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Court of Appeal of Alberta

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1901-0255AC
TRIAL COURT FILE NUMBER:	1801-10960
REGISTRY OFFICE:	CALGARY
PLAINTIFF/RESPONDENT:	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
STATUS ON APPEAL:	APPELLANT
DEFENDANTS/APPLICANTS:	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**FACTUM**

FIAT

Let the within Factum be filed despite non-compliance with the following Rules/Practice Directions:
Rule 14.26(2)(a)

Appeal from the Judgment of
The Honourable Mr. Justice D.B. Nixon
Dated the 15th day of August, 2019
Filed the 18th day of February, 2020

J Baptiste

Case Management Officer
Laurie Baptiste

FACTUM OF THE APPELLANT

Dated: May 29, 2020

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INTRODUCTION

1. The Appellant PricewaterhouseCoopers Inc., LIT is the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp., formerly known as Perpetual Energy Operating Corp. ("**PEOC**").

2. The Trustee commenced an action against Perpetual Energy Inc. ("**PEI**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp. ("**POC**") (jointly, the "**Perpetual Respondents**") and against Ms. Susan Riddell Rose ("**Rose**"), for 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.

3. 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. The Defendants say, *inter alia,* that the Asset Transaction was only "an imbedded step" in a series of transactions, through which PEI retained certain selected assets, disposed of the remaining assets by combining the legal and beneficial interests in PEOC, through the Asset Transaction, and then sold all the shares in PEOC to an arm's length purchaser (the "**Share Transaction**").

4. The Trustee filed evidence in support of its claims, to confirm, *inter alia*, that the consideration received by PEOC in the Asset Transaction was *at least $217,570,800 less* than the value of the consideration it provided to the Perpetual Respondents.[1] The Respondents did not provide any evidence to contradict the Trustee's evidence that the Asset Transaction was at undervalue by at least $217,570,800.[2] Instead, they applied to strike and/or dismiss all of the Trustee's claims on the basis of certain "discrete threshold issues".[3]

5. The Chambers Judge treated the Asset Transaction and the Share Transaction as one

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[1] Affidavit of P. Darby at para. 44

[2] Affidavit of M. Schweizer, at paras. 20 and 23 **[AEKE, p. A211-212]**

[3] August 27, 2018 Application of the Perpetual Respondents, at para. 1(a) **[AR, p. P40]**; October 19, 2018 Application of S. Rose, at paras. 3-4 **[AR, p. P51]**

"aggregate" transaction. He found that the Perpetual Respondents were not entitled to summary dismissal of the Trustee's *BIA* s. 96 claim against them, but struck or dismissed the Trustee's other claims against the Respondents.

PART I - STATEMENT OF FACTS

6. 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.

7. In 2016, PEI determined that it was in the best interest *of PEI* to sell certain shallow natural gas assets (the "**Goodyear Assets**").[4] The Goodyear Assets were "mature legacy assets" of PEI.[5] They had been "operating on a negative cash flow basis for a long time" and were subject to high fixed operating costs including "extremely high municipal property taxes". The Goodyear Assets were also associated with very significant future asset retirement obligations ("**ARO**").

8. Perpetual solicited potential buyers for these assets and entered into negotiations in May 2016 with Kailas Capital Corp. ("**Kailas**").[6] Kailas would ultimately incorporate 1986114 Alberta Inc. ("**198**") to enter into the Share Purchase agreement with PEI and acquire its shares in PEOC[7] as part of the Share Transaction.

9. 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 approval.

10. The sale of the Goodyear Assets was effected in steps, through a restructuring of the Perpetual corporate group and a number of agreements. First, POT sold its beneficial interest in the Goodyear Assets to PEOC pursuant to the Asset Transaction. Then, PEOC transferred legal title to all the remaining POT assets, except 1% of the legal title to four strong

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[4] Affidavit of S. Rose, at paras. 1 and 25 **[AEKE, p. A234]**
[5] Transcript of Cross-Examination of S. Rose, Exhibit 7.
[6] Affidavit of S. Rose, at paras. 27-33 **[AEKE, pp. A234-235]**
[7] Affidavit of S. Rose, at para. 40 **[AEKE, p. A237]**

producing East Edson wells (the "**Retained Interests**") to POC, as the new trustee for POT. 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.

11. In July 2016, Wentao Yang, who would became a director of PEOC following the Share Transaction,[8] wrote to Ms. Rose at PEI on behalf of Kailas. He expressed the view that Kailas' offer to purchase PEI's shares in PEOC for $1 was compelling because the assets PEI had decided to sell had a significant negative value:

> We believe this offer to be compelling based *on a negative $10 million 2P Net Present Value* on June 28, 2016 forward strip pricing, inclusive of undiscounted costs relating *to future abandonment liabilities of $34 million* but *exclusive of an additional $53 million of Asset Retirement Obligations* and $47.4 million f [sic] salvage value as of June 2016 (*with over 2,000 suspended wells in need of abandonment and/or reclamation in the near future*) as well as over $6.0 million of negative field operational cash flow from January to April 2016 associated with the Referenced Assets. *These numbers are provided to Kailas* through internally generated resources by *Perpetual Energy Inc.*[9] [Emphasis added.]

