(d), (f), and 577.)

III. Judgments in the Courts Below

Federal Court, Trial Division (1988), 18 F.T.R. 81

11 Denault J. had no trouble in concluding that Captain Kelch, as captain of the *Ohio*, conducted the flotilla in a negligent manner. Kelch had personal knowledge that the turn around St. Helen's Island at the entrance to the Port of Montréal would be a difficult one because he had run into trouble there the year before while towing another vessel. He was aware that the current at that point was fast and had actually agreed the night before with Captain Lyons of the *Widener* that they would make the turn at a less precarious place. In fact, he had notified Captain Lloyd, vice-president of operations of Great Lakes, that he was calling in a fourth tug (the *Rival*) to assist in the turn precisely because he was concerned about the difficulties involved. While Denault J. did not fault Kelch for his arrangement of the tugs, he found Kelch negligent in having them enter the turn at full speed so that they had little power to respond to deviations in the course of the tow. He further found Kelch negligent in failing to communicate adequately with the other tugs. In this regard, Denault J. made the following finding of fault (at pp. 103-4):

However, the greatest part of the liability must of necessity rest with the lead tug, the "Ohio", its master and owners. The lack of preparation which was apparent in the organization and conduct of this voyage, the haste shown by Capt. Kelch to get into the Port of Montréal, the flagrant lack of communication between the masters both before the turn at the Ile Ste-Hélène buoy and while they were proceeding back up the river, the decision to turn at that location, their return speed, are all factors which helped to make the accident inevitable. Furthermore,

the mechanical breakdown on the tug, which had been the subject of extreme tension, cannot serve to exonerate the owners of the "Ohio" in respect of the "Rhone".

12 Denault J. also found the *South Carolina* failed to discharge its burden in establishing that it had not been at fault. Moreover, he held the captain of the *Widener* was negligent for failing to communicate with the *Ohio* as the accident developed and in not dropping the barge's anchor on his own initiative. He apportioned 80 percent of the liability to Great Lakes and 20 percent to North Central.

13 Denault J. proceeded to consider the question of limitation of liability under s. 647(2). He analyzed the organization of Great Lakes and essentially found that the directing minds of Great Lakes were represented by Captains Lloyd and Kelch, as well as Joseph White, who was responsible for the maintenance and repairs for its fleet. He noted that, while Captain Lloyd had plenary responsibility for operational matters, he had delegated significant responsibility over the tug *Ohio* to Kelch. In particular, he observed that Kelch was responsible for anything relating to the navigation of the *Ohio*, including the provision of maritime maps and ensuring that all necessary items were on board the tug. He also highlighted that, by Lloyd's own admission, Kelch was part of the company's management and that Kelch himself viewed his many duties as making him a representative of Great Lakes. In terms of this particular voyage, Denault J. noted that, apart from preliminary measures taken care of by Lloyd, all navigational decisions were Kelch's responsibility. Therefore, while Kelch referred to Lloyd for authority to retain a fourth tug, Denault J. viewed this merely as a formality to cover the financial aspects of the matter. The decision whether to retain an additional tug rested with Kelch.

14 Denault J. also found that the breakdown of the towing equipment had to be attributed to the negligence of Great Lakes in maintaining its equipment. Moreover, he was particularly concerned by the fact that Lloyd had not been aware that Kelch had elected to act as master of the flotilla and, as a matter of practice, did not check whether Great Lakes' servants would assume responsibility as lead tug in a flotilla. Therefore, he concluded (at p. 110):

In short, even assuming that the defendant G.L.T. was able to prove the identity of persons whose acts identified them with acts of the company, it is far from establishing that those persons were not guilty of fault or privity in the sense that must be given to these words, as explained in the "*Kathy K*". On the contrary, the evidence established that Capt. Lloyd was the person whose acts identified him most with the acts of the company so far as administration and general supervision are concerned, and it was abundantly clear from his testimony that he knew practically nothing of what was happening on board his tugs during this voyage, cared very little about it and gave his masters all possible latitude. The person responsible for maintenance, Jos White, gave no plausible explanation of the mechanical breakdown on board the "Ohio". Finally, Capt. Kelch, who was responsible on the company's behalf not only for providing the tugs with the documentation necessary for such a voyage, but inter alia

for hiring a fourth tug to bring the barge to its destination, failed lamentably in his duties by exercising his functions as a company manager negligently in respect of the "Rival".

15 Denault J. dismissed the argument that, because the mistakes made by Captain Kelch were navigational in nature, the limitation provisions within the Act should nevertheless apply. He found the fact that Kelch performed non-navigational functions, such as providing maps and arranging additional tugs, made him part of Great Lakes' management and, as such, any errors committed while in his capacity as tug master were those of the company. He concluded (at pp. 109-10):

It does not much matter whether he acted wrongfully in his capacity as a manager of the company, as port master, or whether his faults are attributable to navigational errors as tug master: that cannot be a means of excluding his liability to the plaintiff. If the same person who commits a navigational mistake is also one whose acts identify him with acts of the company, and in that capacity is also at fault, his employers cannot benefit from the limitation of liability contained in s. 647.

16 Denault J. next turned to North Central's action against Great Lakes. He found Great Lakes breached its contractual obligation to North Central and could not limit its corresponding liability for the same reasons stated above. He also found that the limitation of liability contained in Great Lakes' published tariff did not form part of the contract between the parties and, therefore, he refused to give effect to it. Accordingly, Denault J. held North Central was entitled to recover the entire amount of the damages sustained by the *Widener* from Great Lakes.

Federal Court of Appeal, [1990] 3 F.C. 185

17 Hugessen J.A. wrote for the court. He addressed the findings of negligence against the three vessels in turn. He confirmed the finding of negligence against Kelch on the *Ohio*, noting that it was well supported by the evidence and that any other conclusion would have been perverse. He also confirmed the finding against the *Widener*. However, he rejected the assessment of fault against the *South Carolina*, noting that any errors it had made had been pursuant to orders from Kelch on the *Ohio* and not any negligence on the part of those responsible for her navigation. He stated, however, this reversal had no implications for the distribution of liability between Great Lakes and North Central.

18 On the issue of limitation of liability, Hugessen J.A. disagreed with the trial judge's finding of actual fault or privity in Captain Lloyd because of his inadequate supervision of Captain Kelch. While he agreed with the trial judge that an owner may be in actual fault or privity through sins of omission, he noted that the jurisprudence requires that such omission breach the standard of a reasonably prudent shipowner and be causally related to the casualty. Relying on *The Lady Gwendolen*, [1965] 1 Lloyd's Rep. 335 (C.A.), *Grand Champion Tankers Ltd. v. Norpipe A/S (The Marion)*, [1984] 2 All E.R. 343 (H.L.), and *Northern Fishing Co. (Hull), Ltd. v. Eddom (The Norman)*, [1960] 1 Lloyd's Rep. 1 (H.L.), he commented (at pp. 212-13):

The comparison between these cases and the facts as found by the learned Trial Judge in the case at bar is striking. There is no suggestion that a lack of supervision by the owners contributed in some way, however remote, to the casualty. The specific acts of negligence found against Captain Kelch are without exception ordinary questions of navigation lying within the normal authority and scope of activity of the master. There is no shred of evidence to suggest that a prudent shipowner would have so concerned himself with the details of navigation as to specifically instruct Kelch where to turn the flotilla or at what speed to tackle the St. Mary's current or in what manner to communicate with the other captains.... [T]here was no reasonable likelihood that any closer degree of supervision and reporting imposed by the owners at the company's Head Office in Cleveland would have materially affected the actions or decisions of Captain Kelch when he was navigating his flotilla in the Port of Montréal.

19 He further found Denault J. to have erred in finding Great Lakes was in actual fault or privity by reason of White's supervision of the repair and maintenance of the *Ohio's* towing machinery. While there was clearly a causal link between the breaking of the towing machine and the resulting damage, Hugessen J.A. concluded the trial judge erred in imposing such a high standard on the owner of a ship in relation to the proper functioning of its equipment. He highlighted that Great Lakes' inspection and maintenance system was "numerous and sophisticated" and that there was no finding of any inadequacy or defect in that system. As such, Hugessen J.A. observed that the trial judge's assessment of fault had the effect of incorrectly turning a shipowner into an insurer every time a casualty results from an equipment failure.

20 Hugessen J.A. then turned to the question of whether Kelch was a directing mind of Great Lakes. Citing *Wishing Star Fishing Co. v. The B.C. Baron*, [1988] 2 F.C. 325 (C.A.), he noted that, if Kelch was a directing mind, the fact that he was also acting as master and that his negligent acts had been committed within the scope of that capacity was irrelevant. Hugessen J.A. emphasized that Kelch was more than an ordinary master and had extended duties and responsibilities for the conduct of the flotilla. In this regard, he relied on the following facts in coming to the conclusion that Kelch was a directing mind of Great Lakes: (1) he was the towmaster of the flotilla and was vested with authority to give commands to all the other vessels in the flotilla; (2) his appointment to command the flotilla was not made by or with the knowledge of anyone senior to him at Great Lakes; (3) he was described, in parts of the evidence, as being part of management, a salaried employee, a "trouble shooter" and the person responsible for breaking in new captains; and (4) he took care of the documents for all of the Great Lakes' fleet. Hugessen J.A. admitted that this finding was at "the outer margins of the application of the doctrine of corporate identification" (p. 222) but declined to characterize the trial judge's finding as so palpable and overriding an error that it warranted appellate intervention, particularly bearing in mind the heavy burden on Great Lakes to establish its right to invoke the statutory limitation.

21 With respect to Great Lakes' liability for the damage caused to the *Widener*, Hugessen J.A. rejected Great Lakes' attempt to raise the issue of contributory negligence. Moreover, he further dismissed its assertion that the limitation of liability clause contained in its tariff rates formed part of the contract between the parties. As such, apart from striking from the trial judgment the attribution of fault against the *South Carolina*, Hugessen J.A. dismissed both the appeal and the cross-appeal.

IV. Issues

22 These appeals raise three issues. First, is the master of the appellant's tug *Ohio* a directing mind of the appellant by virtue of the fact that he exercised some discretion and performed some nonnavigational functions as an incident of his employment? Second, do the limitation of liability provisions in the *Canada Shipping Act* apply to limit a shipowner's liability for the acts or omissions of its servant in directing a flotilla comprising vessels belonging to other shipowners? Third, in the event that the appellant is entitled to limit its liability under the *Canada Shipping Act*, what vessels must be taken into account in determining the extent of its liability?

V. Analysis

1. Is the Master of the Appellant's Tug a Directing Mind of the Corporation?

23 The appellant, Great Lakes, contends that Hugessen J.A. erred in concluding that there was actual fault or privity on its part on the basis that Captain Kelch was a directing mind of the corporation and that therefore Great Lakes could not limit its liability under the *Canada Shipping Act*. Assessing the merits of this contention requires that I examine briefly both the general principles pertaining to the limitation of liability under the *Canada Shipping Act* and the development of the doctrine of corporate identification before applying the relevant principles to the facts of this case. As a preliminary matter, I believe it important to point out that the identification of particular individuals within a corporate structure as directing minds of that company is a question of mixed fact and law. As Lord Reid observed in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.), at p. 170, "It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent." The legal issue is concerned with identifying which functions or offices ground corporate identification; the factual issue determines who carries out these functions or fills these offices.

(a) The General Principles of Limitation of Liability and Corporate Identification

24 It is well settled that in an action to limit liability under s. 647(2) of the *Canada Shipping Act*, the onus is on the shipowner claiming the limitation to establish a complete absence of "actual fault or privity" on its part. The onus is a heavy one which is not discharged by showing merely

that the owner was not the sole or principal cause of the mishap: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 819.

25 The leading Anglo-Canadian case setting out the meaning of the words "actual fault or privity" and its application to a corporate shipowner is *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), aff'g [1914] 1 K.B. 419 (C.A.). The words "actual fault or privity" were found to denote something personal and blameworthy to a shipowner as opposed to a constructive fault arising under the doctrine of *respondeat superior*. In the oft-quoted words of Viscount Haldane L.C. at pp. 713-14:

It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim *respondeat superior* the burden lies upon him to do so.

26 In *Paterson Steamships, Ltd. v. Robin Hood Mills, Ltd. (The Thordoc)* (1937), 58 L.L. Rep. 33 (P.C.), Lord Roche adopted the meaning attributed to the words "fault and privity" by both the Court of Appeal and the House of Lords in *Lennard's, supra*, and further highlighted that the fault or privity of a shipowner must be fault or privity in respect of that which causes the loss or damage in question. See also *British Columbia Telephone Co. v. Marpole Towing Ltd.*, [1971] S.C.R. 321, at pp. 326-27, *per* Ritchie J.

27 Therefore, in the case of a corporate shipowner, it is necessary to consider whether the acts of a particular individual giving rise to liability should be attributed to that of the company itself. Said differently, the question that arises is at what point in the hierarchy of a company is the fault of a person employed in the organization to be treated as the fault of the company itself. In this connection, the nature of a corporation was aptly described by Viscount Haldane L.C. in *Lennard's, supra*, in the following manner at p. 713:

My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles

of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.

28 In *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, the Court of Appeal compared a corporation to a human body, describing those who control what a company does (and who therefore are the directing mind and will of a company) as the brain of an individual. Denning L.J. rejected the argument that only actions arising from a meeting of a company's board of directors can form the intention of a company. Rather, he accepted that the intention of a company can be derived from its officers and agents in some instances depending on the nature of the matter in consideration and their relative position within the company. Denning L.J. observed at p. 172:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

29 In *Tesco Supermarkets, supra*, the House of Lords dealt with a situation in which a manager of one store in a chain of supermarkets was found to have been negligent in supervising an employee who placed improperly priced goods for sale, thereby committing a pricing offence under the *Trade Descriptions Act 1968* (U.K.), 1968, c. 29. Their lordships held that the mere fact that the manager exercised limited discretion in the performance of his assigned role did not render him part of the directing mind of the company. Lord Morris of Borth-y-Gest stated at pp. 180-81:

A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company ... He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it.

30 Some commentators have suggested that their lordships placed too great a reliance upon form at the expense of function in their analysis: I.A. Muir, "Tesco Supermarkets, Corporate Liability

and Fault" (1973), 5 *N.Z.U. L. Rev.* 357, at p. 365. Glanville Williams states in his *Textbook of Criminal Law* (2nd ed. 1983), at p. 973:

In crimes requiring *mens rea* it does not greatly matter if the range of persons inculpating the company is restricted, since the purposes of deterrence are generally best served by prosecuting those who are responsible. It is in offences of negligence that the limitation of liability imposed in *Tesco* is most injurious. That a company should not be liable for an offence of negligence committed by its branch manager, who after all represents the company in the particular locality, is a considerable defect in the law.

Another commentator characterizes *Tesco Supermarkets* and the cases which followed it as evincing a "socially unjustifiable regression" which was incapable of providing effective deterrence against criminal conduct perpetrated by multinational corporations with complex managerial structures: E.G. Ewaschuk, "Corporate Criminal Liability and Related Matters" in (1975), 29 *C.R.N.S.* 44, at pp. 52-53.

31 This Court considered the issue of corporate identification in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 *S.C.R.* 662. Estey J. found that in order for a corporation to be criminally liable under the "identification" theory, the employee who physically committed the offence must be "the 'ego', the 'centre' of the corporate personality, the 'vital organ' of the body corporate, the '*alter ego*' of the employer corporation or its 'directing mind'" (p. 682). However, he also acknowledged that there may be more than one directing mind and highlighted that there may exist the "delegation and sub-delegation of authority from the corporate centre" and the "division and subdivision of the corporate brain". In this regard, Estey J. provided the following guidance as to who may qualify as the directing mind of a corporation at p. 693, casting doubt in the process of whether the specific conclusion reached in *Tesco Supermarkets, supra*, is appropriate in the Canadian context:

The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.... [A] corporation may, by this means, have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and sub-delegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in *Tesco, supra*, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made.

32 As Estey J.'s reasons demonstrate, the focus of inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.

33 Negligence on the part of a master of a ship in the performance of his or her navigational duties does not amount to actual fault or privity on the part of a corporate shipowner. Courts have viewed masters as the "hands" of a shipping company. Obviously, if it were otherwise a corporate shipowner's right to limit its liability would be virtually nonexistent. However, having said that, the courts have moved away from allowing shipowners to wash their hands completely of all responsibility for matters of navigation by leaving everything to the discretion of their masters. Whereas in the past it may have been sufficient for a shipowner to discharge its responsibility by merely showing that it appointed a competent master, a number of decisions now make it clear that there exists an overall duty on a shipowner to supervise properly the navigation of its vessels: see, for example, *Grand Champion Tankers, supra*, and *Continental Bank of Canada v. Riedel International Inc.* (1991), 78 D.L.R. (4th) 232 (F.C.A.).

34 In such instances, the focus of inquiry is on whether a shipowner acted as an ordinary reasonable shipowner in the management and control of its shipping operation (e.g., in the selection of its crew and supervision of the navigation of its vessels): *The Lady Gwendolen, supra*, and *The Garden City*, [1982] 2 Lloyd's Rep. 382 (Q.B. (Adm. Ct.)). Courts have further applied a "reasonable likelihood" test in determining whether the exercise of particular duty by a shipowner would have prevented the impugned damage. For example, in *Marpole Towing, supra*, Ritchie J. accepted that damage caused by the negligent navigation of a ship does not give rise to actual fault or privity on the part of the shipowner where the navigational error committed by the tug master could not have been foreseen by the shipowner.

35 The issue, however, this Court is asked to consider is not whether Great Lakes breached its duty to supervise and manage its vessels properly but instead whether Captain Kelch's faults are essentially the actual faults of Great Lakes by reason of his position within the corporate hierarchy of the appellant. In this regard, it is relevant to note Hugessen J.A.'s observation at p. 213 that "if Kelch was truly a directing mind and will of the company, the fact that he was also acting as master and that his negligence was committed in that capacity is nothing to the point": see also *Wishing Star Fishing, supra*, and *Société anonyme des minerais v. Grant Trading Inc. (The Ert Stefanie)*, [1989] 1 Lloyd's Rep. 349 (C.A.). The appellant did not challenge this proposition before this Court and, in light of the conclusion I have arrived at, I need not discuss this matter any further.

(b) *Application of These Principles to This Case*

36 Captain Kelch was admittedly the master of the *Ohio* at the time of the collision. As noted above, navigational errors committed by a ship's master, in the course of his or her duties, do not in themselves give rise to actual fault or privity on the part of the shipowner in the absence of a breach of its duty to supervise the management and navigation of its vessel which is causally linked to the resulting damage. However, it is alleged that Captain Kelch also performed exceptional duties on behalf of his employer which rendered him not just a master but more importantly a directing mind of Great Lakes such that his fault was that of the company. In particular, the courts below emphasized that Kelch was *de facto* commodore of the flotilla and in this capacity he gave instructions to the other vessels in the flotilla and could elect to bring in additional tugs if he deemed it necessary for safe navigation. Furthermore, reference was made to the fact that Kelch was described as being part of management, a salaried employee, a fleet captain, a "trouble shooter" and the person responsible for breaking in new captains. The courts below also placed weight on the fact that Kelch was responsible for ensuring that the paperwork was in order for all of the tugs in Great Lakes' fleet.