12. PEI's own assessment confirmed that the Share Transaction and the related Asset Transaction would indeed be in the best interest of PEI.[10] An August 2016 internal presentation highlights the benefits to PEI of disposing of its shares in PEOC but only after POT had transferred to PEOC, in the Asset Transaction, the beneficial interest in the negative value assets described in Mr. Wang's letter.

    12.1. Perpetual Operating Corp. would replace PEOC as the licensee for the Perpetual Respondents with the Alberta Energy Regulator and their Licensee Liability Rating ("**LLR**") would rise from 2.05 to 5.12;[11]

    12.2. The Perpetual Respondents' projected ARO for the year ending 2016, excluding salvage, would be reduced from $123 million to $35 million.[12]

    12.3. The so-called "Goodyear Assets" to be disposed of through the Asset Transaction and the Share Transaction represented "approximately 71% of forecast year end 2016

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[8] Affidavit of P. Darby, at para. 28 **[AEKE, p. A5]**
[9] July 7, 2016 Letter from Kailas Capital Corp. to Perpetual Energy Inc., Affidavit of S. Rose at para. 34 and Exhibit E **[AEKE, pp. A235 and 289]**
[10] Affidavit of S. Rose, at paras. 1 and 25 **[AEKE, p. A234]**
[11] Goodyear Presentation, at pp.5-9, Affidavit of P Darby, Exhibit C **[AEKE, pp. A21-A25]**
[12] Goodyear Presentation, at pp. 9 and 22, Affidavit of P Darby, Exhibit C **[AEKE, pp. A25, A38]**

corporate liabilities."[13]

13. Although the interests of PEOC are not discussed in the PEI internal assessment, the same presentation reveals the negative consequences of the Asset Transaction for PEOC:

13.1. PEOC's LLR would drop from 2.05 to 1.02.[14]

13.2. With the exception of the valuable assets put in the name of PEOC on an interim basis to "maintain" its LLR for a limited time,[15] PEOC would be left with the Goodyear Assets and the $87 million in ARO associated with them.[16]

13.3. The Perpetual Respondents would dispose of 71% of their "corporate liabilities" represented by the Goodyear Assets, solely by transferring them to PEOC. [17]

14. PEI's disclosure to the market at the time reflects its view that these Transactions were "in the best interest of PEI".[18]

14.1. On September 27, 2016, PEI announced that it had entered into an agreement to dispose of a large percentage of its "high liability" mature shallow gas properties in Eastern Alberta" and that the transaction would increase PEI net asset value by $28.5 million.[19]

14.2. On October 3, 2016, PEI announced that it had been able to materially increase its liability management ratio to over 4.2 through, *inter alia*, the disposition "of all of the liabilities associated" with the Goodyear Assets.[20]

14.3. On November 7, 2016, PEI announced that it was able to dispose the Goodyear Assets "including net asset retirement obligations ("ARO") of $131.0 million" for "nominal proceeds".[21] This disposition would have far-reaching positive impacts [for PEI]

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[13] Goodyear Presentation, at p. 22, Affidavit of P Darby, Exhibit C **[AEKE, p. A38]**
[14] Goodyear Presentation, at pp. 5-9 **[AEKE, pp. A21-25]**; Retained Interests Agreement, Affidavit of P Darby, Exhibit F **[AEKE, pp. A142-156]**
[15] Goodyear Presentation, at p. 8 **[AEKE, p. A24]**; Retained Interests Agreement, preamble para. 2 and s. 5.1(c)(vii)Affidavit of P Darby, Exhibit F **[AEKE, pp. A144 and A151]**
[16] Goodyear Presentation, at p. 22 **[AEKE, p. A38]**
[17] Goodyear Presentation, at p. 22 **[AEKE, p. A38]**
[18] Affidavit of S. Rose, at paras. 1 and 25 **[AEKE, p. A234]**
[19] September 27, 2016 Press Release, at paras. 1 and 4, Affidavit of P Darby, Exhibit O **[AEKE, p. A187]**
[20] October 3, 2016 News Release, Transcript of Cross-Examination of S. Rose, Exhibit 5 **[AEKE, p. A1113]**
[21] November 7, 2016 Press Release, p.1, Transcript of Cross-Examination of S. Rose, at Exhibit 6 **[AEKE, p. A1116]**

because "these mature legacy assets had been funds flow negative for many years".[22]

15. As a result, the Asset Transaction benefited PEI:

    15.1. Through the Asset Transaction, the Perpetual Respondents were able to dispose of 71% of their corporate liabilities, including at least $87 million in ARO associated with the Goodyear Assets, by transferring them to PEOC.