37 With respect, I cannot agree with the conclusion reached by the courts below as to the status of Captain Kelch as a directing mind of Great Lakes. In my opinion, the facts of this case do not merely put it at "the outer margins of the application of the doctrine of corporate identification" but outside those margins.

38 While Captain Kelch was described as part of the "management" and a "trouble shooter" for Great Lakes (Hugessen J.A., at p. 221; Captain Lloyd, Evidence, hearing September 15, 1987, transcript at p. 49; and Captain Kelch, Commission Evidence, Appeal Book, app. I, vol. 3, at p. 291), one must look behind these labels and consider the responsibilities and functions performed by Captain Kelch within the Great Lakes' hierarchy in the context of captains of seafaring vessels. In this respect, it is clear from the totality of the evidence that Captain Kelch was essentially a port captain subject to the supervision and direction of Captain Lloyd. It is not surprising that given his twenty-five years of expertise that Kelch was given additional responsibilities in such matters as breaking in new tug captains, assisting with occasional problems, and taking care of documents for Great Lakes' fleet. However, these additional tasks, in my mind, do not denote delegation to Captain Kelch of the governing executive authority over the management and supervision of Great Lakes' fleet. This authority remained with Captain Lloyd, as is borne out by the evidence.

39 For example, Captain Kelch described both his and Captain Lloyd's role at Great Lakes in the following manner:

Q. At the end of your employment with Great Lakes, you were a fleet captain?

A. Port captain, or whatever.

Q. What were your duties?

.....

A. Flunkie.... I was a flunkie, believe me, more or less a trouble shooter. I would make tows. I could communicate pretty good with the unions, you know, really.

.....

Q. Chick Lloyd was mentioned. Who exactly is he?

.....

A. He is the flunkie now. He was the operations manager. He was a vice-president.

Q. He was a vice-president and operations manager. What were the nature of his duties then?

A. Well, he could make prices on the tows. They would come to him if somebody wanted a specific tow or tug or anything like that.

Q. Was he responsible for crewing the tugs?

A. Well, in a way. I mean he had a lot of people that if he didn't want them on there, they didn't go. He was in charge of the whole operation, really, as far as the marine end of it, you know.

Q. And I take it then he was your supervisor?

A. My supervisor, my immediate supervisor, yes.

Q. Did you report only to him?

A. Just about. I never had any cause to report to anyone one else unless, of course, you call into the dispatcher. I mean, I was under Chick Lloyd. I did — whatever rotten job he had for me, I done.

(Captain Kelch, Commission Evidence, Appeal Book, app. I, vol. 3, at pp. 404-6; see also pp. 299 and 411.)

40 In terms of Captain Kelch's role as towmaster of the flotilla, evidence was led at trial to show that it was not out of the ordinary practice for the captain of the lead tug to act as master of a flotilla (Captain Lyons, Evidence, hearing September 15, 1987, transcript at pp. 130-31). Arranging for additional tugs was also a component of the exercise of navigational responsibilities. While Captain Kelch did not require authorization to engage a fourth tug, he frequently reported to Captain Lloyd about his actions (Denault J., at p. 107). His extensive authority in navigational matters was not unusual in the trade. In this regard, we should bear in mind that, by necessity and tradition, the discretion of a master in the performance of his or her assigned role is a wide one that generally extends to all acts that are usual and necessary for the use and employment of a ship:

Grant v. Norway (1851), 20 L.J.C.P. 93, at p. 98. A master's discretion in navigational matters does not derive from delegation of central authority but from tradition and necessity. The very nature of the shipping business makes it impractical for a ship's master to call in for instructions to deal with routine navigational concerns. In this respect, the appellant submits, correctly in my mind, that to find Captain Kelch a directing mind of Great Lakes on the basis of his authority in navigational matters while at sea would virtually nullify the effect of the limitation of liability provisions within the *Canada Shipping Act*.

41 It should be noted that the managerial complexity of shipping companies is not a novel development of which earlier formulations of the corporate identification doctrine were not cognizant. Keeping in mind Estey J.'s observations in *Canadian Dredge & Dock, supra*, one cannot truly say that the authority over navigational matters enjoyed by Captain Kelch is the sort of delegation which conferred "governing executive authority" over the management of Great Lakes' ships. It is in the very nature of seafaring that the master must be invested with discretion to respond to variations in the weather, the tides, and other navigational matters. It does not flow from this necessary delegation that the master is thereby invested with the full discretion to act without guidance from supervisors in relation to matters of corporate policy, such that he can be said to have been delegated managerial authority. Nor can it be said that a master is free from control and instruction from those at Great Lakes responsible for the supervision and management of its fleet (i.e., Captain Lloyd). The fact that Captain Lloyd may have been lax in his supervision of Captain Kelch does not alter the fact that Kelch was essentially a servant of Great Lakes.

42 With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea. While Captain Kelch no doubt had certain decision-making authority on navigational matters as an incident of his role as master of the tug *Ohio* and was given important operational duties, governing authority over the management and operation of Great Lakes' tugs lay elsewhere. Therefore, I am of the view that the courts below erred in holding that Captain Kelch was part of the directing mind and will of Great Lakes. As a result, the collision between the *Rhône* and the *Widener* did not occur with the actual fault or privity of Great Lakes.

2. Does Section 647(2) Apply to Limit Great Lakes' Liability with Respect to Errors Committed in the Navigation of Other Vessels Within the Flotilla not Owned by Great Lakes?

43 Because I am of the view that the courts below erred in finding Captain Kelch a directing mind of Great Lakes, it is necessary to consider the respondents' alternative argument that s. 647(2) does not extend to limit Great Lakes' liability for Captain Kelch's direction of other vessels within the flotilla not owned by it. For ease of reference, I reproduce again s. 647(2)(d):

647. ...

(2) The owner of a ship ... is not, where any of the following events occur without his actual fault or privity, namely,

.....

(d) where any loss or damage is caused to any property ... through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship,... or

(ii) any other act or omission of any person on board that ship;

44 The respondents contend that Captain Kelch was negligent with respect to the navigation not only of the *Ohio* but also of the *Ste. Marie II*, *Rival*, and *Widener*. As such, they submit that Great Lakes cannot limit its liability under s. 647(2)(d)(i). This provision allows a shipowner only to limit its liability for damage caused through the navigation or management of its own ships. Since it is alleged that the collision was caused through acts or omissions of Captain Kelch in the navigation of vessels not owned by Great Lakes, the respondents submit that the appellant cannot rely on this provision to limit its liability. Moreover, the respondents contend that s. 647(2)(d)(ii) should not be interpreted to apply in this case since it would require this Court to accept that any act or omission of Captain Kelch on board the *Ohio* would be subject to limited liability regardless of whether it is related to the operation of that vessel. In this regard, the respondents highlight that Captain Kelch's directions related not only to the operation of the *Ohio* but also to the overall navigation of the flotilla.

45 A similar argument was addressed and unanimously rejected by the Court of Appeal in *The Bramley Moore*, [1963] 2 Lloyd's Rep. 429. In that case, the owners of a tug brought an action to limit their liability under the English equivalent to s. 647(2) of the *Canada Shipping Act* for a collision between a barge being towed by the tug and a third vessel. The tug and tow were separately owned. Counsel for the third vessel contended that the tug's owners were not entitled to limit their liability. They argued that it was by reason of the improper navigation of both tug and tow that the collision occurred and, therefore, a claim could not be made out under the statute both prior to and after its amendment in 1958. The relevant portion of the statute prior to 1958 provided that the "owners of a ship" could limit their liability for damage caused to another vessel "by reason of the improper navigation of the ship." Accordingly, it was submitted that since the collision was not only caused by reason of the improper navigation of the tug but also the tow, the tug owner was not able to claim the benefit of limited liability under the statute.

46 Lord Denning, M.R., writing for the court, dismissed this argument on two separate grounds. First, he highlighted that the statutory provision required courts to consider the cause of the damage. He reasoned that, at least in the case of separate ownership, where only those on

board a tug are negligent, the true cause of the damage is the improper navigation of the tug and not the tow. In those circumstances, the statute would apply without question to limit the liability of the tug owner. He reasoned at p. 436:

It can well be said that the owners of the tug were guilty of "improper navigation" of the barge — in that they were in control of the movement of the barge through the water. But the section requires you also to look at the cause of the damage. That is clear from the words "by reason of". And in a case where those on the tug are negligent, and those on the barge are not, the cause of the damage is in truth the improper navigation of the tug, not the improper navigation of the barge. It is the tug which is the cause of all the trouble. That is, at any rate, the way in which these cases have been regarded in the past This must be on the assumption that the damage is "by reason of the improper navigation" of the tug, but not "by reason of the improper navigation" of the tow.

47 Second, Lord Denning found that, in any event, the argument that the tug owners' right to limit their liability was conditional on their being owners of the barge was dispelled by virtue of the 1958 amendment to the Act. This amendment expanded the scope of limited liability to also include damage caused to any property "through any other act or omission of any person on board the ship." Applying this statutory provision to the fact situation at hand, Lord Denning observed at p. 437:

If those on board the tug are negligent and those on board the tow are not, and the tow comes into collision with another vessel, then clearly the damage is caused through an "act or omission of any person on board the tug". If you insert the appropriate words into the section as now amended, it reads in this way: "The owners of a tug shall not, where damage is caused through any act or omission of any person on board the tug, be liable in damages" beyond an amount calculated on the tonnage of the tug. So read, it seems clearly to cover the case when those on the tug are negligent and those on the tow are not. It shows that the owners of the tug can limit their liability according to the tonnage of the tug.

48 The respondents, in the case at bar, contend that Captain Kelch's orders to turn at the Seaway entrance buoy and to proceed at full speed once the turn had been made involved not only Great Lakes' tugs but also the *Rival* and *Ste. Marie II*. Therefore, it is argued that these acts of Captain Kelch, which were expressly found by the courts below to have caused the resulting casualty, involved the navigation of vessels not owned by Great Lakes, thereby foreclosing its ability to rely on s. 647(2)(d)(i). Moreover, they argue that it is implicit in the trial judge's reasons and findings that Captain Kelch's omission to order the drop of the *Widener's* anchor contributed to the collision. In this regard, the respondents contend that this case can be distinguished from cases such as the *Robertson v. Owners of the Ship Maple Prince*, [1955] Ex. C.R. 225 (which have held that where a tug and tow are separately owned, a casualty arising from the navigation of the tow should be

attributed to the tug) since Captain Kelch was capable of navigating the *Widener* without the use of the *Ohio*.

49 Accepting for the sake of argument that the cause of the collision must be attributed to Captain Kelch's navigation not only of the *Ohio* but also the other vessels within the flotilla not owned by Great Lakes, the respondents' argument nonetheless fails on the clear words of s. 647(2) (d)(ii). This provision provides that Great Lakes, as owner of the *Ohio*, may limit its liability for damage caused to another vessel through "any other act or omission of any person on board [that] ship." Therefore, Great Lakes may limit its liability since the cause of the collision consisted of acts or omissions of Captain Kelch on board the *Ohio*.

50 Interpreting s. 647(2) in this manner to limit the appellant's liability accords not only with the clear words of the statute but also with the purpose underlying this section, namely, removing the threat of unlimited liability to a shipowner. In this regard, we should recall the role of limited liability for shipowners in the development of modern shipping enterprises and in the facilitation of insurance coverage: see *Marpole Towing, supra*, at p. 338; *The Garden City, supra*, at p. 398; and Christopher Hill, *Maritime Law* (3rd ed. 1989), at p. 242. As has often been observed, the origin of these limitation provisions rests with the desire to promote commerce and international trade by affording shipowners protection from the full impact and perhaps ruinous pecuniary liability arising from acts of navigation over which they have no personal control.

51 Certainly, a number of commentators have drawn into question the continued need for limited liability in this day and age of corporations and developed insurance markets: e.g., Grant Gilmore and Charles L. Black, *The Law of Admiralty* (2nd ed. 1975), at p. 822. However, whether this regime is responsive to modern realities is a question of policy to be determined by Parliament and not the courts whose task is to interpret and give effect to the intention of Parliament. In this regard, I consider the following comment by Lord Denning in *The Bramley Moore, supra*, at p. 437 apposite:

The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.

52 Accordingly, Great Lakes is not precluded from limiting its liability under s. 647(2) under the respondents' alternative argument.

3. In the Event that Great Lakes Is Entitled to Limit its Liability Under Section 647(2), Is the Appropriate Unit of Limitation Under Section 647(2) the Tonnage of the Tug Ohio Alone or the Aggregate Tonnage of the Tugs Ohio and South Carolina?

53 Great Lakes submits that, in the event that it is found able to limit its liability under s. 647(2), its limitation should be restricted to the tonnage of the tug *Ohio*. The respondents, however, contend that the proper unit of limitation is the combined tonnage of the two tugs owned by the appellant, the *Ohio* and *South Carolina*. They submit that the collision was caused in part by the combined navigation of both these tugs by the same servant of the appellant. Therefore, they argue that liability should be calculated according to the aggregate tonnage of the "wrongdoing mass". The *Canada Shipping Act* provides that a shipowner's liability may be limited according to the tonnage of its vessel whose navigation or management caused the resulting damage or on which the impugned acts or omissions giving rise to liability occurred. However, a review of Anglo-Canadian jurisprudence, relating to the limitation of liability for collisions involving tugs and tows, reveals some divergence of opinion as to which vessels belonging to a shipowner must be taken into account in determining the extent of the shipowner's liability. As such, it is appropriate to review the case law briefly before stating my conclusion on this point.

54 Early English case law accepted that, where a tug and tow are commonly owned, navigational errors committed by the employees of the shipowner, while on board the tug, are also errors in the navigation of the tow thereby giving rise to liability to the shipowner as both owner of the tug and tow: *The Ran*; *The Graygarth*, [1922] P. 80 (C.A.); *The Harlow*, [1922] P. 175 (Adm.); and *The Freden* (1950), 83 Ll. L. Rep. 427 (Adm.). Accordingly, the appropriate unit of limitation was that of both tug and tow.

55 Canadian courts adopted a similar stance. In *Owners of the M.S. Pacific Express v. The Tug Salvage Princess*, [1949] Ex. C.R. 230, the court relied on *The Ran* and *The Harlow* to conclude that, where a tug and tow are commonly owned, liability will be limited according to the aggregate tonnage of both despite the fact that only the tug could be said to have been negligent. Sidney Smith D.J.A. commented at pp. 234-35:

But to do this they must bring into account the tonnage of those of their vessels as may have contributed to the damage by actual impact, or by their momentum. Liability must be calculated on the aggregate tonnage of the wrong-doing mass. I think this is the effect of *The Ran*; *The Graygarth* case *supra*, as explained in the *Harlow* case *supra*. Here the tonnage in question must be that of tug plus barge; for, to slightly modify the language of plaintiffs' submission, "the tug and derrick-barge were lashed together as a unit during the whole of the relevant period; it was a case of the one vessel, one owner, one master, one group of employees of that owner".

56 However, in *Maple Prince*, *supra*, Sidney Smith D.J.A. drew a distinction between cases in which the tug and tow are separately and commonly owned. The court in that case held a tug owner was entitled to limit its liability based on the tonnage of the tug alone for a collision between

its tow and a third vessel because, unlike the situation in *Pacific Express, supra*, the tug and tow were not owned by the same person. He observed at pp. 228-29:

I think the language of the decisions on limitations taken in its full effect indicates that the ships that must be brought into account in fixing a tonnage-basis of liability are the defendant's ships that are "guilty" in the affair of the collision.... Where the barges do not belong to the tug-owner, they are not "guilty", and so are not to be considered.

57 The issue came before this Court in *Monarch Towing & Trading Co. v. British Columbia Cement Co.*, [1957] S.C.R. 816. Monarch owned the tug and chartered the unmanned scow which became stranded and sank during the voyage. The owner of the scow sued the tug owner. Negligence was admitted and the tug owner brought an action to limit its liability. For purposes of the limitation provisions, "owner" was defined to include the "lessee or charterer of any vessel responsible for the navigation thereof". Consequently, Monarch was deemed both the owner of the tug and scow. When it sought to limit its liability, it argued that the appropriate measure of its liability should be the tonnage of the tug alone since the actual negligence occurred on the tug. This Court rejected that argument and held liability should be assessed on the combined tonnage of both vessels.

58 Kerwin C.J., writing also for Taschereau J. and with Cartwright J. concurring, reasoned that since Monarch was the owner of both vessels for purposes of the *Canada Shipping Act* and further that the tow was not an "innocent" ship, the tonnage of both vessels had to be taken into account. He found the scow, as well as the tug, to be negligent on the ground that its stranding was caused by those in command of the tug who were both servants of Monarch and also responsible for the navigation of the scow. As such, this case was found to be distinguishable from *Maple Prince, supra*. Locke J. came to the same conclusion without rendering any reasons. Rand J., with Cartwright J. also concurring, observed that liability in this case arose both in contract and tort. As such, he interpreted the term "ship" in then s. 657 of the *Canada Shipping Act*, R.S.C. 1952, c. 29, to include both a tug and its tow performing a contractual undertaking. He observed that the same result would arise if the claim had been based in tort concluding that, since both vessels were owned by Monarch, the negligent navigation of the tug by Monarch's agents was also attributable to the navigation of the scow and thereby rendered the latter also negligent. The scow was held to be in a "guilty agency" and to be analogous to the barge in *The Ran, supra*. Rand J. stated at p. 822:

With a common ownership of two vessels whose combined mismanagement has caused damage through collision to the goods of a shipper in one of them, the liability of the owner is related to the several fault of each of his vessels, that is, they are deemed to be two sources of liability, two distinct agencies with different servants of the same master, each giving rise to a responsibility and each coming under the limitation of s. 657. [Citation omitted.]

59 However, when the issue of limited liability came before the English Court of Appeal again in *The Bramley Moore, supra*, Lord Denning openly questioned the significance of common ownership in determining the extent of a shipowner's liability. In his opinion, where those on board a tug are negligent and those on a tow are not, the cause of damage is the improper navigation of the tug and not its tow. It is the tug which is the cause of all of the trouble. In this regard, Lord Denning drew into question the decision in *The Ran, supra*. He failed to see the relevance of common ownership and found there was "no logical ground" for this special exception allowing for liability to be assessed on the combined tonnage of tug and tow where both are commonly owned. In his opinion, it is only when those on board both the tug and tow are negligent and it is the combined negligence of both vessels which cause the damage that liability against the common owner of both vessels should be based on the combined tonnage of both tug and tow: i.e., *The Harlow, supra*. It is important to stress that Lord Denning's comments regarding common ownership were strictly *obiter dictum* since the tug and tow in that case were not commonly owned.

60 Lord Denning's *obiter* comments were reluctantly followed in *London Dredging Co. v. Greater London Council (The Sir Joseph Rawlinson)*, [1972] 2 Lloyd's Rep. 437 (Q.B. (Adm. Ct.)). The issue before the court was on what basis could the owners of a tug and tow limit their liability for a collision arising from the negligence of those on board the tug but for which there was no negligence on the part of anyone on the tow. As the tug and barge were owned by the same person, the respondent submitted that the appropriate limit should be the combined tonnage of both ships. Kerr J. expressed great sympathy for the view that the owner of a tug whose barge was also involved in the casualty should be called upon to pay an amount related to both vessels. However, he felt bound by Lord Denning's test of "causative negligence" to hold that liability must be limited according to the tonnage of the tug alone. Consequently, he dismissed the respondent's argument that the English equivalent to our s. 647(2)(d)(i) required liability to be limited according to the tonnage of both tug and tow, stating the following at p. 445:

First, there is the passage by Lord Denning, giving the unanimous judgment of the Court of Appeal, about the effect of causation.... It seems to me that on the basis of that passage the only causative negligence, which is the negligence to which one must look, must in cases such as this be regarded as negligence in the navigation of the tug, and not negligence in the navigation of the tow or negligence in the navigation of both the tug and tow. Accordingly, whilst it is apparently still correct to say that a person who negligently navigates a tug towing something may be negligent in the navigation both of the tug and the tow, in particular where the damage is caused wholly or as in the present case partly by the tow, it seems to me that the effect of the decision of the Court of Appeal is that the *causative* negligence is in such cases to be treated as negligence in the navigation of the tug alone. I also consider that if this is the correct approach to the statutory position before 1958, then one cannot say that this has been altered by the 1958 Act. [Emphasis in original.]

61 With the decisions in *The Bramley Moore*, *supra*, and *The Sir Joseph Rawlinson*, it must now be regarded as settled in English jurisprudence that common ownership of a tug and tow is irrelevant for purposes of the limitation of liability provisions of the Act: L.J. Kovats in *The Law of Tugs and Towage* (1980), at p. 172, and Hill, *supra*, at p. 260. Regardless of ownership, liability is limited according to the vessel found to be negligent.

62 Although English jurisprudence has expressly cast doubt on the correctness of finding the owner of a tug and tow liable to the extent of their combined tonnage, when the issue came before this Court again in *Kathy K*, *supra*, liability was assessed against the common owner of a tug and tow for the negligent navigation of the tug on the basis of the tonnage of both vessels. Without elaborating on its reasons, this Court merely stated that it agreed with the trial judge that liability should be based on the aggregate tonnage of the wrongdoing mass (i.e., the tug and tow). At the trial level, [1972] F.C. 585, Heald J. (as he then was) relied on *Pacific Express*, *supra*, and *Monarch Towing*, *supra*, to reach this conclusion. Neither court in *Kathy K*, *supra*, made any reference to *The Bramley Moore*, *supra*, or to *The Sir Joseph Rawlinson*, *supra*.

63 Not surprisingly, Great Lakes submits this Court should follow the English example and base the extent of its liability solely according to the tonnage of the *Ohio*. The respondents, on the other hand, highlight that jurisprudence from this Court suggests that liability must be calculated on the aggregate tonnage of those vessels owned by Great Lakes forming the "wrongdoing mass" (i.e., the tugs *Ohio* and *South Carolina*). The respondents also raise *The Alvah H. Boushell*, 38 F.2d 980 (4th Cir. 1930), in support of their position. The relevant passage relied on by the respondents appears at p. 982:

In this case, the towing company contracted to tow a ship to a given destination, necessitating the use of two of its tugs. The ship was taken over and placed in the control of the tugs, under the specific direction of the master of one of the tugs. That master took command of the ship and tugs, and was proceeding en route in charge of the flotilla, directing the same from the ship's bridge, as is customary, and while so engaged, pursuant to the towage undertaking, a collision occurred, as a result of the fault in navigation of the tow thus in charge of the master of one of the tugs, so placed in command by the towing company. Under such circumstances, both tugs are responsible and liable for damages arising from such collision, certainly where, as found here by the trial court, and as to which there seems to be no very serious controversy, both were participants in the venture and undertaking, and both were at fault in bringing about the collision. The master of the *Boushell*, so in control of the undertaking, was, in such circumstances, to all intents and purposes, the master of both vessels, and the two tugs constituted the unit to be surrendered to justify a limitation of liability.

64 While the court in that case held the owner of the two tugs had to surrender both tugs in order to limit its liability, contrary to the suggestion of the respondents, I do not interpret that case

to stand for the proposition that a blameless tug under the direction of the lead tug must also be included in determining the extent of a shipowner's liability. In my mind, the broad language used in that case should be read in light of the fact that both tugs were found by the trial judge to have been at fault. The Circuit Court rejected the argument that the subordinate tug was entirely free from fault in bringing about the collision since the lead tug was in charge of the tow. The Circuit Court, to the contrary, emphasized that at the time of the collision the subordinate tug was the only one of the two tugs still in a position to render aid in avoiding the collision. Liability was also assessed against the lead tug on the basis that it owed a duty to exercise the proper precautions for the protection and safe conduct of shipping placed under its control. As such, the decision is distinguishable from the case at bar where only one of the tugs was actually found to have been at fault. The respondents did not challenge before this Court Hugessen J.A.'s finding of no fault on the part of the *South Carolina* and his statement that the uncontradicted evidence in the record as to the *South Carolina's* actions was "wholly disculpatory" (p. 200).

65 It is apparent that there exists a difference of opinion between Canadian and English courts in interpreting what is essentially the same statutory provision. The respondents seek to extend the wrongdoing mass principle developed in the context of tug and tow cases to the case at hand. However, for purposes of this appeal I do not believe it necessary or appropriate to resolve this divergence of opinion between Canadian and English courts given my view that the respondents' argument can also be dismissed under the existing wrongdoing mass doctrine.

66 It is important to highlight that the jurisprudence on this issue has never extended so far as to require that *all* the vessels within a flotilla belonging to an impugned shipowner be taken into account in determining the extent of that shipowner's liability: *The Harlow, supra*, *The Freden, supra*, and *Maple Prince, supra*. The intent of s. 647(2) is to limit liability for navigational errors according only to the tonnage of those vessels causing the alleged damage. Apart from the vessel responsible for the overall navigation of a flotilla, only those vessels of the same shipowner which physically caused or contributed to the resulting damage form the unit for which liability is limited: *Pacific Express, supra*, and *Monarch Towing, supra*. As already mentioned, the *South Carolina* was absolved of any fault in this case. Only the *Ohio* and the *Widener* were found to have been negligent. Moreover, it does not appear from the findings of the courts below that the *South Carolina* contributed to the collision in any manner other than in following Captain Kelch's instructions with respect to the location of the turn and the speed at which it travelled. Said differently, it did not physically contribute to the collision in any manner. The resulting damage to the *Widener* and the *Rhône* would have arisen notwithstanding the role of the *South Carolina*. In light of these facts, the *South Carolina* cannot be held to be a "guilty" vessel or part of the "wrongdoing mass".

67 In my view, it would be stretching the principles of causation beyond their proper limits to hold a vessel not physically causing the impugned damage nor responsible for the navigation of the vessel which in fact physically caused the damage to be part of the "wrongdoing mass". While

it may appear to be unjust to limit a shipowner's liability to only one vessel when it has a second vessel which may be used to satisfy a plaintiff's loss, we must remember, as Lord Denning pointed out in *The Bramley Moore, supra*, that the rationale for limitation of liability rests on public policy concerns and not necessarily on considerations of justice. As stated above, the purpose of these limitation provisions generally is to promote international trade and merchant shipping by giving shipowners the protection of limited liability. In my opinion, it would be counter to the intent of these limitation of liability provisions to include within the unit of limitation a helper tug not committing a fault of its own or otherwise physically causing the impugned damage. Therefore, I am of the view that liability should be limited only to the tonnage of the *Ohio*.

V. Disposition

68 Both appeals are allowed and the judgment of the Federal Court of Appeal, in so far as it relates to the Great Lakes' inability to limit its liability under s. 647(2) (now s. 575(1)) of the *Canada Shipping Act*, is set aside. The unit of limitation for purposes of s. 647(2) should be the tug *Ohio*. Pursuant to s. 649(2), the appellant's liability in both actions with respect to all the losses and damages resulting from the collision of the *Rhône* and *Widener* is limited to the tonnage of the *Ohio*. The appellant is entitled to its costs in this Court. However, because it disputed a finding of liability in both of the courts below and because this finding was upheld on appeal, the appellant is entitled only to half of its costs in the courts below.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by McLachlin J. (dissenting in part):

69 I have read the reasons of Iacobucci J. and substantially agree with them, except on one issue. I agree that the limitation on liability found in s. 647(2) of the *Canada Shipping Act*, R.S.C. 1970, c. S-9, applies in this case. Like my colleague, I would reject the argument that the appellant cannot claim the benefit of the limitation of liability because Captain Kelch was its directing mind. I would also reject the argument that the limitation of liability does not apply where some of the vessels in a flotilla are not owned by the party responsible in law for a shipping accident.

70 The only remaining question is what vessels must be taken into account into determining the extent of the liability. On this point, I respectfully differ from my colleague. In my view, the wording of the section, the jurisprudence, the rationale for the limitation, and the practical implications of the alternative rulings, all point to the conclusion that both tugs owned by the appellant, the *Ohio* and the *South Carolina*, should be considered in determining the extent of the liability.

71 The limitation is stated in the following terms. Provided that it applies, the owner is not:

647. ... liable for damages beyond the following amounts, namely,

.....

(f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 1,000 gold francs *for each ton of that ship's tonnage*. [Emphasis added.]

The phrase "that ship" refers back to the opening of s. 647(2), which confers the limitation on "[t]he owner of a ship...." The question is what, for the purposes of this case, constitutes "that ship". Section 647(2)(d) incorporates a further limitation which may bear on the meaning of "that ship". The loss or damages must be caused through:

- (i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship ... or
- (ii) any other act or omission of any person on board that ship;

72 Of the four tugs towing the barge the *Widener*, two, the *Ohio* and the *South Carolina*, were owned by the appellant. All the tugs acted in tandem. The *Ohio* was positioned ahead of the *Widener*, the *Rival* was behind the *Widener*, and the *South Carolina* and *Ste. Marie II* were to the starboard and port sides of the *Widener*, respectively. Captain Kelch, who was on board the *Ohio*, acted as *de facto* tow master of the flotilla. The Captain's navigational errors, compounded by a malfunction of the *Ohio's* towing apparatus, caused the collision. The findings of the trial judge focus on two navigational errors by Captain Kelch: (1) having the tugs enter the turn in question at full speed; and (2) failing to communicate with the masters on board the various tugs. As a result of these errors, the tugs were unable to respond adequately to deviations in the course of the tow, and the barge which they were towing collided with another vessel, the *Rhône*.

73 The question is whether the appellant's liability is limited by reference to the tonnage of the *Ohio*, or whether the tonnage of both vessels owned by the appellant, the *Ohio* and the *South Carolina*, should be used as the basis for calculating the maximum liability of the appellant under s. 647. The appellant contends that only the *Ohio's* tonnage should be considered, because it was the ship from which Captain Kelch's navigational negligence emanated. This would result in lower liability than if the aggregate tonnage of both vessels were considered, as the respondents contend.

74 My colleague Iacobucci J. concludes in the appellant's favour that only the tonnage of the *Ohio* should be considered in determining the amount of the limitation. The principle he applies, as I understand it, is that only a vessel which is "guilty", or independently contributed to the collision, can be considered to be a "ship" for purposes of the limitation in s. 647 of the *Canada Shipping Act*. Applying this principle, he concludes as a matter of fact that the *South Carolina* was not a "guilty" ship, characterizing it as "a helper tug not committing a fault of its own or otherwise physically causing the impugned damage" (p. 541). This leads him to the conclusion that the *South Carolina* should not be considered in determining the amount of the limitation of liability under s. 647 of the *Canada Shipping Act*.

75 With great respect, I cannot agree with my colleague's statement of the governing principle, nor with the resulting conclusion that the *South Carolina* was an "innocent" ship. These differences lead me to the conclusion that both vessels should be considered in determining the amount of the limitation under s. 647 of the *Canada Shipping Act*.

76 The question is fundamentally one of statutory interpretation. Two different lines of interpretation exist on the authorities, which for purposes of convenience may be termed the Canadian approach and the revised English approach. As I see it, the jurisprudence may be summarized as follows.

77 Canadian and English jurisprudence in the first part of this century uniformly took the view that where two vessels owned by the same owner were involved in an accident due to the navigational errors of the owner's employees, the tonnage for the purpose of the owner's limitation of liability was both vessels: *The Ran; The Graygarth*, [1922] P. 80 (C.A.); *Owners of the M.S. Pacific Express v. The Tug Salvage Princess*, [1949] Ex. C.R. 230; *Monarch Towing & Trading Co. v. British Columbia Cement Co.*, [1957] S.C.R. 816.

78 In 1963, in *obiter* comments in *The Bramley Moore*, [1963] 2 Lloyd's Rep. 429 (C.A.), a case involving a single tug and a separately owned tow, Lord Denning, M.R., suggested that even if the tow had been owned by the same company as owned the tug, the limitation would have been based on the tug alone, because that was the only "negligent" ship. This fault-based approach was reluctantly adopted in the case of *London Dredging Co. v. Greater London Council (The Sir Joseph Rawlinson)*, [1972] 2 Lloyd's Rep. 437 (Q.B. (Adm. Ct.)). These two cases represent what I have called the revised English rule.

79 This Court confirmed the traditional "aggregate tonnage" approach in 1975, after the divergence of the English courts, although without mentioning the English cases: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802.

80 Where the two vessels involved are a tug and a barge owned by the same owner, the two lines of authority clearly produce divergent results. On the Canadian "aggregate tonnage" view, the navigational error relates to both vessels and both therefore serve as the basis for calculating the tonnage relevant to the limitation. On the revised English view, the tug alone can be said to be at fault, and tonnage for purposes of the limitation is confined to the tug. The same result would seem to follow in a case like the present, where two commonly owned tugs are involved in an accident caused by the negligence of the owner's employee. On the Canadian approach, one would take the "aggregate tonnage" of the two tugs. On the revised English view, one would arguably consider only the tonnage of the tug or tugs which are at fault.

81 American authority lends support to the use of the Canadian "aggregate tonnage" approach where two or more commonly owned tugs are affected by the same navigational negligence. My

colleague Iacobucci J. suggests that the American case of *The Alvah H. Boushell*, 38 F.2d 980 (4th Cir. 1930), is distinguishable, and that the broad language used by the Circuit Court of Appeals was *obiter*. That may be so. This does not negate the fact that the court's comments on using the combined tonnage of two tugs under common direction for the purposes of calculating the liability limit amount to a restatement of the position taken in American maritime law on this issue. Moreover, there is additional American case law that is almost directly on point to the facts in the matter at hand. In *The Bordentown*, 40 F. 682 (S.D.N.Y. 1889), two commonly owned tugs had been engaged in towing a flotilla of canalboats when most of the canalboats were lost in a heavy gale. The *Bordentown* was found liable on the basis of the decision of the tow master, who was on board the *Bordentown*, to attempt to cross an unsheltered area of water despite the dangerous wind and sea conditions. The court went on to hold that in assessing the applicable liability limit, both the *Bordentown* and the second tug, the *Winnie*, had to be taken into account, stating at p. 687:

As regards the vessels required by the statute to be surrendered in a case like the present, there can be no doubt that the *Bordentown* is one of them. The master of the tow was all the time on board of her, directing the navigation of all. I have no doubt that the *Winnie*, also, must be included. At the time when the master's fault arose, the *Winnie* was as much a part of the moving power as the *Bordentown*, and was equally under the same direction. She belonged to the same owners; and from the beginning to the end she was engaged, in the owners' behalf, in the work of towing the other boats, precisely as the *Bordentown* was engaged. It was immaterial on board which tug the master, for the time being, was, or from which boat his orders were given. Both as related to the owners of the tugs and as related to the owners of the boats in tow, the *Bordentown* and the *Winnie*, in taking the tow through to Kills, were in effect one vessel.

See also *The Anthracite*, 168 F. 693 (2d Cir. 1909), *certiorari* denied 214 U.S. 522 (1909), and Walter W. Jones, "Flotilla or Several Vessels of Same Owner as Liable Under Federal Statute Providing for Limitation of Shipowner's Liability (46 USC § 183(a))" (1971), 9 A.L.R. Fed. 768.

82 I am reluctant to depart from the settled Canadian approach unless it is clearly wrong. I am doubly reluctant given the rather shaky foundation on which the change is urged. As I noted earlier in these reasons, Lord Denning's comments in *The Bramley Moore* regarding a commonly owned tug and tow were *obiter*. More importantly, a close reading of his reasons for judgment reveals what is in my respectful view a fundamental flaw in his analysis on this point. At page 436, Lord Denning states:

I can see no logical reason for distinguishing cases when tug and tow are in the same ownership from cases where they are in different ownership.

But in fact a "logical reason" for this distinction may be found on the next page of Lord Denning's reasons for judgment, where he states (in a passage also quoted in my colleague's reasons):

The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage.

83 This rationale does not apply where the owner of the tug also owns the tow, as Kerr J. noted in *The Sir Joseph Rawlinson* at pp. 440-41:

Thirdly, Mr. Thomas submitted that there is nothing intrinsically anomalous in a result which distinguishes between cases of common ownership and cases where the tug and tow are in different ownerships. He said that when an owner is employing (to use a neutral term) more than one of his ships in circumstances in which more than one is involved in one collision, then there is nothing anomalous in a result whereby his liability is higher than if only one ship had been involved.

Here again it seems to me that Mr. Thomas is correct in principle. The section is based on the tonnage of a ship, which is intended to reflect her value and size, so that it follows that the greater the tonnage, the greater the potential limited liability. It therefore seems to me that there is nothing anomalous in a result whereby an owner is under a greater liability, albeit limited, if two of his ships are involved in a collision than if only one is involved.

Although Kerr J. ultimately ruled that the liability limit in that case was to be calculated on the basis of the tug's tonnage only, he made it clear that had he not considered himself bound by Lord Denning's *dicta* in *The Bramley Moore* he would have ruled the liability limit was to be calculated on the basis of the combined tonnage of the tug and tow. At page 446, he stated:

I am not convinced, but it is not necessary to speculate about this, that if the present case had reached the Courts before the decision and reasoning of *The Bramley Moore* in the Court of Appeal, the legal position as I see it now facing me in this Court would be the same. I decide this case in the plaintiff's favour because I regard myself as bound by what was said in *The Bramley Moore* and because I regard the matter as not being any longer *res integra* in this Court. But for that decision I should have decided in favour of the defendants on the basis of Mr. Thomas's arguments

84 Notwithstanding the questionable pedigree of the revised English approach, the fact remains that if the approach hitherto adopted in this country is incompatible with the wording of s. 647 of the *Canada Shipping Act* or is less likely to fulfil the section's purpose than the revised English approach, revision of the rule in this country may be justified. It is therefore necessary to examine the wording of the section and the implications of the alternative interpretations with some care.