    15.2. Kailas was aware that the liabilities associated with the Goodyear Assets greatly exceeded their positive asset value, as Mr. Wang indicated in his letter to Ms. Rose.[23] Kailas' downside risk was limited to the $1 it was prepared to pay to acquire PEOC's shares[24] and it even incorporated a new entity, 198, to acquire those shares and enter into the Share Transaction.[25]

16. The Asset Transaction was unquestionably in the best interests of PEI for all the reasons discussed in both the internal presentation and PEI's external disclosure to the market. The liabilities associated with the Goodyear Assets, including the ARO, were not eliminated but merely transferred from one Perpetual entity to another.[26] PEOC lost in direct proportion to PEI's gain.

PART II - GROUNDS OF APPEAL

17. It is respectfully submitted that:

    17.1. The Chambers Judge erred in law in finding that a release executed by Ms. Rose (the "**Release**") was a complete defence to the Trustee's breach of director's duty claims against her;

    17.2. The Chambers Judge erred in law in finding that Ms. Rose was not the directing mind of PEOC;

    17.3. The Chambers Judge erred in fact and law in finding that Ms. Rose was entitled to the

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[22] November 7, 2016 Press Release, p. 4, Transcript of Cross-Examination of S. Rose, at Exhibit 6 **[AEKE, p. A1119]**
[23] July 7, 2016 Letter from Kailas Capital Corp. to Perpetual Energy Inc., Affidavit of S. Rose at para. 34 and Exhibit E
[24] July 7, 2016 Letter from Kailas Capital Corp. to Perpetual Energy Inc., Affidavit of S. Rose at para. 34 and Exhibit E **[AEKE, pp. A235 and 289]**; Share Purchase Agreement, s. 1.1(j)
[25] Affidavit of S Rose, at para. 40 **[AEKE, p. A237]**
[26] Goodyear Presentation, at pp. 5-9 **[AEKE, pp. A21-25]**

protection of the business judgment rule;

17.4. The Chambers Judge erred in law in finding that Ms. Rose did not breach her duties as PEOC's sole director in approving the Asset Transaction;

17.5. The Chambers Judge erred in law in striking the Trustee's oppression claim for failing to disclose a reasonable cause of action;

17.6. 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

17.7. The Chambers Judge erred in law in striking the Trustee's equitable rescission claim for failing to disclose a reasonable cause of action.

PART III – STANDARD OF REVIEW

18. The applicable standards of review are discussed below in relation to each issue.

PART IV – ARGUMENT

A. The Chambers Judge Erred in Finding that the Release Executed by Ms. Rose was a Complete Defence to the Trustee's Breach of Director's Duty Claims

1. The Chambers Judge erred in law in his interpretation of the Release

19. The Chambers Judge found that the Release was a complete bar to the Trustee's claims against Ms. Rose.[27] He found that the Trustee's claims against Ms. Rose were "solely in relation to her having acted as a director of PEOC" and this was "directly contrary to the express terms of the Release."[28] This finding reflects several errors of law reviewable on a correctness standard:[29]

20. The Chambers Judge erred in his interpretation of the Release, which did not contain clear language barring the Trustee's claims. He applied the definition of "Claim" from the Share

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[27] Reasons for Judgment, at para. 330.
[28] Reasons for Judgment, at para. 329.
[29] *Biancaniello v DMCT LLP*, 2017 ONCA 386 (*Biancanellio*), at para. 22 **[Trustee's Authorities, Tab 1]**

Purchase Agreement whereas the Release, in fact, applied to "Claims" as defined in the "Purchase and Sale Agreement".[30]

21. The Chambers found, at least implicitly, that a Release entered into between Ms. Rose and PEOC could displace the statutory provisions applicable to Ms. Rose, including *BIA* s. 96, and bind a Trustee in Bankruptcy appointed more than a year later.

22. The Chambers Judge incorrectly interpreted *ABCA* s. 122(3), holding that it only prevents officers and directors from contracting out of "existing duties" owed to a corporation.[31] He committed a further error by basing his interpretation, in part, on "common practice" without expert evidence.[32]

2. The Release does not contain clear language barring the Trustee's claims

23. In *Biancaniello*, the Ontario Court of Appeal held that a correctness standard of review applied to the interpretation of a release even though it was not a standard form document. The release in question used language standing in many common release documents, so its proper interpretation raised issues of general importance.[33]

24. The Court in *Biancaniello* also held that the following principles apply to determine what was "in the contemplation of the parties" when they executed a release:

> 1. One looks first to the language of a release to find its meaning; at para. 8.
> 2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that party intended to release claims of which it was unaware: at paras. 9-10.
> 3. General language in a release will be limited to the thing or things that were specially in the contemplation of the parties when the release was given: at para. 13.
> 4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them: at para. 23.
> 5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties: at para. 28.[34]