85 This brings me to the question of whether s. 647 of the *Canada Shipping Act* accords with the traditional Canadian view that in the situation of common ownership, both a tug and tow are to be considered for purposes of setting maximum liability for an accident involving the tow which was caused by navigational error of those on board the tug. In my view it does. The words "that ship" in s. 647(2)(f), which governs the limitation, refer us back to the opening words of s. 647(2), "[t]he owner of a ship". Subsection (2)(d)(i) applies where there is loss or damage caused to property, by "the navigation or management of the ship", "whether on board that ship or not". There is no requirement here that the ship itself have been "negligent", nor that the negligent navigator have been on board the ship which is used for purposes of the limitation. All that is required is that there have been an act or omission in relation to the navigation or management of a ship. This language is broad enough to encompass the misdirection of a tow, and thus supports the long-standing Canadian position that the tonnage of both tug and tow are to be considered for purposes of determining the limitation on liability where an accident occurs as a result of a navigational error.

86 Section 647(2)(d)(i) clearly contemplates that where *navigational* errors are concerned, it does not matter whether the negligent employee was on board or off a ship used as the basis for calculating the limitation of liability. As I see it, s. 647(2)(d)(ii) deals with errors not enumerated in s. 647(2)(d)(i); in those cases only must the negligent employee be on board the ship.

87 Where damage is caused as a result of the negligent navigation of a flotilla as a whole, it is questionable whether it is appropriate to say that the negligence attaches only to the lead tug, and not as well to any other tug in a flotilla that is owned by the owner of the lead tug. The reasoning underlying the traditional Canadian approach applies just as much to two commonly owned tugs as to a commonly owned tug and tow, as the decision in *The Bordentown* demonstrates. The fault of misnavigation of a flotilla cannot realistically be confined to a single vessel; in fact it affects all the vessels which are involved in directing the barge. The fact that the navigator happens to be standing on one vessel or the other is incidental; what is essential is the direction which caused the various vessels to act as they did. In fact, in the case at bar, the mistakes of navigation caused *all* the tugs, including the *South Carolina*, to move the barge too quickly. That movement, exacerbated by the mechanical malfunction on the *Ohio*, caused the collision. So it seems to me inaccurate to say that the *South Carolina* did not physically contribute to the collision and the loss.

88 The traditional Canadian approach of considering the aggregate involved tonnage of the owner responsible for the accident for purposes of determining the limitation is also supported by consideration of the purpose of s. 647 of the *Canada Shipping Act*. The policy basis of the enactment of statutory liability limitations for shipowners, including the limitation in the *Canada Shipping Act*, is the promotion of shipping by limiting the potentially ruinous risk that would otherwise be faced by shipowners. The liability limit in English law was originally the value of the ship plus the value of the freight charge being earned on the voyage. For a number of reasons, including the practical difficulties of valuing individual ships, the basis for calculating

the liability limit was later changed to a set value per ton of the ship — which is of course the basis for calculating the liability limit under the *Canada Shipping Act*. See R. G. Marsden, *The Law of Collisions at Sea* (11th ed. 1961), at pp. 131-34, and J. J. Donovan, "The Origins and Development of Limitation of Shipowners' Liability" (1979), 53 *Tul. L. Rev.* 999. Under either method, a shipowner's potential liability is limited to a value based on the assets which have been devoted by the shipowner to the operation in question.

89 Where the owner owns more than one vessel involved in the operation, the assets directed at the operation are not limited to one of the vessels, for example, the lead tug in this case, but include all of them. The owner's assets employed in the operation being higher, the amount of the limitation should proportionately be higher, if the purpose of the section is to be respected. The rationale of the limitation has nothing to do with which ship a tow master of a flotilla may be physically situated on while making navigational decisions affecting the flotilla as a whole. Moreover, it is often a matter of chance which vessel the navigating officer is on. Should the owner's liability be reduced by reason of the fact the navigator was on a small tug rather than a large barge?

90 The practical implications of the alternative interpretations on conduct in the shipping industry similarly support the traditional Canadian position. If I am not mistaken, the rule adopted by Iacobucci J. may provide a disincentive to the safe operation of flotillas. It has been suggested that a flotilla such as the one in issue here is best operated from the bridge of the ship that is being towed, the *Widener*. Typically a barge will have much more tonnage than a tug. A rule basing the limitation on the tonnage of the "directing" vessel would mean that a company which chose to place its navigator on the barge would incur the risk of greater liability in the event of an accident. So, even if that were the safest place for the navigator to stand, it might be more prudent for the towing company to insist that he operate from the smallest vessel it owns in the flotilla rather than the barge. On the other hand, under the rule which has long represented the law in Canada, the towing company's limitation on liability would be the same regardless of which vessel in the flotilla the navigator directs it from. There is therefore no disincentive to choose the safest vessel.

91 In addition, excluding the tonnage of the tow for the purposes of determining the owner's liability limit where the tug and tow are commonly owned can lead to the absurdity that an owner of a ship can effectively reduce the applicable liability limit by changing the method of the ship's propulsion. If the ship moves under its own power, the liability limit applicable if the ship causes damage in a collision will be based on the tonnage of the ship. But if the ship is converted into a dumb barge, and thereafter propelled by a tug, the revised English position would, if followed, result in the liability limit being based on the tonnage of the much smaller tug. Why should whether a ship is powered by internal engines or by a tug owned by the same party that owns the ship make a difference to the applicable liability limit?

92 Finally on this point, it should also be borne in mind that s. 647 is an extraordinary provision, operating in derogation of the usual rights of recovery against negligence causing damage to others.

Unless it is clear that the limitation should be reduced to a portion of the owner's assets involved in the collision, it seems to me all the assets should be considered; the courts should derogate from the usual rights of recovery only to the extent that the language and the purpose of the provision clearly so require.

93 For all these reasons, I am of the view that the traditional Canadian rule should be affirmed, with the result that in cases of navigational error affecting the conduct of a flotilla, all the vessels owned by the party responsible for the error which are affected by the error, whether involved directly in the accident or contributing causally to the accident, should be considered for purposes of determining the maximum liability of that party.

Disposition

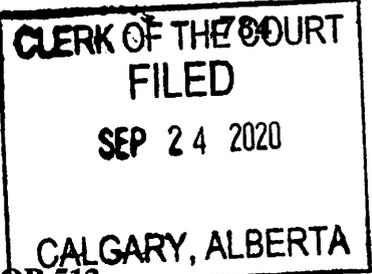
94 I would allow both appeals and set aside the judgment of the Federal Court of Appeal in so far as it asserts the inability of the appellant to limit its liability under s. 647(2) of the *Canada Shipping Act*. I would hold that the extent of the limitation should be determined by the aggregate tonnage of the *Ohio* and the *South Carolina*. In light of the divided success of the parties in these appeals and in the overall conduct of this case, I would order that each party bear its own costs of the proceedings in this Court and in the courts below.

Appeals allowed. L'Heureux-Dubé and McLachlin JJ. dissenting in part.

Solicitors of record:

Solicitors for the appellant: *Martineau Walker*, Montréal.

Solicitors for the respondents: *Lavery, de Billy*, Montréal.



Court of Queen’s Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABQB 513

Date:
Docket: 1801 10960
Registry: Calgary

Between:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

Plaintiff/Respondent

- and -

Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose

Defendants/Applicants

**Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon**

I. Introduction

[1] A summary of my decision concerning the Application of Susan Riddell Rose Respecting Costs (the “Rose Costs Application”) was given orally on Wednesday, August 26, 2020 from the bench. I advised the parties that I expected to issue written reasons. The detailed reasons and conclusions are provided below. If there are any discrepancies between the oral reasons provided and this written decision, this written decision takes precedence.

[2] PricewaterhouseCoopers Inc, LIT (“PWC Inc”) states that it is acting in this litigation in its capacity as the Trustee in Bankruptcy (the “Trustee”) of Sequoia Resources Corp (“SRC”),

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and not in its personal capacity. SRC formerly operated under the name of Perpetual Energy Operating Corp (“PEOC”). The Trustee is represented by an individual, who is a Senior Vice President of PWC Inc.

[3] PEOC is one of a number of entities within the corporate group under Perpetual Energy Inc (“PEI”) (collectively, the “Perpetual Group”). PEOC was the trustee to a trust named the Perpetual Operating Trust (“POT”). POT was established under an indenture (the “POT Trust Indenture”).

[4] As part of the underlying series of transactions, PEOC resigned as the trustee of POT, and was replaced by another wholly-owned subsidiary of PEI.

[5] PEI is the beneficiary to various oil and gas properties, licences and permits (collectively, the “POT Assets”) under the POT Trust Indenture. POT administered the beneficial interest in the POT Assets, subject to the POT Trust Indenture.

[6] A sales process and negotiation occurred in 2016 between the Kailas Capital Corp (“Kailas Capital”) and PEI. The substance of the negotiation between these two corporations and their respective affiliates involved the transfer of ownership and control of certain oil and gas assets (the “Goodyear Assets”) from the Perpetual Group to 1986114 Alberta Inc (“198Co”). This transfer of the Goodyear Assets was effected through a sale of shares. The Goodyear Assets were a subset of the POT Assets.

[7] There were a number of steps underlying the disputed transaction, including the combination of the legal and beneficial ownership of the Goodyear Assets within PEOC, the transfer of the PEOC shares from PEI to 198Co (the “PEOC Share Transaction”), the resignation of Ms. Susan Riddell Rose (“Ms. Rose”) as a director of PEOC, and PEOC’s change of name from “Perpetual Energy Operating Corp” to “Sequoia Resources Corp” (collectively, the “Aggregate Transaction”).

[8] PEI is a widely-held public corporation. Prior to the PEOC Share Transaction, PEOC was a wholly-owned subsidiary of PEI. The defendant, Ms. Rose, was one of several directors on the board of PEI.

[9] The above-mentioned combination of the legal and beneficial ownership of the Goodyear Assets within PEOC occurred immediately before the PEOC Share Transaction. The legal ownership of the Goodyear Assets was already held by PEOC. The beneficial ownership of the Goodyear Assets was shifted from POT to PEOC in order to effect the desired combination (the “Asset Transaction”).

[10] 198Co is a wholly owned subsidiary of Kailas Capital. The voting shares of Kailas Capital were owned 50% by Mr. Wang and 50% by Mr. Yang. Those two individuals were the only directors of Kailas Capital, and they were also the principals of 198Co (collectively, the “198Co Principals”).

[11] In *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 at para 55 [the “PWC QB Reasons”], I inferred that each of Mr. Wang and Mr. Yang was at arm’s length with all members of the Perpetual Group and Ms. Rose. There was no evidence that the 198Co Principals were acting in concert with either the Perpetual Group or with Ms. Rose. Further, there was no evidence that the 198Co Principals were related to the Perpetual Group or Ms. Rose, or that they were, as a question of fact, dealing with each other on a non-arm’s length basis.

[12] After the PEOC Share Transaction, the 198Co Principals also became the principals of Sequoia (formerly PEOC) (collectively, the “**Sequoia Principals**”).

[13] PWC Inc filed a Statement of Claim against Ms. Rose and others on August 2, 2018 (the “**August 2018 SOC**”). The August 2018 SOC advanced a number of allegations against Ms. Rose, including: (i) that she benefitted personally from the Asset Transaction; (ii) that the Asset Transaction was clearly not in the best interests of PEOC, thus amounting to oppression or prejudice; and (iii) that Ms. Rose caused 198Co to agree to a Resignation and Mutual Release, dated October 1, 2016 (the “**Release**”), (collectively, the “**Action**”).

[14] Ms. Rose was successful in her defence of the Action. As a result of that success, Ms. Rose is seeking costs. She is also seeking an order directing that PWC Inc be personally liable for any costs awarded to her.

[15] PWC Inc concedes that Ms. Rose is entitled to costs. However, it states that she is only entitled to Schedule C costs, taxable in the normal course.

II. The issues

[16] The issues before me relate to: (i) the scale of costs; and (ii) PWC Inc’s personal liability.

[17] Concerning the scale of costs issue, the specific question is whether Ms. Rose should be awarded costs: (i) on a solicitor-and-own-client basis; (ii) on a solicitor-client basis; or (iii) on a party-party basis.

[18] Concerning the PWC Inc liability issue, the specific question is whether that entity should be personally liable for the costs, rather than have costs payable by the Estate of Sequoia Resources Corp (the “**Sequoia Estate**”).

III. The law of costs

A. General comments

[19] Typically, costs are assessed on a pay-as-you-go basis, and are payable forthwith: Rule 10.29 of the *Alberta Rules of Court*, Alta Reg 124/2010 (the “**Rules**”); see also *Enviro Trace Ltd v Sheichuk*, 2015 ABQB 28 at para 9; and *VAS v Grace*, 2014 ABQB 268 at paras 3 and 10; and William A Stevenson and Jean E Côté, *Alberta Civil Procedure Handbook*, 2020 ed (Edmonton: Juriliber, 2020) vol 1 at 10-37 [*Stevenson & Côté 2020*]. Ms. Rose was successful in responding to the extraordinary claims made against her. As a result, she is entitled to an award of costs.

[20] The Court has wide discretion to award costs. The discretion extends to awarding “any amount that the Court considers to be appropriate in the circumstances, including . . . an indemnity to a party for that party’s lawyer’s charges”: *Re Estate of Montgomery*, 2019 ABQB 833 at para 15 [*Montgomery*]; Rule 10.31(1); *Court of Queens Bench Act*, RSA 2000, c. C-31, s. 21; *Lameman v Alberta*, 2011 ABQB 532 at para 6, leave to appeal refused 2011 ABQB 724. The Rules and prior decisions are to be used only as guidelines: *269335 Alberta Ltd v Starlite Investments Ltd*, 1987 CanLII 3391(ABQB) at para 5 [*Starlite*].

B. Rules of Court

[21] The Rules set out the guidance regarding the exercise of the Court’s discretion in awarding costs. The Rules state that a “successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must

pay the costs forthwith”: Rules 10.29-10.33. The Rules are premised on the assumption that the unsuccessful party has the economic capacity to pay.

[22] In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider, among other factors: “(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action . . . (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake”: Rules 10.33(2)(a) and (d).

C. Categories of costs

[23] Where costs are warranted, the Court tends to look at three types or categories of awards: *Re Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2020 ABQB 12 at paras 12 to 15 [*Canada North*]; see also *R&R Consilium Inc v Talbot*, 2019 ABQB 275 at para 41, citing *Trizec Equities Ltd v Ellis-Don Management Services Ltd*, 1999 ABQB 801 at para 19. I summarize these cost categories as follows:

- (i) Solicitor-and-own-client costs: where this category of costs is applied, the successful party receives full indemnity for their legal fees and proper disbursements;
- (ii) Solicitor-client costs: where this category of costs is applied, the successful party receives *reasonable* legal fees and disbursements, which amounts to less than full indemnification; and
- (iii) Party-party costs: where this category of costs is applied, the successful party typically references Schedule C of the Rules.

[24] Ultimately, the individual circumstances of each case best inform the exercise of judicial discretion: *Canada North* at paras 12 to 15; see also *Weatherford Canada Partnership v Addie*, 2018 ABQB 571 at paras 54-57, aff'd 2019 ABCA 92 [*Weatherford*]; and *McAllister v Calgary (City)*, 2018 ABQB 999. This Court confirmed that the obligation to compensate the wrongfully accused party in costs may stem from the reputational and personal impact of serious and unfounded allegations: *Northland Material Handling Inc v Parkland (County)*, 2012 ABQB 586 at para 13.

D. The scale of costs

1. Solicitor-and-own-client (full indemnity) costs

[25] Instances where solicitor-and-own-client (full indemnity) costs should be awarded include: (i) where justice can only be done by indemnification; (ii) where there was no serious issue of fact or law that required the proceedings; or (iii) where a party delays or protracts the litigation (including where the party requires proof of facts that should have been admitted): *Montgomery* at para 16; *Weatherford* at para 26, citing *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684; *Primrose Drilling Ventures Ltd v Amethyst Petroleums Ltd*, [2008] AWLD 2311 (QB) at para 8, aff'd 2008 ABQB 462, aff'd 2009 ABCA 259; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 26; *Pillar Resource Services Inc v PrimeWest Energy Inc*, 2017 ABCA 19 at paras 8 and 123-126. The list of categories of conduct that are serious enough to warrant solicitor-client costs is not closed: *Montgomery* at para 71; *Paniccia Estate v Toal*, 2012 ABCA 397 at para 135.

[26] While this cost category is not closed, an award of solicitor-and-own-client costs “is virtually unheard of except where provided by contract”: *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2019 ABQB 684 at paras 548 [*Manson Insulation*]; *Condo Corporation No 0410106 v Medicine Hat (City)*, 2020 ABCA 43 at para 4; *Goldstick Estates (Re)*, 2019 ABCA 508 at para 25; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at paras 77 and 78 [*Luft*]; *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at para 69; *Weatherford Canada Partnership v Artemis Kautschuk und Kunststoff-Technik GmbH*, 2019 ABCA 92 at para 14 [*Appeal Weatherford*]. In particular, costs awarded on this basis will be available only if one of the successful litigation parties identifies a contractual foundation for full indemnification.

[27] In this case, there is no evidence of a relevant contract, so that factor is not available to justify an award of costs on a solicitor-and-own-client basis. However, as stated above this category of costs is not closed. In one case, this Court held that full indemnity for legal costs was justified in order to discourage allegations of bias and dishonesty where no reasonable basis existed to support such allegations: *College of Physicians & Surgeons (Alberta) v H(J)*, 2009 ABQB 48 at paras 46-49, cited in *Weatherford* at para 29.

2. Solicitor-client costs

[28] The award of solicitor-client costs is more common than an award of “solicitor-and-own-client costs”. Solicitor-client costs are awarded in circumstances where the successful party should receive reasonable legal fees and disbursements because the situation warrants an award that is less than full indemnification: *Canada North* at para 12.

[29] This award equates to an amount of “reasonable fees and disbursements”, but no “frills or extras ... which should not be fairly passed on to [unsuccessful litigants]. ...”: *Manson Insulation* at para 549; *Luft* at para 77. Solicitor-client costs only apply to litigation expenses that arise from the litigation in question: *Appeal Weatherford* at para 14.

[30] Solicitor-client costs awards are also rare. They “... must be based on a finding of *intentional* misconduct during the litigation” (emphasis in original): *Manson Insulation* at para 550; *Appeal Weatherford* at para 14. The kinds of misconduct that attract this level of award have been described as “... reprehensible, egregious, scandalous or outrageous ...”: *Manson Insulation* at para 550; and *Twinn v Twinn*, 2017 ABCA 419 at para 25.

[31] The Alberta Court of Appeal has identified a number of factors which favour an award of solicitor-client costs: see *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2018 ABCA 110 at para 15 [*Secure 2013 Group*]; see also *FIC Real Estate Fund Ltd v Phoenix Land Ventures Ltd*, 2016 ABCA 303. Those factors include: (i) blameworthiness in the conduct of the litigation; (ii) when justice can only be done by a complete indemnification for costs; (iii) when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive proceedings, when the misconducting party was “contemptuous” of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his; (iv) when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion; (v) positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs; (vi) litigants found to be acting fraudulently and in breach of

trust; (vii) fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and (viii) an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges: *Secure 2013 Group* at para 15. As an aside, I note that a number of the solicitor-client cost factors identified by the Alberta Court of Appeal overlap with solicitor-and-own-client cost factors that the appellate court has touched on in the past.

3. Party-party costs

[32] Party-party costs are awarded by reference to Schedule C of the Rules. Schedule C was recently amended, effective May 1, 2020. Subject to agreement or court order to the contrary, the new Schedule C rules apply to all assessable items whether the activity described in the item occurred before or after the May 1, 2020 date.

[33] Prior to the amendment of Schedule C, the Court addressed its long-standing deficiencies through enhancements. Those adjustments included one or more of the following: (i) a multiplier against the applicable column; (ii) an inflationary adjustment; (iii) an extra lump sum amount; or (iv) a modifier based on a percentage of actual legal costs: *Canada North* at para 12.

[34] The Trustee conceded that an award of costs calculated by reference to Schedule C was available to Ms. Rose in this case. In my view, that concession sets the floor amount.

E. Jurisdiction to award costs against non-parties

[35] Common law courts have the jurisdiction to award costs against non-parties on the basis that they were the “promoter” of the unsuccessful litigation: *20th Century Television & Appliances Ltd v Midnapore Property Investments Ltd*, [1992] 2 WWR 403 (ABCA) at para 2 [*20th Century*]; see also *Perry v Perry*, [1917] 3 WWR 315 (Man KB), aff’d [1918] 2 WWR 485 (Man CA); *Curry v Davison* (1922), 23 OWN 3 (Div Ct); *Marchiori v Fewster*, 30 BCR 251 (CA), aff’d (1922), 63 SCR 342.

[36] The Courts have stated that when “[t]he real litigant who puts up a man of straw in whose name the litigation is carried on in order to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be cited by notice to appear and show cause and may thereupon be ordered in a proper case to pay the costs of the opposite party even when the nominal litigant had a legal status similar to that of the real litigant to instate the proceedings”: *Starlite* at para 6, citing: *Sturmer v Beaverton*, 3 OWN 333 (HC), aff’d 25 OLR 566 (Div Ct) at 577; *The Queen v Greene* (1843), 4 QB 646 (Eng KB); *Oasis Hotel Ltd v Zurich Insurance Co*, [1981] 5 WWR 24 (BCCA) at 28; and see also *Young v Young*, [1993] 4 SCR 3 at para 269; *Jones v Green*, [1995] AWLD 1164 (QB) at paras 17-20. And see *Riddoch v Anderson* (December 2, 1991), Windsor 1379/86 (Ont Gen Div); *David v Pilot Insurance Co* (1991), 49 CPC (2d) 282 (Ont Gen Div), aff’d on other grounds (1994), 24 CCLI (2d) 69 (ONCA); *Florence v Canada (Air Transport Committee)*, 42 CCLI 9 (Fed TD); *Mitt v Henriksson* [1968], 1 OR 373 (HC); *Witt v Sax* (1980), 22 AR 249 (CA) at 254-55; *358427 Alberta Inc v Monenco Advisory Services Ltd*, 1998 ABQB 16 at para 33.

[37] This rule has been applied in cases involving insolvency. In one particular case, the Alberta Court of Appeal awarded costs against a receiver-manager: *20th Century* at paras 2-3. In that case, the appellate Court stated the following:

[2] Exposure to possible liability for costs on the part of a private receiver has been the subject of surprisingly little comment on both case law and text

authority. Nonetheless the general power of the court to award costs against the real promoter of litigation, although unnamed as a party to it, seems clear. The power was inherent in the Court of Chancery and has survived today. ... It is also contemplated by the *Rules of Court*.

...

The traditional test is who is the real promoter of the litigation? Once that is determined exposure to liability for costs may arise should that litigation fail. ... In misconduct cases solicitors may have to pay (Rule 602). The extended liability has reached insurers. ...

[3] That Coopers & Lybrand carried the litigation here is confirmed by the fact that the application for the ex parte injunction was backed by the affidavit of John MacNutt, an officer of Coopers & Lybrand. The intended beneficiaries in the action were 20th Century, the insolvent debtor, and the Bank of British Columbia which sought to avoid the honouring of its letter of credit and put Coopers & Lybrand in as their private receiver-manager under its debenture from 20th Century.

[38] While I acknowledge that the above costs award was against a receiver-manager, I see no policy reason not to extend this concept to bankruptcy circumstances. As a result, I find that this Court has the jurisdiction to award costs against the real promoter of litigation in a bankruptcy context.

F. Personal liability of “trustees in bankruptcy” for costs

1. General comments

[39] As noted above, PWC Inc is the Trustee. A body corporate, such as PWC Inc, may hold a licence as a trustee: section 14.08 of the *Bankruptcy and Insolvency Act* (“*BIA*”). A body corporate that holds a licence as a trustee may perform the duties and exercise the powers of a trustee through a director or officer who holds a licence as a trustee: section 14.09 of the *BIA*.

[40] The individual who represented PWC Inc signed the relevant correspondence as a LIT (being the acronym for “Licenced Insolvency Trustee”), Senior Vice President. Given the representations in the correspondence that the individual LIT signed, I infer that PWC Inc satisfies all of the prerequisites to be, and is, a licenced trustee.

[41] When a bankruptcy order is issued, a bankrupt ceases to have any capacity to deal with its property. Subject to the *BIA* and the rights of secured creditors, the property of a bankrupt passes immediately to, and vests in, the trustee named in the bankruptcy order: section 71 of the *BIA*.

[42] Counsel for the Trustee asserts that PWC Inc is not personally liable for costs. In particular, Counsel for the Trustee asserted in oral argument that costs are only eligible from the Sequoia Estate. I disagree. The simple fact that PWC Inc was acting in a representative capacity does not preclude the possibility that PWC Inc may be held personally liable for costs: *B & W Building Maintenance Ltd v Superstein* (1991), 116 AR 149 (QB) at paras 9 and 10 [*B & W Building*]; *Livent Inc (Special Receiver and Manager of) v Deloitte & Touche*, 2010 ONSC 2267 at para 97 [*Livent*]. I note that although *B & W Building* and *Livent* were in the context of

security for costs, I am of the view that the general principles arising from these decisions apply to the question of costs.

[43] In cases where the trustee litigates, it will be personally liable for costs if the estate does not have sufficient assets to indemnify the costs. Further, if the trustee acts without inspector permission, it may be deprived of an indemnity: Frank Bennett, *Bennett on Bankruptcy*, 21st ed (Toronto: LexisNexis Canada Inc 2019) at 114 [*Bennett on Bankruptcy*]; see also *Re Wedlock Ltd* (1925), 5 CBR 662 (PEISC); *Re Cynatime (Canada) Inc* (2005), 12 CBR (5th) 198 (ONSC [in Bankruptcy]); *Sigurdson v Fidelity Insurance Co of Canada*, 1980 CanLII 404 (BCCA) [*Sigurdson*]. But the indemnity entitlement is not an issue for this Court to address in this hearing.

[44] Even if the inspectors approve the litigation, the trustee is still personally liable for costs to the successful party if there are insufficient assets in the estate to satisfy any award of costs. The underlying policy is that a trustee in bankruptcy is not allowed to pursue litigation in circumstances where it has immunity from personal liability for costs: see *Touche Ross Ltd v Weldwood of Canada Sales Ltd* (1984), 49 CBR (NS) 284 (ONSC [in Bankruptcy]) [*Touche Ross*]; *Vancouver Trade Mart Inc (Trustee of) v Creative Prosperity Capital Corp* (1998), 7 CBR (4th) 3 (BCSC) [*Vancouver Trade Mart*]; *Canadian Imperial Bank of Commerce v 437544 Ontario Inc* (1995), 43 CPC (3d) 216 (ONCA); *Berry v Cypost Corp*, 2004 BCSC 244; and *Crossing Co v Banister Pipelines Inc*, 2004 ABQB 56.

2. Bankruptcy proceedings

[45] Bankruptcy Court is a separate court in Canada that deals exclusively with bankruptcies. A judge who presides over bankruptcy court is generally knowledgeable about the *BIA*.

[46] While this Action is not a bankruptcy proceeding, I provide a few preliminary comments for context. In particular, section 197 of the *BIA* provides authority for the Courts to award costs in bankruptcy proceedings. That provision reads as follows.

197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

[47] Subsection 197(3) of the *BIA* is noteworthy for the purposes of this case. Even in bankruptcy proceedings, the Court has the discretion to award costs against trustees personally: *Touche Ross* at paras 8 and 9; *British Columbia (Civil Forfeiture Act Director) v Nguyen*, 2009 BCSC 827 at paras 44-49 [*Nguyen*]; *Carter Oil & Gas Ltd (Trustee of) v 400133 BC Ltd*, 1998 ABCA 372 at paras 40 and 43 [*Carter Oil*].

[48] For example, where a trustee in bankruptcy embarks on litigation when no assets are in the estate, Courts have determined it an appropriate circumstance in which to exercise their discretion under subsection 197(3) to hold the trustee personally liable for costs: *Vancouver Trade Mart* at para 30; *Touche Ross* at paras 5 and 6.

[49] In summary, the policy in bankruptcy proceeding is “loser pays”. That policy is a common thread in most litigation forums.

3. Civil law proceedings

[50] As mentioned above, section 197 of the *BIA* applies to bankruptcy proceedings. In this case, the Trustee is the plaintiff in a civil lawsuit. The Trustee elected to sue outside of Bankruptcy Court to seek civil remedies. In so doing, the Trustee lost any protection from personal liability for costs. The Trustee and the lawsuit are governed by the Rules.

[51] The Rules offer no immunity to trustees in bankruptcy from orders for costs. A summary of the law in this area is as follows.

Section 197(3) only applies to proceedings in the bankruptcy court. If a trustee in bankruptcy takes proceedings or has proceedings taken against it in the ordinary civil courts, s. 197(3) has no application, and if the trustee is unsuccessful in such proceedings, it will be personally liable for costs. The trustee is, however, entitled to indemnity out of the bankrupt estate unless it has been guilty of some misconduct in bringing the proceedings or has taken them without the permission of the inspectors: *Sigurdson v. Fidelity Insurance Co. of Canada*, 35 C.B.R. (N.S.) 75, [1980] 6 W.W.R. 315, 20 B.C.L.R. 345, 110 D.L.R. (3d) 491 (C.A.); *Kubicsek (Trustee of) v. Brackenbury* (1990), 80 C.B.R. (N.S.) 259, 44 C.P.C. (2d) 113, 1990 CarswellBC 431 (B.C. S.C.); *Berry v. Cypost Corp.* (2004), [2004] B.C.J. No. 403, 2004 CarswellBC 426, 50 C.B.R. (4th) 36, 26 B.C.L.R. (4th) 62, 2004 BCSC 244 (B.C. S.C.). Costs of civil litigation may, in an appropriate case, be awarded against the trustee on a solicitor and client basis: *Montini Foods Ltd. (Trustee of) v. General Accident Ins Co of Canada* (1997), 150 DLR (4th) 378 (Ont Gen Div).

[See L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009), I§84 (“*Bankruptcy and Insolvency Law of Canada*”).]

[52] Other judicial comments support the view that ordinary civil litigation is not a proceeding under the *BIA*: see *Sigurdson* at paras 34 and 35. In civil litigation cases, well-established law makes the trustee personally liable for the costs of litigation: see *Montini Foods Ltd (Trustees of) v General Accident Assurance Co of Canada*, 1997 CanLII 12321 (ON SC) at para 28 and 29; and *Sigurdson* at para 35.

[53] Though a trustee must take steps to recover or protect the bankrupt’s property, its duties do not extend to “elaborate and expensive investigation and litigation” in civil courts: *Sigurdson* at para 33. Justice Newbould commented on this area as follows in *Re: 144 Park Ltd*, 2015 ONSC 6864 at para 11:

The general rule is that a receiver or trustee litigates at its peril if there is no source of indemnity available to it, with the two standard sources of indemnity residing in the assets of the estate or a contract of indemnity from one or more

creditors. The discipline imposed by a “loser pays” costs rule applies equally to decisions to commence proceedings by a receiver or trustee.

[Also see *Spyglass Resources Corp v Bonavista Energy Corporation*, 2017 ABQB 504 at paras 120-122; *Crossing Co v Banister Pipelines Inc*, 2004 ABQB 56 at paras 15-20; *Vancouver Trade Mart* at paras 29 and 30; *Nguyen* at para 48.]

[54] In *Vancouver Trade Mart* and *Sigurdson*, the Court held that section 197 of the *BIA* did not apply and thus the trustee could be held personally liable for costs. The Court in both cases found that when the trustee chose to engage in such an “elaborate and expensive investigation and litigation,” it did so not under a duty imposed by the *BIA* but based on its discretionary decision.

[55] Indeed, a bankruptcy trustee has no duty to sue. However, section 30(1)(d) of the *BIA* provides that a trustee in bankruptcy may, with the permission of the inspectors, “bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt”. This legislative framework in section 30 of the *BIA* raises a few points.

[56] First, the purpose of section 30 of the *BIA* is to protect the estate. Inspectors are part of that protective process. That legislative framework is deliberate, and is structured that way to allow a trustee to benefit from the business experience of the inspectors.

[57] When inspectors are appointed, their permission must be sought before certain actions are taken by the trustee. The evidence in this case is that inspectors were appointed.

[58] One of the powers on which a trustee needs to seek inspector approval before proceeding concerns legal proceedings. In particular, a trustee may only “...bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt” if it has the permission of the inspectors: section 30(1)(d) of the *BIA*.

[59] The stipulation that the inspectors approve litigation and other legal proceedings has a history to it. Historically, the lack of any supervisory oversight in respect of trustees in bankruptcy resulted in “...scandals involving inefficient and collusive liquidations by incompetent and untrustworthy trustees”: House of Commons, Study Committee on Bankruptcy and Insolvency Legislation, *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (June 1970) (often referred to as the “Tassé Committee Report”) at 17; see also the Office of the Superintendent of Bankruptcy *Inspectors’ Handbook*, online (pdf): osb.ic.gc.ca. Providing inspectors, who are representatives of creditors, the ultimate authority over key decisions, such as litigation, provides a safeguard against inappropriate conduct by trustees.

[60] The failure of the trustee to seek permission from the inspectors as a prerequisite to exercising certain powers has been held by other superior courts to be fatal. That is, absent evidence that a trustee obtained the permission from the inspectors to, for example, assign a contract, the Court cannot assume that it was properly authorized: *Hoole v Advani*, [1996] BCWLD 1236 (SC) at paras 104 and 105.

[61] Second, section 30 of the *BIA* refers to the need for the trustee to seek permission from “inspectors” as a prerequisite to certain actions. The inspectors are appointed as representatives of all creditors, and they occupy positions of trust. They are expected to assist the trustee by virtue of their experience, and are required to supervise certain aspects of the administration that is carried out by the trustee.

[62] The authorization by the inspectors will ordinarily be given through a properly called meeting of inspectors. The inspectors must authorize the legal proceedings; mere acquiescence is not sufficient: *Re Nierenberg* (1979), 30 CBR (NS) 267 (ONSC [in Bankruptcy]) at para 18. There is no differentiation between inspector approval for a proceeding: (i) in Bankruptcy Court; and (ii) ordinary civil Court: *Casson v Lakeside Hotel & Resort Ltd* (1967), 61 DLR (2d) 421 (BCCA) at para 15. I find that section 30(1)(d) of the *BLA* applies equally to a proposed action within either court system.

[63] Inspectors give advice and direction to the trustee regarding specific actions to be taken in the administration of the estate. They also supervise the trustee's administration and ensure that the trustee acts in accordance with their directions.

[64] In this case, despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose.

[65] The lawsuit must be in the best interests of the estate, taking into consideration the costs and risks associated with litigation. If the lawsuit is to pursue claims for the benefit of the estate's creditors, it must concern claims of the creditors generally and not individual creditor claims. In this case, however, the Trustee made claims against Ms. Rose which, on their face, related to certain alleged creditors, but not all the creditors.

[66] The conduct of the Trustee is also relevant:

If a trustee brings legal proceedings without first making proper investigations and inquiries to see if there is a sound basis for the proceedings, the court may order the trustee to pay costs personally: *Burns v. Royal Bank* (1922), 2 C.B.R. 482 (Ont. H.C.). Where the trustee acted in a high-handed manner in proceeding with a sale of assets when a motion had been brought by a secured creditor for possession of certain assets, the court ordered the trustee to pay the costs of the creditor personally: *Re Lemieux* (1921), 1 C.B.R. 464 (Que. S.C.). Where a trustee caused litigation by carelessness and lack of common sense, the court ordered the trustee to pay the costs of the litigation personally: *Re Bryant; Ex parte Gordon* (1889), 6 Morr. 262 (H.C.). Where the trustee gave an unfair and improper advantage to a prospective purchaser of assets, it was ordered to pay the costs personally of all the proceedings: *Re Davies Footwear Co.* (1923), 4 C.B.R. 131 (Ont. C.A.). Where a trustee acted improperly in connection with an appeal launched by the bankrupt prior to bankruptcy with respect to a debt alleged to be owing to the bankrupt, the trustee was ordered to pay the costs personally: *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 28 C.B.R. (3d) 161, 21 O.R. (3d) 89, 1994 CarswellOnt 309 (C.A.).

[See *Bankruptcy and Insolvency Law of Canada*, I§84.]

[67] While this is not a costs proceeding in the Bankruptcy Court, it is instructive to review the costs that have been awarded in that context. In particular, the Bankruptcy Court has ordered costs to be personally payable by a trustee or a proposal trustee in various circumstances, including the following.

- (a) Where the trustee has taken an "improper and perverse view as to its duties": *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1464 at para 17

[*Asian Concepts*], citing *Re Commonwealth Investors Syndicate Ltd* (1986), 38 ACWS (2d) 184 (BCSC) [*Commonwealth*].

- (b) Where the assets of the estate are insufficient to pay the award of costs: *Carter Oil* at paras 40 and 43; in citing the appellate case, I note that the underlying case, being *Carter Oil*, was formally framed as being “In The Matter Of The Bankruptcy of Carter Oil & Gas Limited”.
- (c) Where the trustee failed to take a neutral view of the case: *Asian Concepts* at para 17.
- (d) Where the trustee failed to impartially represent the interests of all creditors: *Mutual Trust Co v Scott, Pichelli & Graci Ltd* (1999), 11 CBR (4th) 62 (Ont Gen Div) at para 9 [*Mutual Trust*]; and see also *Asian Concepts* at para 18.
- (e) Where the trustee advanced an “adversarial strategy, including as to issues of debatable merit”: *Re Farm Mutual Financial Services Inc*, 2010 ONSC 2184 at paras 6-10; and see also *Asian Concepts* at para 19.

[68] While section 197 of the *BIA* contemplates party-party costs in bankruptcy proceedings, in civil proceedings the Court may award costs on any scale against a trustee, including on a solicitor-client basis: see *Bankruptcy and Insolvency Law of Canada*, I§92.