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[30] Reasons for Judgment, at paras. 291 and 293; Purchase and Sale Agreement, s. 4.01(l) **[AEKE, p. A67]**; Share Purchase Agreement, s. 1.1(m) **[AEKE, p. A87]**
[31] Reasons for Judgment, at para. 317.
[32] Reasons for Judgment, at para. 319.
[33] *Ibid* **[Trustee's Authorities, Tab 1]**
[34] *Ibid*, at para. 42, citing *Bank of Credit & Commerce International SA (In Liquidation) v Ali (No.1)*, [2001] UKHL 8 **[Trustee's Authorities, Tab 1]**

(a) The Release provision at issue is either unclear or erroneous

25. Consistent with the first principle above, a releasee is not entitled to rely on a release if the language used is sufficiently unclear. In *Van Hooydonk*, the Court held that the releasees were not entitled to rely on an "erroneous sentence" and struck out that portion of the release.[35] Similarly, in *McCallum*, the Court found that the releasee was not entitled to rely on an indemnity clause in the release because the clause failed "to say what it means".[36]

26. The Release in question provides that:

> 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 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.[37]

27. The Purchase and Sale Agreement defines "Claims" to mean:

> As it pertains to the Assets only, no suit, action or other proceeding before any court or governmental agency has been commenced against Vendor, or to the knowledge of Vendor, has been threatened against Vendor or any Third Party, which might result in impairment or loss of the interest or loss of the interest of Vendor in and to any of the Assets or which might otherwise adversely affect the Assets other than has been previously disclosed.[38]

28. As in *Van Hooydonk* and *McCallum*, the incorporation of the Purchase and Sale Agreement definition of "Claims" into the Release is awkward and grammatically unclear, meaning the provision does not convey any clear meaning.[39] Alternatively, if the Release should have incorporated the definition of "Claim" from the Share Purchase Agreement, rather than the definition of "Claims" from the Purchase and Sale Agreement, as it did, then the provision is "erroneous".[40] Whether the provision fails to convey any clear meaning or is actually erroneous, Ms. Rose, as releasee, is not entitled to rely on it.

(b) There is no clear language releasing unknown claims

29. The Release provision at issue expressly incorporates the definition of "Claims" from the Purchase and Sale Agreement, set out above, which states that "no suit, action or other

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[35] *Van Hooydonk v Jonker*, 2009 ABQB 8 (*Van Hooydonk*), at paras. 41 and 44 **[Trustee's Authorities, Tab 2]**
[36] *McCallum v Jackson*, 2019 ONSC 7077, at paras. 45-50 **[Trustee's Authorities, Tab 3]**
[37] Resignation and Mutual Release, p. 1 August 2, 2018 Affidavit of P. Darby, at Exhibit H **[AEKE, p. A159]**
[38] Purchase and Sale Agreement, s. 4.01(l), p. 16, August 2, 2018 Affidavit of P. Darby, Exhibit D **[AEKE, p. 67]**
[39] *Van Hooydonk*, *supra*, at para. 44 **[Trustee's Authorities, Tab 2]**; *McCallum*, *supra*, at paras. 45-50 **[Trustee's Authorities, Tab 3]**
[40] *Van Hooydonk*, *supra*, at para. 44 **[Trustee's Authorities, Tab 2]**

proceedings before any court or governmental agency has been commenced against Vendor, *or to the knowledge of Vendor*, has been threatened against Vendor or any Third Party." This language would appear to exclude Claims that had not yet been brought in the form of any suit, action or proceeding, unless they were threatened *to the Vendor's knowledge.* This is not "clear language" showing the parties intended to release unknown claims.[41] Instead, it is unclear language tending to suggest the opposite.

30. Even if the definition of "Claims" from the Purchase and Sale Agreement is replaced with the definition of "Claim" from the Share Purchase Agreement, the revised language still does not clearly indicate any intention to cover unknown *future* Claims. The definition of Claim in the Share Purchase Agreement is "any claim, demand, lawsuit, proceeding, arbitration, or governmental investigation, in each case, whether asserted, threatened, pending or existing."[42] Interpreting the revised provision as broadly as possible in favour of the releasee, a "claim" would still have to be "existing" in order to be a Claim within the meaning of the Share Purchase Agreement. Regardless of discoverability, a claim does not come into existence until all of its elements are made out.[43] A claim under s. 96 of the *BIA* does not arise until after an "initial bankruptcy event" and the appointment of a Trustee in bankruptcy. Accordingly, even if the broader definition of "Claim" is inserted into the Release, the Release would still only cover "existing" claims, and it could not have covered claims that did not arise until March 2018, when a Trustee in Bankruptcy, capable of bringing a s. 96 claim, was appointed in respect of PEOC.[44]

3. Even if the Release had contained clear language, an agreement between Ms. Rose and PEOC could not displace the statutory provisions applicable to Ms. Rose

31. The release entered into between Ms. Rose and PEOC's new directors as part of the Share Purchase Transaction only applied to claims that were "specially in the contemplation of the parties when the release was given".[45] The release *did not* apply to future claims and it *could not* apply to future claims brought by a Trustee in Bankruptcy, which would not even be