[69] Courts have awarded escalated costs against a trustee in the following situations:

- (a) The trustee’s conduct in the litigation is “deserving of rebuke”, including where it “abandoned its neutral role” in the proceeding: *Asian Concepts* at para 35.
- (b) Where a trustee adopts an adversarial stance in litigation with “no justifiable reason”: *Mutual Trust* at para 8.
- (c) Where the trustee’s conduct has put the party opposite to unnecessary and considerable expense: *Commonwealth* at paras 5 and 6; *Liakas, Re* (1993), 25 CBR (3d) 101 (QCSC) at paras 25 and 26.
- (d) Where the trustee took a position opposite clear precedent: *Lazanyi v Pechan* (2006), 21 CBR (5th) 182 (ONSC) at paras 3, 4 and 11.

IV. Trustees in bankruptcy are held to higher standards than other civil litigants

A. General principles

[70] A trustee in bankruptcy is held to high standards. A trustee: (i) is an officer of the Court; (ii) has duties at common law; (iii) has an obligation to report all relevant information to the Court; and (iv) has an obligation to act neutrally.

[71] These high standards apply to a trustee whether the lawsuit is proceeding in Bankruptcy Court or ordinary civil Court. I make this comment because the trustee in bankruptcy is an officer of the Court in all of its actions concerning its appointment, including its conduct in either of the above-mentioned Courts: *GMAC Commercial Credit Corporation - Canada v TCT Logistics Inc*, 2006 SCC 35 at para 89 [*GMAC*], albeit this is comment by Deschamps J in dissent.

[72] A trustee is governed by the *BIA* and a Code of Ethics. This requires the trustee to conduct itself with a high degree of integrity, honesty and impartiality.

[73] Even when involved in litigation, a trustee should not adopt an “adversarial and hostile role”: *Norris, Re*, 1996 ABCA 357 at para 24 [*Norris*]. Rather, the trustee should “present all the relevant facts in a dispassionate, non-adversarial manner”: *Royal Bank of Canada v Racher*,

2017 ABQB 181 at para 97. The Alberta Court of Appeal has noted the applicability of this responsibility to the Trustee in this very case: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36 at para 51 [the “*PWC First Appeal Reasons*”].

[74] A trustee in bankruptcy has an obligation to “act fairly and justly, and to do what is morally right and honest”: *Re Giorgio Galleria Ltd* (1995), 2 BCLR (3d) 337 (SC) at para 28. Where the trustee chooses to commence litigation in respect of an allegedly improper transaction, it is not to “take up the cudgel” in favour of any particular creditor, and should not assume an “adversarial [or] hostile role from the witness stand” in its conduct or in affidavit format: *Touche Ross* at para 9.

[75] Adopting an adversarial and hostile role in litigation (including with respect to reviewable transactions) while presenting a “bare bones skeletal case just sufficient to invoke the presumption in s. 95(2) without disclosing to the court those facts which might ... weigh against the presumption” is conduct “by a Trustee as an officer of the court which must not be tolerated or condoned”: *Norris* at para 24. A trustee is obliged to bring to the Court’s attention all the relevant information within his or her knowledge as an officer of the Court: *Ionian Financial Group Inc (Trustee of)*, [2005] RJQ 836 (SC) at para 29.

[76] As an officer of the Court, a trustee should simply present the facts. In doing so, it is critically important, in my view, that a trustee conduct a proper investigation. Further, in the course of providing evidence in affidavit format, a trustee must remember that it should restrict its evidence to the facts.

[77] Generally, affidavits that include opinions, arguments, conclusions and law will be struck out or ignored: *Canapen (Phipps-McKinnon) Ltd v Edmonton (City)*, 2016 ABQB 501 at para 12; see also *IMD v RAD*, 2019 ABQB 963 at paras 94-97 [*IMD*]; *Engler v Engler*, 2012 ABQB 442 at para 47; and *Sturgeon Lake Indian Band v Canada (Attorney General)*, 2016 ABQB 384 at paras 155-161. Any conclusion based on the evidence is the function of the court, not the affiant: *IMD* at para 95.

[78] In this case, the individual representing of the Trustee opined in his affidavit that the Asset Transaction was not in the best interests of PEOC. While there are limited circumstances where such opinions will be allowed, both the Court and the trustee must be careful of the boundaries. In this case, the assertion that the Asset Transaction was not in the best interests of PEOC goes to a key determination that needs to be made by the Court. The Court will make that determination, based on all of the evidence before it.

[79] The individual representing the Trustee also stated in his affidavit that Ms. Rose personally benefited from the “Goodyear Restructuring”. For purposes of this decision, I will treat that assertion in the affidavit as an opinion of the affiant.

[80] The inclusion of the “benefit” in the affidavit is troubling. The fact that the “benefit” assertion was stated categorically in an affidavit is a circumstance where I find the affiant overstepped his boundaries.

[81] I make this comment because the “benefit” issue is a determination for the Court. The Trustee is certainly entitled to include the benefit allegation in the August 2018 SOC, and to advance argument on the point. To that end, the Trustee should include the relevant evidence in a supporting affidavit. The Court then has the obligation to make a decision concerning the alleged benefit, based on the evidence before it.

[82] In summary, the affiant should include only the facts in the supporting affidavit. As the Supreme Court of Canada has stated, “[a] basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved”: *R v D(D)*, 2000 SCC 43 at para 49. In my view, that same principle should apply to the Trustee in respect of this “benefit” issue.

B. Investigating a director

1. Fairness as a critical factor

[83] The consequences of suing a director of a public corporation are significant. This is especially the case when the allegations against the director include assertions that his or her conduct was oppressive, unfairly prejudicial, or unfairly disregarded the interests of the creditors of the corporation.

[84] I am not suggesting that a director of a public company is not to be sued by a trustee in bankruptcy. Such a lawsuit may be justified. However, before such a lawsuit is initiated, the trustee must establish a proper foundation for the legal action. This is the reason an appropriate investigation is so important.

[85] The decision of a trustee in bankruptcy to sue a director of a public corporation is a discretionary decision. The foundation underlying that decision is in the nature of an investigative proceeding.

[86] An investigative proceeding that may result in a lawsuit by a trustee in bankruptcy against a director of a public company must include the appropriate participation by the individual affected. In my view, the greater the potential impact of a lawsuit on the director, the greater the need for the trustee to: (i) satisfy the principles of fairness at common law; and (ii) fulfill the duty of fairness and the requirements under procedural fairness.

[87] Bankruptcy is a process governed by principles of fairness: *Engels v Richard Killen & Associates Ltd*, 2002 CanLII 49496 (ON SC) at para 150 [*Engels*]. As stated above, a trustee in bankruptcy is an officer of the Court: *GMAC* at para 89. They must act with professional neutrality in the interests of the creditors and the bankrupt. It is the responsibility of a trustee to be even-handed and dispassionate with all parties affected, including a director: *Engels* at para 150; *Dubyk (Re)*, 2009 SKQB 426 at para 19; see also *Barter (Re)*, 2014 BCSC 528 at para 36.

[88] The office of a trustee is cloaked with broad powers, and significant responsibilities. When exercising those powers, justice must both be done and seen to be done: *Engels* at para 46; see also *Petrick (Re)*, 2017 BCSC 1780 at para 37 [*Petrick*]. A trustee has “a duty to act fairly and justly and to do what is morally right and honest”: *Taylor (Re)* (1997), 47 CBR (3d) 106 (BCSC) at para 21 [*Taylor*]. These obligations again emphasize the principle of fairness, which applies to all stakeholders (although it does not extend to a solicitor acting for a trustee): *Kaiser, Re* 2011 ONSC 4877 at para 20 [*Kaiser*].

[89] When conducting an investigation, the trustee in bankruptcy has an obligation to follow a procedure that is in compliance with the principles of procedural fairness. That includes fairness to, and in respect of, a director who is being investigated.

[90] Fairness in this context includes the disclosure of the facts alleged against a director. In my view, it also requires that the director be given an opportunity to respond to the allegations. To properly address that responsibility, the director must be informed of the investigator's objectives, including where the director may be a defendant in a lawsuit. The question that should always be asked by the trustee is whether it adhered to those principles in conducting the investigation. In making this statement, I again acknowledge that the trustee must be the master of both the investigation protocol, and how and when the disclosure is made to the director.

[91] In my view, the requirement for increased disclosure is justified by the significant consequences for the person's career and status in the community. For example, some Courts have noted that a finding of professional misconduct may be more serious than a criminal conviction: *Sheriff v Canada (Attorney General)*, 2006 FCA 139 at para 32. I would extend this requirement for disclosure to the alleged misconduct by a director of a public company. In my view, this extension concerning disclosure is further supported by the principles of fairness that apply to the actions of a trustee in bankruptcy, and the responsibility of the trustee to act with professional neutrality.

[92] The rules of procedural fairness include the conduct of a neutral and thorough investigation: *Grover v National Research Council of Canada*, 2001 FCT 687 at paras 58 and 63 [*Grover*]; see also *Miller v Canada* (1996), 112 FTR 195 (TD) at 201. The investigation file prepared by a trustee also must be objective. That is, the investigative report must present the position of the director in a factual and balanced way.

[93] In my view, it is important that a trustee in bankruptcy comply with the rules of procedural fairness when it is conducting an investigation into a director of a public company. In this regard, I adopt the comments of Lord Denning, MR, in *Selvarajan v Race Relations Board*, [1976] 1 All ER 12 (CA) [*Selvarajan*]. While Lord Denning made these comments in the context of a Race Relations Board that was charged with duties similar to those of the Canadian Human Rights Commission, I view his statements as instructive of the responsibility that any investigative body has to act fairly. The comments of Lord Denning are as follows, at 19:

In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

[The above quote from Lord Denning was cited with approval by the Supreme Court of Canada in *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at para 28.]

[94] This Court has also considered *Selvarajan*, but in the context of bankruptcy, most notably in *Cormie v Principal Group Ltd (Trustee of)* (1989), 66 Alta LR (2d) 340 (QB [in Bankruptcy]) [*Cormie*]. In *Cormie*, one of the primary issues before the Court was whether the report prepared by the trustee in bankruptcy complied with the requirements of the *Bankruptcy Act*, and if so, whether the report should be made public. With regards to this issue, the Court explained that the relevant inquiry was whether the trustee owes the persons named in the report a duty of fairness. The Court held that because the individuals mentioned in the report were given the opportunity to object and to apply to have the report altered, the trustee had discharged his duty of fairness. Significantly, the Court added at para 81:

The duty of fairness, however, would be breached by allowing the full report to be made public. It contains allegations of wrongdoing of a serious nature. Those named in the report and who would be adversely affected have not been afforded an opportunity to respond to the evidence in support of those allegations. ...

[See also *Blais v Alberta (Minister of Municipal Affairs)*, 2018 ABQB 71 at paras 49 and 50.]

[95] Briefly, the Court in *Cormie* summarized that the duty of fairness on the trustee's part would be breached if the trustee's allegations against the applicants were to become public, as the applicants would not have had a chance to address the said allegations. In other words, a trustee is in violation of its duty of fairness if: (i) it makes certain allegations of wrongdoing of a serious nature against an individual; (ii) that individual is not given a chance to address the allegations; and (iii) the allegations become public.

[96] Even though *Cormie* was decided in the context of a report prepared by a trustee in bankruptcy, in my view, the general legal principles therein apply to a situation where a trustee in bankruptcy launches a legal action against an individual.

[97] While I do not suggest that a trustee in bankruptcy is obligated to investigate every nuance or interview all possible witnesses, the failure to interview, for example, one or two key witnesses may demonstrate a serious deficiency in the investigative process: *Grover* at para 69. The broad discretion vested in a trustee in bankruptcy in respect of the investigative process it wishes to implement, including which witnesses to interview, does not allow it to short-circuit the investigative process and ignore a key witness. To the contrary, the failure to interview a person who is significantly connected to the subject transaction may lead to the inference of pre-judgment by the trustee: see *Grover* at para 71.

2. Suggested conduct

[98] In my view, if a trustee in bankruptcy is considering the prospect of suing a director such as Ms. Rose, the trustee must do two things.

[99] First, the trustee in bankruptcy must conduct an appropriate investigation. In the course of conducting that investigation, the trustee must ensure that it seeks, reviews and considers all of the relevant and material evidence to determine whether it has a viable lawsuit. Further, that investigation must be neutral and thorough.

[100] Using the present case as an example, this standard requires the trustee to: (i) ask questions of the relevant parties; (ii) review the relevant documentary evidence it thinks necessary for the litigation of a claim; and (iii) ensure that issues that are to be litigated have at least been raised with the possible defendant such that they have the opportunity to provide a response before litigation is formally commenced. Once the trustee has the benefit of all of the relevant and material facts, it must consider the totality of the potential evidence in the context of the case that it wishes to pursue.

[101] Second, the trustee in bankruptcy must comply with section 30 of the *BIA* and seek the permission of the inspectors.

[102] In my view, if a trustee in bankruptcy fails to conduct a reasonable investigation of the allegations that it wishes to pursue, it is at serious risk of having not fulfilled its duties to the Court.

C. Additional thoughts – foreign foundations & duty to expand the law

[103] Much of the judicial guidance associated with trustees is based on a foundation that was established in England. While not binding, I provide the following comments as additional reference points for consideration.

[104] The Chancery Appeals division in England has made a couple of comments that are instructive. These older cases have been referred to in academic materials and judicial commentary.

[105] The first comment highlights the duty of the Court to interfere if circumstances warrant. The comment was made in the case of *Hampden v Earl of Buckinghamshire*, [1893] 2 Ch 531 (CA) [*Hampden*]. The context involved a question concerning the responsibility of a trustee to act fairly in respect of different beneficiaries. I acknowledge that this case does not involve a trustee in bankruptcy, but the underlying principle is instructive. Justice Kekewich stated the following:

[A]n honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and protect; and if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the court to interfere: *Hampden* at 544.

[106] The second comment highlights the obligation to make inquiries into the facts. The comment was made in the case of *In re Marquis of Ailesbury's Settled Estates*, [1892] 1 Ch 506 (CA) [*re Marquis*]. The context involved a house and land that were vested with a young man in his capacity as a tenant for life. The young man had mortgaged his life estate to a lender. Bankruptcy proceedings were being taken against the young man. Lord Justice Fry stated the following:

No doubt the trustee of the settlement must act honestly: he must act as an upright, independent, and righteous man would act in dealing with the affairs of others: and, in like manner, the Court is bound to inquire into every relevant consideration, every relevant circumstance; and, like my learned brethren, I

decline to shut out from the consideration of the Court anything which ought to exercise an influence upon the discretion of an honest man. In the present case, therefore, I think we must approach the subject by a consideration of everything which should so influence an honest man or the Court: *re Marquis* at 546.

[107] The third comment highlights the obligation of officers of the court to apply standards of conduct that society expects of the Court itself. Applying that standard to an officer of the Court in a context such as this case requires a trustee in bankruptcy to act fairly in the administration of the bankruptcy estate. One of the foundations for this principle is found in *Ex parte James*, (1874) LR 9 Ch App 609.

[108] The principle in *Ex parte James* was recently touched on in *Lehman Brothers Australia Ltd v MacNamara & Ors*, [2020] EWCA Civ 321 [*Lehman Brothers*]. In the context of that appellate decision, Lord Justice David Richards stated the following:

The principle established by the decision of the Court of Appeal in *Ex parte James* is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers. The principle applies to a failure to act, as much as to positive acts: see *Re Hall* [1907] 1 KB 875, a decision of this court. As a public authority and given its role in society, the court is expected to apply standards to its own conduct which may go beyond bare legal rights and duties. A specific example is a sale of property made by the court in accordance with its powers: *Else v Else* (1872) LR 13 Eq 196. Trustees in bankruptcy, liquidators in compulsory liquidations and administrators are all officers of the court. In the case of administrators, this is expressly provided by paragraph 5 of schedule B1. As such, they are acting on behalf of the court and they will accordingly be held to these standards by the court.

That the governing principle is that the court should apply to its officers those standards of conduct that society expects of the court itself is made clear in the authorities: see *Ex parte James* at 614; *Ex parte Simmonds* (1885) QBD 308 at 312 per Lord Esher MR; *Re Tyler* [1907] 1 KB 865 per Vaughan Williams LJ at 869, Farwell LJ at 871 and Buckley LJ at 873; *Lehman Brothers* at paras 35 and 36.

[109] The principle in *Ex parte James* has been applied in Canada. In recognizing the relevance of the principle to this Court, I can do no better than quote a comment by Justice Clancy: *Taylor* at para 21.

But there is an overriding principle which must be considered. In *Re Giorgio Galleria Ltd.* (1995), 2 B.C.L.R. (3d) 337 (B.C.S.C.) Humphries J. of this Court approved the principle laid down in *Condon, Re; Ex parte James* (1874), 9 Ch. App. 609. The rule in *Ex parte James* requires a Trustee in bankruptcy to act fairly in the administration of bankruptcy estate. The rule is applicable where the bankrupt estate has been enriched at the expense of the person making the claim and where to permit that to happen would be unfair and inequitable even though it

may be correct in law. A Trustee in bankruptcy is an officer of the Court and has a duty to act fairly and justly and to do what is morally right and honest.

[110] To the above judicial comments, I would add the following four observations.

[111] First, insolvency professionals have a responsibility to act fairly in the exercise of their authority: *Kaiser* at para 20. While I recognize that a trustee in bankruptcy has a duty to pursue assets of the bankrupt, which may involve litigation, it must do so in a manner that is fair to all stakeholders, including directors.

[112] Second, I have an ongoing responsibility to expand the common law, where appropriate. A vibrant legal system: (i) must be alert and responsive to new developments; and (ii) must recognize the need to reform when it is appropriate to do so. The law is not static; to the contrary, the law is dynamic. If the law does not require a trustee in bankruptcy to carry out an appropriate investigation of, for example, a director in terms of litigation that an officer of the Court is contemplating against an officer of a corporation, then I need to set a precedent. The same principle applies to the need for appropriate disclosure to, for example, an individual who is a director of a public corporation before the litigation is formally commenced. While I make these comments in the context of a cost application, I am of the view that the concept of fairness already obligates the court to state that we cannot have officers of the Court launching litigation without an appropriate investigation and disclosure.¹ Mere assumptions by a trustee in bankruptcy are not sufficient.

[113] Third, the elements of procedural fairness vary from case to case. The content is to be decided in the context of each individual case: see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21. A review of procedural fairness in other areas of the law may be instructive in this regard.

[114] Fourth, the content of the procedural fairness is directly proportionate to the importance of a trustee's decision to the lives of those affected, and the impact that it has on those persons: *Baker* at para 25; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 9. That is, the greater the importance and impact of a trustee's decision, the greater the need for procedural fairness.

V. The conduct of the Trustee

[115] It is clear from all of the above that the actions of the Trustee are at the heart of this costs analysis, with respect to: (i) the scale of costs; and (ii) PWC Inc's personal liability. A review of the relevant events that are in evidence provides important context.

¹ It is arguable that the precedent for obligating the Plaintiff to ascertain the facts was established decades ago, and costs were awarded. See *Burns v Royal Bank of Canada* (1922), 69 DLR 608 (Ont SC) at 617; 1922 CanLII 534 (ON SC). That case involved the bankruptcy of Judge-Jones Milling Co. On hearing a motion by the moving creditor, Mulock CJ Ex stated that "[t]he circumstances connected with the giving of the impeach preferences were suspicious: the plaintiff, however, apparently took no steps to ascertain whether such suspicion was well-founded, but launched these actions, charging fraud against the defendants. The charges were baseless, and the defendants were entitled to unqualified vindication of their conduct, material element of which, in my opinion, is payment of the costs by the party responsible for the charges." The appeal to the First Divisional Court of the Appellate Division was dismissed on October 2, 1922.