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[41] *Biancanellio, supra*, at para. 42 **[Trustee's Authorities, Tab 1]**
[42] Share Purchase Agreement, s. 1.1(m), August 2, 2018 Affidavit of P. Darby, Exhibit E **[AEKE, p. A87]**
[43] *Biancanellio, supra*, at para. 52 **[Trustee's Authorities, Tab 1]**; *Salna v Awad*, 2011 ABCA 20, at para. 36 **[Trustee's Authorities, Tab 4]**
[44] *Bankruptcy and Insolvent Act*, R.S.C. 1985, c B-3, s. 96 **[Trustee's Authorities, Tab 5]**
[45] *Biancanellio, supra*, at para. 42 **[Trustee's Authorities, Tab 1]**

appointed until more than a year later. As a mere agreement between private parties, PEI, PEOC and Ms. Rose, the release also could not displace the provisions of the *ABCA* and the *BIA* applicable to Ms. Rose.

(a) A bankrupt cannot release future *BIA* claims by its trustee in bankruptcy

32. Ms. Rose provided no authority for the proposition that a release given by PEOC could apply to prevent the Trustee, appointed more than a year later, from pursuing statutory claims against her under s. 96 of the *BIA*. This is unsurprising given the mischief that would be caused if it were a valid proposition: every party or privy to a transfer at undervalue or fraudulent preference would simply insist on a release from the bankrupt, tying the hands of any future trustee in bankruptcy and frustrating the purpose of the *BIA*.

33. The issue is dealt with implicitly by the Ontario Court of Appeal in *Montor*, which concerned various claims by the trustee of a bankrupt group of companies arising from a pre-bankruptcy settlement between the group and the individual respondent, Goldfinger. The trustee's claims included a s. 96 claim to set aside $2.5 million in payments to Goldfinger, provincial unjust preference claims, an oppression claim and a claim for unjust enrichment.[46]

34. As part of the memorandum documenting the settlement, one of the future bankrupts had agreed that $2.5 million already paid represented a partial payment of the purchase price of certain shares owned by Goldfinger.[47] All the members of the group of companies had also provided Goldfinger with a release.[48] The trustee did not seek to set aside the memorandum of settlement.[49]

35. The Court in *Montor* reviewed the trial judge's detailed reasons for dismissing the trustee's claims. There is no suggestion that Goldfinger was entitled to rely on the pre-bankruptcy release as a defence to any of the trustee's claims. Such a defence would, presumably, have made an 8-day trial unnecessary.[50] The Court only considered the memorandum of

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[46] *Montor Business Corporation v Goldfinger*, 2016 ONCA 406, at paras. 1-2, 78, 88 and 105 **[Trustee's Authorities, Tab 6]**
[47] *Ibid*, at para. 15 **[Trustee's Authorities, Tab 6]**
[48] *Ibid* **[Trustee's Authorities, Tab 6]**
[49] *Ibid*, at para. 116 **[Trustee's Authorities, Tab 6]**
[50] *Ibid*, at para. 29 **[Trustee's Authorities, Tab 6]**

settlement in finding that it was juristic reason sufficient to negative the trustee's claim for unjust enrichment.[51]

36. The approach taken by the Ontario Court of Appeal in *Montor* is consistent with the approach it took in a more recent decision, *Kerzner*, concerning a release given by a co-owner and employee as part of a change of control.[52] The chambers judge found that the sale agreement and release protected the new owner from all claims relating to the former co-owner's employment prior to the sale, including under Ontario's *Employment Standards Act*.[53]

37. On appeal, the Court rejected the argument that the release of pre-sale employment claims, including statutory claims, was part of a "package deal". Applying a correctness standard of review, the Court held that regardless of whether the release was a stand-alone agreement or part of a "package deal", "it must comply with the ESA."[54] Regardless of the terms of the release, the employee could not have contracted out of his pre-sale statutory entitlements, contrary to the *Employment Standards Act*.[55]

38. The decisions in *Montor* and *Kerzner* support the proposition that, regardless of its terms, a pre-bankruptcy release cannot preclude a trustee for bringing statutory claims under the *BIA*. The parties to a release simply cannot agree to "contract out" of the statutory provisions applicable to them, particularly in a way that would prevent a future trustee in bankruptcy from performing its functions under the *BIA*.[56]

(b) Ms. Rose could not contract out of liability for breaches of her statutory duties

39. Like the *Canada Business Corporations Act*[57] (the "***CBCA***") and the Ontario *Business Corporations Act* [58] (the "***OBCA***"), the *ABCA* includes a provision expressly providing that a director is not permitted to contract out of liability for breach of his or her statutory duties. Section 122(3) provides that:

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[51] *Ibid*, at para. 116 **[Trustee's Authorities, Tab 6]**
[52] *Kerzner v American Iron & Metal Company Inc*, 2018 ONCA 989, at para. 3 **[Appellant's Authorities, Tab 7]**
[53] *Ibid*, at para. 4 **[Appellant's Authorities, Tab 7]**
[54] *Ibid*, at paras. 33-34 **[Appellant's Authorities, Tab 7]**
[55] *Ibid*, at paras. 35-36 **[Appellant's Authorities, Tab 7]**
[56] *Bankruptcy and Insolvent Act*, R.S.C. 1985, c B-3, s. 96 **[Trustee's Authorities, Tab 5]**
[57] *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(3) **[Trustee's Authorities, Tab 8]**
[58] Ontario *Business Corporations Act*, RSO 1990, c B-16, s. 134(3) **[Trustee's Authorities, Tab 9]**

> 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 a director or officer from liability for a breach of that duty*.[59] [Emphasis added.]

40. For additional clarity, Ontario's analogous provision includes an explanatory heading:

> **Cannot contract out of liability**
>
> (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.*

41. In *McMurdo,* the Court considered whether a departing director in a change of control could have obtained a release from claims that he breached his director's duties.[60] A former director sued, *inter alia*, for breach of fiduciary duty brought a third party claim against his former counsel for not obtaining such a release when he retired.[61] His former counsel sought to amend their statement of defence to plead that any such release would have been unenforceable due to s. 134(3) of the *OBCA*.[62]

42. In determining whether the proposed defence was tenable at law, the Court rejected the argument that s. 134(3) applied only to current or incoming directors and not releases given to departing directors:

> 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 for them, for example, to contract out of liability for 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.[63]

43. Like s. 134(3) in the *OBCA*, s. 122(3) in the *ABCA* and s. 122(3) in the *CBCA* include similar provisions precluding former directors from contracting out of liability for breaches that occurred while they held their positions. The "policy of the legislation", referred to by the Court in *McMurdo*, is clear: to ensure directors comply with their statutory duties while in office by ensuring that any release given to them on the way out cannot cover liability for

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[59] *Business Corporations Act*, RSA 2000 c B-9, s. 122(3) **[Trustee's Authorities, Tab 10]**
[60] *McKay-Cocker Construction Ltd. v McMurdo* (2001), 109 A.C.W.S. (3d) 245 (ONSCJ), at paras. 2, 3, 4, 5 and 12 **[Appellant's Authorities, Tab 11]**
[61] *Ibid*, at paras. 3-5 and 12 **[Appellant's Authorities, Tab 11]**
[62] *Ibid*, at para. 12 **[Appellant's Authorities, Tab 11]**
[63] *Ibid*, at para. 16 **[Appellant's Authorities, Tab 11]**

breaches of those duties. The explanatory heading in the *CBCA*'s version of s. 122(3) removes any doubt that it precludes any contracting out of liability for past breaches. It reads "No exculpation".[64]

44. The chambers judge did not refer to the *McMurdo* decision in his reasons, although it was relied on by Ms. Rose. He held that s. 122(3) "embodies the principle that officers and directors may not contract out of *existing duties* owed to the corporation."[65] If that were the only intention of s. 122(3), the alternative clause beginning with "or relieves the director from any liability" would be unnecessary surplusage.[66] It would not even be necessary for s. 122(3) to refer to liability at all in order to express that directors may not contract out of their "existing duties to the corporation".

45. The Chambers Judge cited five reasons for rejecting the Trustee's interpretation of s. 122(3).

46. "*First, the use of a mutual release by business people in transactions is common practice.*" Section 122(3) does not preclude "business people" for using releases "in transactions". It applies narrowly to prevent departing directors and officers from being released from breaches of their statutory duties. This "no exculpation" approach is clearly intended to ensure officers and directors comply with their duties while in office.

47. "*Second, the implication inherent in the position of the Trustee is that directors can never be released in the transactions that involve an acquisition of control.*"[67] Again, directors can be released but not from liability for breaches of their statutory duties. Exposing directors "to liability for an indeterminant length of time" if they breach their statutory duties is precisely the objective of the "no exculpation" approach reflected in s. 122(3).

48. "*Third, there are books written on the use of releases. My review of that literature does not support the proposition advanced by the Trustee*".[68] Without knowing what literature the Chambers Judge reviewed, the Trustee cannot address this statement. The *McMurdo*

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[64] *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(3) **[Trustee's Authorities, Tab 8]**
[65] Reasons for Judgment, at para. 317.
[66] *Brick Protection Corporation v Alberta (Provincial Treasurer)*, 2011 ABCA 214, at para. 76 **[Trustee's Authorities, Tab 12]**
[67] Reasons for Judgment, at para. 320.
[68] Reasons for Judgment, at para. 321.

decision was put forward by Ms. Rose to address this very issue and it specifically rejects the interpretation of s. 122(3) accepted by the Chambers Judge.

49. "*Fourth, there is a need for finality: Tsaoussis at 275. But for releases, a director may never achieve finality.*" The purpose of the "no exculpation" approach reflected in s. 122(3) is to limit the finality a director can obtain upon his or her departure. In these circumstances, 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.