A. Trustee's preliminary review – the June 26, 2018 letter

[116] On June 26, 2018, the Trustee wrote to PEI and advised that it had completed a preliminary review of the material provided by the Perpetual Group (the “**June 26, 2018 Trustee Letter**”). The June 26, 2018 Trustee Letter focused on the Asset Transaction and asked the Perpetual Group if there was anything specific that it wanted the Trustee to consider with respect to the following:

- a. the apparent non-arm's length nature of the transaction between POT and SRC;
- b. the fact that the consideration received by SRC from the transaction appeared to have been conspicuously less than the consideration given by SRC, particularly taking into account the asset retirement obligations (“**ARO**”);
- c. the timing of the transaction;
- d. the financial position of SRC immediately before and immediately after the transaction; and
- e. the benefit of the transaction for SRC.

[117] The June 26, 2018 Trustee Letter then asked the Perpetual Group if there was anything else it considered relevant to the review by the Trustee. The June 26, 2018 Trustee Letter closed by asking the Perpetual Group to let the Trustee know, so that it could consider any such additional information.

B. Key events – an overview

[118] The June 26, 2018 Letter was an important communication by the Trustee to Ms. Rose. However, it was just one factor in the relevant sequence of events.

[119] To better understand the context, I provide the following overview of twelve events leading up to, first, the June 26, 2018 Trustee Letter, and, second, the August 2018 SOC, which was filed on August 2, 2018. These twelve particulars stem from my review of the questioning of the individual representing the Trustee.

[120] First, the Trustee received an email from Ms. Rose, dated June 13, 2018. In that email, Ms. Rose indicated to the Trustee that she was “just reaching out” concerning the data that had been provided to the Trustee on the prior Wednesday. In that email communication, Ms. Rose stated explicitly that she was “available to walk through any of the information or spread sheets with the valuation work if required”.

[121] Second, on June 14, 2018, the Trustee replied, “[W]e are reviewing the data provided, and we'll get back to you”. Ms. Rose responded to the Trustee on that same day and asked, “Any idea when you might be ready for a discussion?”

[122] Third, on June 15, 2018, the Trustee replied to Ms. Rose and stated, “We're still reviewing the information. Not sure on timing”. Ms. Rose responded to the Trustee on that same day, and stated, “When you can give us a better indication on timing to discuss, that would be great”.

[123] Fourth, in questioning, the Trustee confirmed that by June 26, 2018, it had reached a preliminary view that the Asset Transaction was a non-arm's length transfer. The Trustee also

confirmed in questioning that in respect of the alleged non-arm's length transfer, there was no further work required.

[124] Fifth and as mentioned above, on June 26, 2018, the Trustee communicated its preliminary views to Ms. Rose concerning the Aggregate Transaction. Those views were communicated in the June 26, 2018 Trustee Letter. That letter made no reference to a claim against Ms. Rose.

[125] Sixth, Ms. Rose responded to the June 26, 2018 Trustee Letter on that same day. She communicated to the Trustee, "We would like to meet tomorrow, if possible, as we do not agree with your preliminary conclusions".

[126] Seventh, on June 27, 2018, the Trustee responded to Ms. Rose, "Once we have reviewed any additional information or comments you choose to provide, [the Trustee] may request a meeting". Ms. Rose responded to the Trustee that same day, and said, "Thank you for the opportunity to provide this additional information. [...] We will prepare a document in that regard and work diligently towards providing it in as timely a fashion as possible. It will likely be next week given the scope".

[127] Eighth, on July 6, 2018, Ms. Rose communicated to the Trustee and stated, "I am just touching base to let you know we are working diligently to pull together the additional information. I believe we are on pace for later next week. Thanks so much" (the "**Rose July 6, 2018 Reporting Email**").

[128] Ninth, in questioning, the Trustee confirmed that it had received the Rose July 6, 2018 Reporting Email. There is no evidence that the Trustee responded to that email from Ms. Rose. Further, there is no evidence that the Trustee communicated with the Perpetual Group between July 6, 2018 and August 2, 2018, when it filed the August 2018 SOC.

[129] Tenth, in questioning, the individual representing the Trustee justified the filing of the August 2018 SOC by stating, "Time was passing. There's 2,500 wells in this package that need attention. We're a bankruptcy trustee. We need to ... move fast".

[130] Eleventh, in questioning, the Trustee asserted a number of times that there was an urgent need to deal with the wells. Notwithstanding that assertion, there is no evidence as to why the Trustee needed to move fast. In considering this comment, I observe that as at the July 2020 hearing, there is no evidence that the Trustee has reclaimed a single well within the Goodyear Assets during its tenure. Further, I observe that there is no evidence to connect the alleged urgency concerning the wells with the urgency to file the August 2018 SOC against Ms. Rose (and others).

[131] Twelfth, in questioning, the Trustee was asked whether it had considered providing Ms. Rose with a response deadline. Specifically, the Trustee was asked whether that was a reasonable thing to do. The Trustee responded that there was no response to its request for further information. The Trustee further stated, "We completed our review. We gave them ample opportunity to respond".

[132] At a hearing before this Court on August 30, 2018, the Trustee represented that it had requested information or an explanation in the June 26, 2018 Trustee Letter. At that hearing, the Trustee stated that since "[n]one was provided and as a result, ...the Statement of Claim was filed on August 2nd".

[133] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

C. The alleged benefit factors

[134] In the August 2018 SOC, the Trustee alleged that Ms. Rose “would benefit personally from the Asset Transaction”. I reiterate that the Trustee did not disclose to Ms. Rose prior to filing the commencement document on August 2, 2018 that she would be named as a defendant in the Action.

[135] In cross-examination concerning this allegation, the Trustee made the following three admissions.

[136] First, in cross-examination the Trustee confirmed that Ms. Rose was not asked whether she had received a personal benefit for the “deal”. Based on this evidence, I find that the Trustee did not provide Ms. Rose with the opportunity to address the benefit allegation before the August 2018 SOC was filed.

[137] Second, in cross-examination the Trustee asserted that Ms. Rose benefited because liabilities were removed from the Perpetual Group. I infer that the liabilities to which the Trustee is referring are primarily the ARO associated with the Goodyear Assets. Based on the evidence before me, I find that in making this assertion, the Trustee drew a legal conclusion without asking Ms. Rose for her position on the matter.

[138] Third, in cross-examination the Trustee stated that he did not “remember having the conversation with anyone whether or not [the Trustee] should [ask Ms. Rose]” about the alleged benefit.

[139] Based on the evidence before me, I find that the Trustee did not ask Ms. Rose a single question concerning the alleged benefit before it filed the August 2018 SOC.

D. The oppression and prejudice factors

[140] In an Affidavit filed on August 2, 2018 (the “August 2018 Trustee Affidavit”), the Trustee opined that “...the Asset Transaction was clearly not in the best interests of PEOC”.

[141] Based on the evidence before me, I find that the Trustee did not ask Ms. Rose any questions concerning oppression or prejudice prior to filing the August 2018 SOC. In particular, I find that the Trustee did not ask Ms. Rose any questions concerning the exercise of her business judgment as a director of PEOC.

[142] While the evidence is that the Trustee interviewed the Sequoia Principals (who are also the 198Co Principals), I find that the Trustee did not ask those individuals any questions concerning their participation in the negotiation of the Aggregate Transaction before the filing of the August 2018 SOC. I make this finding concerning the Sequoia Principals because the Trustee conceded in cross-examination that he did not know what occurred between the vendors and purchasers.

[143] Based on the evidence before me, I also find that the Trustee did not ask the Sequoia Principals any questions concerning the allegations it was going to make in the August 2018

SOC regarding: (i) the Release; (ii) the Asset Transaction; (iii) the Aggregate Transaction; or (iv) Ms. Rose.

[144] The Trustee went on to state in cross-examination that the Asset Transaction was its focus. The Trustee further stated that "...[it] looked at that transaction in isolation".

[145] In cross-examination, the Trustee acknowledged that the Sequoia Principals were involved in other transactions "around town". The Trustee also conceded that the Sequoia Principals understood the oil and gas industry.

E. The release allegations

[146] The Trustee alleged that Ms. Rose caused 198Co to agree to the Release. Some additional background is warranted here for context.

[147] The purchase of the shares of PEOC by 198Co was outlined above. That acquisition by 198Co occurred on October 1, 2016.

[148] In the *PWC QB Reasons*, I inferred that each of the 198Co Principals was at arm's length with: (i) all members of the Perpetual Energy group of entities; and (ii) Ms. Rose: at para 55. As noted above, the 198Co Principals were Mr. Wang and Mr. Yang.

[149] Also mentioned above, the voting shares of Kailas Capital are owned 50% by Mr. Wang and 50% by Mr. Yang. Further, 198Co is a wholly-owned subsidiary of Kailas Capital. The evidence is that Kailas Capital and 198Co were represented by the law firm of McCarthy Tétrault LLP.

[150] The Release is dated October 1, 2016, and was signed by Ms. Rose, on one hand, and by one of the 198Co Principals, on the other hand. But for the allegations made by the Trustee, there is nothing unusual about the Release. The evidence is that a "release" is a common document in transactions that involve the conveyance of shares.

[151] The Trustee's Preliminary Report, dated April 11, 2018 (the "**Trustee's April 2018 Preliminary Report**"), indicated that the strategy implemented by the Sequoia Principals "...appeared to be successful until around August 2017, when gas prices in Alberta began to decline significantly".

[152] The Trustee was aware of the Release when it sent its preliminary views to PEI. The Trustee expressed no concerns about the Release at the time it issued the June 26, 2018 Trustee Letter.

[153] The assertion in the August 2018 SOC is that Ms. Rose caused PEI to require 198Co to agree to the Release (the "**Trustee's Release Assertion**"). Based on my review of the evidence, I find that the Trustee did not ask either Ms. Rose or the 198Co Principals any questions concerning the Trustee's Release Assertion before the August 2018 SOC was filed.

VI. Application of the law to the facts

A. Did the Trustee conduct an appropriate investigation?

[154] Above, I touched on the importance of an appropriate investigation before a trustee in bankruptcy launches litigation. I reiterate that an appropriate investigation is critical because it provides a trustee with the information it will need to make sound decisions. In making this comment, I am of the view the need for an appropriate investigation is consistent with the

necessity of the trustee to always act fairly, and with the dual role of the trustee to be a representative of both the debtor and the creditors: *Bennett on Bankruptcy* at 87; *Mercure v Marquette & Fils Inc*, [1977] 1 SCR 547 at 553; and *Engels* at para 150. Given that dual capacity, the trustee must act with an even-hand: *Petrick* at para 37.

[155] If proper steps are not taken to seek the relevant and material information, the trustee in bankruptcy may make erroneous decisions. In this case, I find the Trustee erred insofar as he made assumptions without: (i) having sought the benefit of all relevant information beforehand; and (ii) having considered that information in context.

[156] Before I comment further, I want to briefly address tunnel vision. The concept of tunnel vision is well-known in the context of criminal law.

[157] Based on my review of matters during this hearing, I find that tunnel vision is a concern in this case. I will use the alleged “benefit” issue to illustrate my concern, although I also comment on other issues. In this regard, I will: (i) outline the concept of tunnel vision; (ii) address an information gap that underlies my concern; and (iii) comment on the possible implications.

1. Tunnel vision concept – application to trustees

[158] Tunnel vision distorts the perception of evidence. It is one of the contributors to wrongful convictions, and is seldom caused by malice.

[159] Tunnel vision has been described as “insidious”, and may infect police, prosecutors, and judges: see *Sophonow Inquiry Report*, “Investigation of Suspects” at 37. While we are not dealing with criminal matters in this case, the “benefit” allegation advanced by the Trustee caused me to consider the tunnel vision issue in this case.

[160] Tunnel vision has been described as “... a single-minded and overly narrow focus on a particular investigative ...theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to the information”: *Morin Inquiry Report*, Volume 1, Chapter 3 at 479. When evidence is incorrectly “filtered”, a biased approach develops: Melvyn Green, “*Crown Culture and Wrongful Convictions: A Beginning*” (2005) 29 CR (6th), 262 at 269.

[161] A fundamental problem with tunnel vision is that it is often “reinforced” as investigators interact, without critically assessing the evidence or testing the investigative theory: *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (2006) at 71. The results can be ruinous to individuals, including directors, whose reputations are critical to the positions they hold. Hence, the importance of being neutral and thorough during an investigation, and the need to be open-minded throughout the investigative process.

[162] My concern in this case is that the Trustee did not critically assess all of the evidence that was, or could have been, before it. As alluded to above, if an individual in a position of authority (such as the Trustee): (i) does not have all of the relevant information; (ii) does not critically assess the relevant information; or (iii) a combination of both of those factors, he or she may make an erroneous decision. In making that decision, the individual may not have a malicious intention. Indeed, the individual may think he or she is doing the right thing. While we can debate its application here, in other venues that type of conduct has been referred to as “noble cause corruption”.

[163] Tunnel vision and noble cause corruption are closely related. This is best illustrated by way of an example, albeit involving a police enforcement context. Once the police are convinced they have identified the perpetrator, dubious investigative practices may be utilized to achieve their ends: See Bruce A. MacFarlane, “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” at 20-26, online (pdf): www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/index.html.

[164] Based on my review of the evidence before me in this case, the same issues may arise with a trustee tasked to investigate matters.

2. The information gap

[165] In cross-examination, the representative of the Trustee was asked whether he would have been better able to discharge his duty if he had, among other steps, followed up with Ms. Rose on her advice that they were providing additional materials. The answer of the Trustee to that question was twofold.

[166] First, the Trustee stated that the review was complete. Based on my review of the evidence, I infer that the Trustee meant that he had completed his review of the evidence by June 26, 2018. The nature of his comment during questioning suggests that the individual representing the Trustee had closed his mind to further consideration at that point. As a result, I find that the individual representing the Trustee had developed tunnel vision by that June 26, 2018 date.

[167] Second, the Trustee stated that Ms. Rose and the Perpetual Group had been provided with ample time to respond. The Trustee had been informed by Ms. Rose on July 6, 2018 that she was assembling further information for it to consider.

[168] Based on my review of the evidence, including the last communication from Ms. Rose to the Trustee, and the argument advanced by the Trustee, I find that the alleged “ample time” given by the Trustee to Ms. Rose to respond was between the Rose July 6, 2018 Reporting Email and August 2, 2018. That equates to 18 clear business days, including the five days of Stampede week. As an aside, I use July 6, 2018 as the reference date because the Trustee knew that Ms. Rose was still preparing the additional disclosure as at that date.

[169] The Trustee represented to this Court that the August 2018 SOC was filed because PEI failed to provide the Trustee with certain requested information. Based on my review of the events generally, and the contents of the June 26, 2018 Trustee Letter specifically, I find no merit to this representation. To the contrary, I find that the Trustee presented its alleged preliminary position in the June 26, 2018 Trustee Letter. It then declined to meet with Ms. Rose.

[170] Contrary to the argument advanced by the Trustee, I also find that it did not request any additional information from PEI or Ms. Rose. Instead, I find that the Trustee stated it would review any additional information or comments that Ms. Rose chose to provide, and that it might then request a meeting. I make this finding because, as noted above, the June 26, 2018 Trustee Letter did not request any particular information. That letter simply listed five areas in respect of which Ms. Rose or PEI might want to provide further particulars.

[171] Ms. Rose reached out twice to the Trustee, and both times indicated that materials were being prepared for its review. Concerning the Rose July 6, 2018 Reporting Email and my review of the evidence, I find the Trustee never even provided Ms. Rose with the courtesy of a reply.

[172] As I noted above, the Trustee indicated on June 27, 2018 in a communication to Ms. Rose that it would review any additional information provided. When I first reviewed that evidence, I took comfort from that reply because it suggested that the Trustee had an open-mind at that juncture. An open mind at that juncture is consistent with its responsibility to be fair, which includes the need to investigate matters appropriately before launching a lawsuit. However, I find the Trustee contradicted itself on that point during questioning.

[173] When the representative of the Trustee was asked during questioning whether it would have been reasonable for him to provide a deadline concerning the additional data that Ms. Rose was assembling for the Trustee, he answered that Ms. Rose had not responded to the request for further information. I find the Trustee's response is inconsistent with the late June and early July communications in evidence. As I noted above, I find no request from the Trustee for additional information. What the Trustee stated was that it would review additional data, if provided by Ms. Rose.

[174] Based on my review of the evidence, I find PEI and Ms. Rose were offering to provide additional data to the Trustee, and the Trustee was on notice of that fact. The Trustee did not wait to receive the forthcoming information.

[175] Instead, the Trustee "moved fast" to file the August 2018 SOC. Since it did not wait to receive that information, the Trustee suffered a self-imposed information gap.

[176] Given the evidence and analysis, I find that the Trustee did not conduct an appropriate investigation in respect of the lawsuit that it launched against Ms. Rose. This finding is supported by a number of evidentiary factors.

[177] First, the Trustee asserted that certain documents spoke for themselves, and that it did not need to ask Ms. Rose any questions. I disagree. The context that Ms. Rose could have provided to the Trustee undoubtedly would have been useful in the exercise of its judgment, especially considering the nature of this Action.

[178] Second, I found above that the Trustee did not ask the Sequoia Principals any questions concerning the allegations it was going to make in the August 2018 SOC regarding the Release, the Asset Transaction, the Aggregate Transaction or Ms. Rose. Again, the context the Sequoia Principals could have provided to the Trustee likely would have been useful in the exercise of its judgment concerning this Action. I state that because the Trustee's April 2018 Preliminary Report indicated that the strategy implemented by the Sequoia Principals "...appeared to be successful until around August 2017, when gas prices in Alberta began to decline significantly". That comment by itself warranted follow-up questions by the Trustee.

[179] Third, I note the additional wells that SRC acquired from third parties. This was reported on page one of the Trustee's 2018 Report. In particular, by its own hand the Trustee reports that SRC grew between the date that 198Co acquired SRC and August 2017. Based on the evidence before me as summarized by the Trustee, that growth in SRC was from an original well count of approximately 2,500 wells to approximately 3,200 wells. The Trustee's April 2018 Preliminary Report indicates that those additional wells were acquired in separate asset purchases from: (i) Husky Oil Operations Ltd; (ii) Waldron Energy; and (iii) various other operators.

[180] While I make no findings concerning that data, I am of the view that certain questions should have been raised for the benefit of all stakeholders, including the Court. As an example, in the August 2018 SOC the Trustee asserts that "[a]s a result of the Transactions generally, and

the Asset Transaction in particular: ...if PEOC was not insolvent, it was rendered insolvent... all for the benefit of ...Rose personally”. Given this assertion in the pleadings, the Trustee should have asked the Sequoia Principals why they were adding assets to SRC between October 2016 and August 2017 if that corporation was insolvent.

[181] While I make no determination concerning those additional asset purchases, I think a Court would want to know the answer to the above question. Further, I am of the view that, as an officer of the Court, the Trustee should have asked at least the Sequoia Principals a question of that nature.

[182] The answers to questions of that type may have added important context to the elements that the Trustee needs to prove as the Plaintiff in this Action. Indeed, the answers to such questions may be critical to the proper administration of justice in matters of bankruptcy.

[183] In relation to the investigation as a whole, I also find that the Trustee drew a conclusion concerning an alleged benefit involving the ARO without allowing Ms. Rose to put her position forward. Indeed, the Trustee did not ask Ms. Rose a single question concerning the alleged benefit that it was going to include in the August 2018 SOC against her.

3. Possible implications – erroneous decisions

[184] In my comments above, I mentioned my concerns with tunnel vision and the benefit issue. The reason I highlighted that point above is because I think certain questions should have been asked of Ms. Rose concerning the alleged benefit. In my view, the failure of the Trustee to ask questions concerning the alleged benefit reflects an important flaw in the conduct of the Trustee.

[185] The questions of Ms. Rose could have been brief and simple. To illustrate the point, the questions the Trustee could have asked include the following:

- (i) Did you, Ms. Rose, benefit from the Asset Transaction?
- (ii) Given the nature of the Asset Transaction, did you, Ms. Rose, enjoy a benefit therefrom that violated the *BIA*?
- (iii) Did the shifting of the beneficial interest in the Goodyear Assets to PEOC remove any ARO exposure from PEI?
- (iv) Does section 2 of the *Income Trusts Liability Act*, SA 2004, c 1-1.5 (the “*ITL Act*”) apply to PEI in its capacity as a beneficiary of the POT Assets.
- (v) If the *ITL Act* does not apply to PEI, is there any provision in the POT Trust Indenture that would expose PEI to ARO?

[186] Based on my review of the questioning of the representative of the Trustee, I am concerned that inquiries of this nature were not raised because of tunnel vision (which had closed the Trustee’s mind to ongoing enquiry). My particular concern arises because of the answer the individual representing the Trustee gave during questioning: “...the benefit is clear because she owns shares in an entity which was cleaned up by removing liabilities...”. For purpose of this discussion, I infer that the individual representing the Trustee is primarily referring to ARO when he uses the term “liabilities”.

[187] The above answer by the Trustee highlights my concern in respect of the “benefit” allegation. I make that comment because Ms. Rose owns shares in PEI, not in POT. Subject to the further evidence that may have been forthcoming from Ms. Rose, if the Trustee had asked the

above questions, it may have come to a different conclusion concerning the alleged “benefit” assertion that it advanced in the August 2018 SOC.

[188] I raise this point as a matter that should have been investigated and considered by the Trustee because it is my understanding that the subject ARO was situated in POT, and not PEI. If that is the case, I query whether any ARO was removed from PEI in the Asset Transaction.

[189] I pose the above question because if the subject ARO was simply shifted from POT to PEOC in circumstances where PEI was never exposed to any ARO, then how does that benefit Ms. Rose?

[190] While the ARO associated with the Goodyear Assets may have been reflected on the consolidated or combined balance sheet of PEI, it may not have been the legal responsibility of PEI at all. Again, I raise these points to illustrate the importance of the questions that should have been asked of Ms. Rose.

[191] In closing on this “benefit allegation”, I find that the Trustee had tunnel vision. I make this finding because the individual representing the Trustee had closed his mind by at least June 26 or 27, 2018. Regrettably, that tunnel vision was basis upon which the Trustee justified its filing of the August 2018 SOC without: (i) completing a neutral and thorough investigation of the particulars, including the questioning of key stakeholders (such as Ms. Rose); and (ii) considering the overall corporate structure.

[192] To emphasize the point, the reason the Trustee needed to consider the overall corporate structure was because any ARO responsibility may have been effectively locked in an entity below PEI. For example, corporate groups manage risk by positioning certain types of businesses and assets in wholly-owned subsidiaries.

[193] While additional data from Ms. Rose may not have changed the alleged preliminary views of the Trustee, it had an obligation to consider any further particulars that were forthcoming. In my view, that obligation to consider is part of fairness. If Ms. Rose had been provided with sufficient time to respond before any commencement document was filed with the Court, the Trustee may have reconsidered or reframed, for example, the alleged benefit.

[194] In this regard, I am also troubled by the assertion of the Trustee that it had provided Ms. Rose with ample time to respond. In these circumstances, I find that Ms. Rose was not provided with “ample time to respond”. I make this finding for four reasons.

[195] First, the Trustee was positioning itself to launch a claim in the range of \$220 million against Ms. Rose in circumstances where it did not provide her with any notice of the forthcoming lawsuit against her. Not only should the Trustee have given notice of that possible exposure to Ms. Rose, in fairness it had a responsibility to properly investigate the circumstances and to provide her with the opportunity to address the issues before it filed the lawsuit.

[196] In fact, the Trustee’s lawsuit against Ms. Rose, which contained serious allegations of wrongful conduct, eventually became publicly available. Notwithstanding its magnitude and potentially harmful impact on Ms. Rose’s reputation, Ms. Rose was not afforded an opportunity to fully address the allegations beforehand. Based on the reasoning in *Cormie* at para 81, I find that such conduct is contrary to the duty of fairness on the Trustee’s part and violates the requirements of procedural fairness.

[197] Second, Ms. Rose had indicated that further data was going to be provided for the Trustee to consider. While Ms. Rose did not meet her own self-imposed deadline, I do not view that as being a justification for the Trustee to “move fast” in terms of filing the lawsuit. Based on my review of the evidence, I find no indication that the Trustee set a deadline by which Ms. Rose was to provide additional particulars.

[198] Third, in any dispute between parties it is important to provide sufficient time for a potential defendant to answer questions and provide its position on matters. In this case, there were a total of 18 clear business days between the last communication of Ms. Rose to the Trustee, which occurred on July 6, 2018, and the filing of the August 2018 SOC on August 2, 2018 by the Trustee.

[199] Given the magnitude of the case that was launched against Ms. Rose and the allegations it contained, I find that time span was not ample. Indeed, the fact that the Trustee had not alerted Ms. Rose to her personal exposure in the lawsuit further supports the finding that the time span was neither ample nor sufficient, particularly when her potential exposure was in the range of \$220 million.

[200] Fourth, I disagree with the alleged justification given by the Trustee that it had to “move fast”. While I do not minimize the ultimate need for the attention to be given to approximately 2,500 wells, in the circumstances of this case I do not accept that as being the justification for the Trustee to “move fast”. I find no evidence before me of any emergency that had to be dealt with forthwith. Further, I find no evidence as to why the filing of the August 2018 SOC, a mere 18 clear business days after Ms. Rose indicated on July 6, 2018 that additional data would be forthcoming, would address any emergency. This finding is further supported by the fact that there is no evidence the Trustee has, for example, reclaimed any wells since it was appointed in March 2018.

[201] Given the facts and analysis, I find that the Trustee failed in its obligation to conduct an appropriate investigation because it did not question Ms. Rose and the 198Co Principals. As a result, the Trustee breached his responsibility to be fair to an important stakeholder by not conducting a neutral and thorough investigation.

[202] Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of \$220 million), I find the conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

[203] As noted above, Trustee’s Release Assertion in the August 2018 SOC is that Ms. Rose caused PEI to require 198Co to agree to the Release. On the face of the pleading, I am not bothered by this factual allegation.

[204] This allegation concerning the Release suggests that PEI forced 198Co to do something. That may have been the case, but this allegation is an important factor in this case because of the manner in which the August 2018 SOC is framed. While the Trustee is the master of his own investigative procedure, it has a responsibility to act fairly: *Engels* at 150.

[205] I am troubled by what came before me in evidence during the underlying hearing. In this circumstance, the Trustee saw no reason to ask Ms. Rose about the Release. In particular, the

individual representing the Trustee saw no reason to ask her whether she had caused PEI to require 198Co to agree to the Release, notwithstanding that it planned to allege that very point in the August 2018 SOC.

[206] Based on the evidence before me, I find the Trustee's Release Assertion was made without a proper investigation. It was merely an assumption. Concerning that evidence, I have two comments.

[207] First, I acknowledge that the commencement document need only plead the important facts that in law would create a certain cause of action: *Stevenson & Côté 2020* at 13-25. In the August 2018 SOC, the Trustee pleaded that "[Ms.] Rose breached her duties to PEOC ...by ...causing PEI to require [198Co] to agree that, as a condition of closing the Share Transaction, [198Co] would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC...": see clause 16.6 of the August 2018 SOC. While it is trite law, I state for the record that a fact alleged in a pleading is not evidence.

[208] The Trustee stated in questioning that he did not query the 198Co Principals because he "was not aware of any evidence where they had been involved in the asset purchase agreement". During that same questioning, the individual representing the Trustee also confirmed that it did not occur to him that he would be better able to discharge his duty to be honest and impartial, and provide the interested parties with full and accurate information if: (i) he examined more carefully the records received from SRC or from PEI concerning the negotiation of the asset purchase agreement; or (ii) he followed up with Ms. Rose concerning her notice that the Perpetual Group was going to provide additional information to the Trustee.

[209] Similarly, I also find that the Trustee did not ask Ms. Rose any questions concerning the Trustee's Release Assertion. Indeed, based on my review of the June 26, 2018 Trustee Letter, I find no mention of the Release. When asked during questioning why he did not ask Ms. Rose for her side of the story, the Trustee stated that "[t]he evidence speaks for itself". In the context of that same cross-examination, the Trustee also confirmed that he did not think it was "proper" to ask Ms. Rose about the Trustee's Release Assertion. I find that answer unacceptable in these circumstances. There is nothing improper about said question, other than it was not asked.

[210] During the initial hearing, Counsel for the Trustee tried to justify the lack of questioning of Ms. Rose by asserting, "I was 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...".

[211] I do not accept that assertion on behalf of the Trustee. My reasons are fourfold.

[212] First, Ms. Rose provided evidence in affidavit format that the Release was negotiated at arm's length. That evidence from Ms. Rose contradicts an important element in the Trustee's Release Assertion. The contradiction relates to the assertion by the Trustee that the 198Co Principals were "required" to execute the Release. Based on the evidence before me, the negotiation of the Release was at arm's length. The implications associated with the Trustee's assertion are significant because they suggest that the Release is something other than a document negotiated between arm's length parties. I do not accept the assertion. It is without merit. I also note that the Trustee did not cross-examine Ms. Rose on her evidence or tender reply evidence.

[213] Second, given the nature of the Trustee's Release Assertion in the August 2018 SOC, I would have expected the Trustee to at least ask the 198Co Principals the following question: Did Ms. Rose cause PEI to require you, the 198Co Principals, to execute the Release against your will? There is no evidence to suggest that a simple question of that type was asked of these key stakeholders.

[214] Third, given that the Trustee was going to claim \$220 million against Ms. Rose, I would have expected a neutral and thorough investigation. While the domain of the investigation in these circumstances is under the control of the Trustee, I find that a neutral and thorough investigation would have required the Trustee to ask the key stakeholders some questions. In this case, the evidence of Ms. Rose was that at no time did the Trustee ask her any questions about the Release or suggest that it is not binding on SRC. Again, the Trustee did not cross-examine Ms. Rose on her evidence or tender reply evidence.

[215] Fourth, implicit in the Trustee's Release Assertion in the August 2018 SOC is the allegation that the 198Co Principals were not acting on an arm's-length basis in respect of one or both of Ms. Rose or PEI. I touched on this above, but from a different perspective. Notwithstanding that allegation, I find that the Trustee provided no evidence that 198Co was operating on a non-arm's length basis in respect of one or both of Ms. Rose or PEI. To the contrary, the evidence is that 198Co was a sophisticated party that was at arm's length with both Ms. Rose and PEI. Further, the evidence is that 198Co was represented by the law firm of McCarthy Tétrault LLP, and it vigorously negotiated all aspects of the Aggregate Transaction. In the absence of evidence, the suggestion that McCarthy Tétrault LLP was forced to do anything in the context of a deal is inconceivable to me.

[216] Based on the evidence before me during the hearing, I found no basis whatsoever to justify the allegation that Ms. Rose caused PEI to cause 198Co to agree to the Release. To the contrary, I find that there is a lack of evidence to support that allegation that was included in the August 2018 SOC. I make that finding primarily because the individual representing the Trustee did not, in my view, carry out a proper investigation. He simply made certain assumptions, and did not take steps to investigate the necessary underlying facts. I find this to be inexcusable conduct for any investigative officer, particularly an officer of the Court.

[217] Given the facts and analysis, I find that the Trustee did not investigate the Trustee's Release Assertion appropriately. As a result, I find no evidence that the Trustee established an evidentiary foundation to support its allegation that Ms. Rose caused PEI to cause 198Co to agree to the Release.

[218] In summary, I find that the Trustee took inadequate steps to investigate the merits of the allegations against Ms. Rose that it included in the August 2018 SOC. The Trustee simply made assumptions. These findings are important in the context of the Rose Costs Application because the conduct of the Trustee in this matter guides me in determining what costs should be applied.

B. What scale of costs should be applied?

[219] The Plaintiff has expressed concern that the submissions advanced by Ms. Rose in the context of the Rose Costs Application suggest that the Trustee engaged in various forms of misconduct. In particular, the Trustee asserts that Ms. Rose alleges that the various claims made against her in the Action were without any belief that they were well-founded, legally and

factually. The Trustee asserts that there is no reasonable basis in law or fact for these submissions by Ms. Rose.

[220] While I acknowledge the assertion advanced by the Trustee, I disagree. For the reasons discussed above, I find the allegations advanced by Ms. Rose are well-founded, both in law and in fact.

[221] Given the facts and analysis, I find that an award of solicitor-client costs in favour of Ms. Rose is warranted. I make this finding because this is a circumstance where justice can only be done by a substantial indemnification for costs.

[222] Ms. Rose swore an Affidavit on May 1, 2020 (the “**Rose May 2020 Affidavit**”) that attached a bill of costs, indicating that her solicitor-client costs are in the amount of approximately \$683,431 (the “**Rose Bill of Costs**”).

[223] Counsel for each of the entities in the Perpetual Group and Ms. Rose allocated work between themselves. The purpose of this work allocation was to reduce or avoid the duplication of effort on common issues (the “**Defendants’ Work Allocation**”).

[224] The Trustee did not cross-examine Ms. Rose on the Rose May 2020 Affidavit. Further, the Trustee did not file any evidence in response to this Application.

[225] The Defendants’ Work Allocation is relevant to the Rose Costs Application because much of the work carried out by counsel for the Perpetual Group otherwise would have been duplicated by counsel for Ms. Rose. There is no evidence that the Trustee challenged the Defendants’ Work Allocation.

[226] Based on the facts and analysis, I find the Defendants’ Work Allocation to be a prudent course of conduct in the circumstances.

[227] Given that the Trustee did not cross-examine Ms. Rose on her May 2020 Affidavit, I accept the Rose Bill of Costs at \$683,431.

[228] I have considered the above evidence, findings and analysis carefully. Based on that deliberation and the exercise of my discretion, I set the award of solicitor-client costs at 85% of the Rose Bill of Costs. I make this determination because I find the Trustee exercised very poor judgment that equates to positive misconduct. In summary, the positive misconduct to which I refer is fourfold.

[229] First, the Trustee did not conduct a neutral and thorough investigation into the circumstances of this case. While the Trustee might have decided to proceed with the lawsuit, the need for an appropriate investigation as prerequisite to that litigation step is of fundamental importance. In my view, an appropriate investigation is linked to fairness.

[230] Second, the Trustee did not provide Ms. Rose with notice of the possible claim in the range of \$220 million against her. For the record, I find this lack of notice inexcusable in these circumstances. The provision of notice is of fundamental importance in many areas of the law, and one of those areas includes the need for a Trustee to give notice to director of a public company in the context of a potential lawsuit of this nature. I expect no less from an officer of the Court.

[231] Third, the Trustee should have provided Ms. Rose with the opportunity to submit additional data for it to consider. I find it outrageous that Ms. Rose notified the Trustee that further particulars were forthcoming and that the Trustee neither waited for those additional particulars nor gave Ms. Rose a deadline by which she should have submitted those particulars to the Trustee.

[232] Fourth, I find Ms. Rose was not given sufficient time to address matters. In the circumstances of this case, I find the conduct of the Trustee in this regard to be egregious. If a Trustee is going to sue a director of a public company and make the type of allegations that it did in this case, it needs to provide that individual with adequate time to address matters. This point overlaps with notice, but is a separate issue.

[233] As a final comment, I make this particular award of costs so that other Officers of the Court are deterred from similar conduct. When this type of conduct occurs, the responsible party should be penalized beyond the ordinary order of costs: *Secure 2013 Group* at para 15(e).

C. Should PWC Inc be personally liable for Ms. Rose's costs?

[234] The Trustee sued Ms. Rose personally in civil court in relation to a corporate transaction. Nearly four years have lapsed since the Aggregate Transaction was effected. Much has happened in the world since then, including in respect of the financial prospects of SRC.

[235] Given the facts and analysis above, I find that PWC Inc is the "promoter" of this litigation.

[236] The Alberta Court of Appeal has recognized that the Sequoia Estate will not be able to pay costs: *PWC First Appeal Reasons* at para 32. Indeed, the Trustee also conceded that the Sequoia Estate would not likely be able to pay costs: *PWC First Appeal Reasons* at para 30.

[237] Based on my review of the law, I find that I have the jurisdiction to award costs against non-parties on the basis that they were the "promoter" of the unsuccessful litigation. Based on that jurisdiction and my above findings, PWC Inc shall bear personal responsibility for the costs awarded in the Rose Costs Application. As a result, and given the circumstances of this case, I order PWC Inc to be directly liable for the costs.

VII. Conclusions

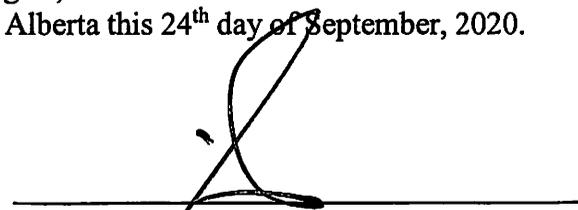
[238] Given the evidence, findings and analysis above, my Orders are as follows:

- a. Costs shall be granted in favour of Ms. Rose.
- b. The Costs in this Action concerning Ms. Rose shall be granted on a solicitor-client basis. I make this finding because this is a circumstance where justice can only be done by a substantial indemnification for costs. I set the award of Costs at 85% of the Rose Bill of Costs.
- c. PWC Inc shall be directly liable for the costs to Ms. Rose.

Heard on the 28th – 30th day of July, 2020.

Oral Reasons for Judgment given on 26th day of August, 2020.

Written Reasons for Judgment dated at Calgary, Alberta this 24th day of September, 2020.



D.B. Nixon
J.C.Q.B.A.

Appearances:

Mr. Rinus de Waal and Mr. Luke Rasmussen
for the Plaintiff/Respondent

Mr. Daniel McDonald QC and Mr. Paul Chiswell
for Perpetual Energy Inc.

Mr. Steven Leitl QC and Mr. Aditya Badami
for Susan Riddell Rose, Defendant/Applicant