50. "*Fifth, the evidence is that Ms. Rose took her responsibilities as a director and officer of PEOC seriously*". This is flawed reasoning: provisions like s. 122(3) apply to all current and former directors in Canada. The proper interpretation of s. 122(3) *cannot* have anything to do with how seriously Ms. Rose took her duties.

51. The Chambers Judge erred in law in his interpretation of s. 122(3). His interpretation fails to give effect to the entire alternative clause dealing with liability. It is also is inconsistent with the "no exculpation" policy behind s. 122(3) and its analogs: to ensure directors and officers comply with their duties while in office by ensuring they cannot obtain forgiveness for such breaches upon their departure.

4. The Chambers Judge erred in making findings about the "common practice" concerning mutual releases without expert evidence

52. In finding that PEOC was entitled to release Ms. Rose from all breach of director's duty claims, notwithstanding s. 122(3), the Chambers Judge referred to:

52.1. The "use of a mutual release by business people in transactions" being "common practice"; and

52.2. The "decades of business convention" that would be displaced if a corporation could not release a former director.[69]

53. There was no expert evidence before the Chambers Judge regarding the "decades of business

[69] Oral Reasons, at p. 12, lines 15-26 **[AR, p. F14]**

convention" he relied on in interpreting s. 122(3). Ms. Rose merely suggested that in *her experience* it was standard industry practice to release outgoing directors in a change of control.[70] Her comment also does not address the *scope of* those releases; the real issue.

54. It appears that the Chambers Judge drew on his own personal experience in making findings regarding the "common practice" and "decades of business convention" concerning the release of claims against former directors.

55. In *Tran*, this Court cautioned against the reliance by a trial judge on his own experience in private practice in the absence of expert evidence:[71]

> As the professions (including the legal profession) become more highly specialized, the circumstances in which a trial judge can properly take judicial notice of the standard of care become narrower and narrower. Judicial notice is only properly taken in cases where the court collectively (and not just individual judges on the court) could make finding on the standard of care without the assistance of expert evidence: [citation omitted]. Judicial notice can only be taken of facts that are notorious and undebatable.[72]

56. The Chambers Judge's apparent reliance on his own personal practice with respect to releasing former directors illustrates the problem identified by this Court in *Tran*: another judge may have had no personal experience with such releases or his or her practice may have been may have been to prepare such releases with a standard s. 122(3) exclusion.

B. The Chambers Judge Erred in Law in Finding that Ms. Rose was not the Directing Mind of PEOC

1. The Chambers Judge erred in law in finding that PEOC's sole director was not its directing mind

57. It is common ground that Ms. Rose approved the Asset Transaction on behalf of PEOC, as its sole director.[73]

58. Nonetheless, the Chambers Judge stated that:

> I find on the balance of probabilities that Ms. Rose was not the "directing mind" of PEOC. Concerning this point, her evidence was that PEOC was a special-purpose corporation that was a wholly owned subsidiary of Perpetual Energy.[74]

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[70] Affidavit of S. Rose, at para. 57 **[AEKE, p. A243]**
[71] *Tran v. Kerr*, 2014 ABCA 350 (*Tran*), at para. 23 **[Trustee's Authorities, Tab 13]**
[72] *Ibid*, at para. 23 **[Trustee's Authorities, Tab 13]**
[73] Affidavit of P. Darby, at para. 8 and Exhibit Q **[AEKE, pp. A2, A205-A206]**; Affidavit of S. Rose, at paras. 1 and 52 **[AEKE, pp. A230, A241]**; Oral Reasons, p. 11, line 11 **[AR, p. F13]**
[74] Oral Reasons, p. 11, lines 24-26 **[AR, p. F13]**

59. The Chambers Judge's finding that Ms. Rose was not the directing mind of PEOC reflects several extricable errors of law,[75] including that a corporation's *sole director* could not be its directing mind.

60. A corporation's directing mind is someone with authority to control what the corporation does, as distinct from servants or agents who carry out the instructions of the directing mind. In *Rhône*, which concerned the status of a ship's captain as a "directing mind" of its owner, the Supreme Court cited the following description with approval:

> 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.[76]

61. Iacobucci J., writing for the majority, held that the ship's captain was not a "directing mind" of its corporate owner because he did not exercise "decision-making authority on matters of corporate policy".[77] This was the "key factor" distinguishing a corporation's directing minds from normal employees.[78]

62. There was no suggestion, much less evidence, that Ms. Rose did not exercise "decision-making authority" with respect to PEOC. Ms. Rose executed the Asset PSA on behalf of PEOC, as its "President and CEO".[79] Ms. Rose was PEOC's sole director and she alone executed the director's resolution approving the Asset Transaction.[80]

63. In finding that Ms. Rose was not the directing mind of PEOC, the Chambers Judge failed to consider whether Ms. Rose exercised decision-making authority with respect to PEOC.

64. Accordingly, the Chambers Judge committed an extricable error of law by failing to apply the correct legal test.[81]

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[75] *Housen v. Nikolaisen*, 2002 SCC 33, at para. 34 **[Trustee's Authorities, Tab 14]**
[76] *Rhône v. Peter A.B.Widener*, [1993] 1 S.C.R. 497, at para. 28, citing *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159 **[Trustee's Authorities, Tab 15]**
[77] *Ibid*, at para. 42 **[Trustee's Authorities, Tab 15]**
[78] *Ibid* **[Trustee's Authorities, Tab 15]**
[79] Purchase and Sale Agreement, p. 28, Affidavit of P. Darby, Exhibit D **[AEKE, p. A79]**
[80] Certified Resolution of the Directors of PEOC, Affidavit of P. Darby, Exhibit Q **[AEKE, pp. A205-A206]**
[81] *Housen*, *supra*, at paras. 34-35 **[Trustee's Authorities, Tab 14]**

2. The Chambers Judge committed an extricable error of law in considering that PEOC was "a special-purpose corporation and a wholly owned subsidiary of PEI"

65. The Chambers Judge determined that Ms. Rose was not the directing mind of PEOC. He applied the wrong legal test by failing to consider whether Ms. Rose exercised "decision-making authority" as PEOC's sole director.

66. In reaching this conclusion, the Chambers Judge considered that PEOC was a "special-purpose corporation" and a wholly-owned subsidiary of PEI.[82] The Chambers Judge appears to have reasoned, incorrectly, that a wholly-owned subsidiary is controlled by its sole shareholder, the parent company, not its sole director. This was an extricable error of law.[83]

67. It is a "fundamental principle" of corporate law, reflected in s. 101(1) of the *ABCA*, that, in the absence of a unanimous shareholders' agreement, a corporation's directors, not its shareholders, have the power *and the obligation* to manage its business and affairs.[84] Section 101(1) is mandatory, providing that a corporation's directors *shall* manage or supervise the management of the business and affairs of the corporation.[85]

68. Section 122(2) of the *ABCA* provides that every director is required to comply with the provisions of the *ABCA*. Similarly, in *Wilson*, the Supreme Court of Canada confirmed that a director can be personally liable for *failing to* exercise his or her duties.[86]

69. Pursuant to s. 101(1) of the *ABCA*, as PEOC's sole director, Ms. Rose *was required* to manage PEOC's business or affairs.[87] In accordance with the same "fundamental principle" reflected in s. 101, PEI only entitlement as sole shareholder was to elect PEOC's director. The "decision-making authority" for PEOC resided with Mr. Rose, as sole director.

70. Accordingly, it was irrelevant whether PEOC was a "special purpose corporation" or PEI's wholly-owned subsidiary. The Chambers Judge committed an extricable error of law in

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[82] Oral Reasons, p. 11, lines 24-26 **[AR, p. F 13]**
[83] *Housen*, *supra*, at paras. 34-35 **[Trustee's Authorities, Tab 14]**
[84] *Business Corporations Act*, RSA 2000, c. B-9, s. 101(1) **[Trustee's Authorities, Tab 10]**; *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565, at para. 35 **[Trustee's Authorities, Tab 17]**
[85] *Business Corporations Act*, RSA 2000, c. B-9, s. 101(1) **[Trustee's Authorities, Tab 10]**
[86] *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037, at para. 47 **[Trustee's Authorities, Tab 18]**
[87] *Business Corporations Act*, RSA 2000, c. B-9, s. 101(1) **[Trustee's Authorities, Tab 10]**; *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565, at para. 35 **[Trustee's Authorities, Tab 17]**

considering these factors in determining whether Ms. Rose was a directing mind of PEOC.[88]

3. The Chambers Judge erred in finding that the "ultimate decision to enter into the Aggregate Transaction was that of Perpetual Energy and its board of directors"

71. In summarily dismissing the claims that Ms. Rose breached her duties as a director of PEOC, the Chambers Judge found that Ms. Rose was not the directing mind of PEOC. The Chambers Judge made the related finding that the decision to enter into the "Aggregate Transaction" was "that of Perpetual Energy and its board of directors."[89]

72. The Chambers Judge appears to have reasoned, incorrectly, that PEI, as the sole shareholder of PEOC, could cause PEOC to enter into the "Aggregate Transaction". This reasoning is contrary to the "fundamental principle" of corporate law, discussed above, that "the power and the obligation" to manage a corporation's affairs rests with its directors not its shareholders.[90] In the absence of a unanimous shareholder agreement, a shareholder, even a sole shareholder, cannot compel a corporation to enter into an agreement or transaction. If the sole shareholder is dissatisfied with the director's conduct, it can vote to remove and replace the director.[91]

73. The Chambers Judge's conclusion that the decision to enter into the "Aggregate Transaction" was "that of Perpetual Energy and its board of directors" is also inconsistent with the evidence, which included a PEOC director's resolution:[92]

    73.1. The director's resolution is executed by Ms. Rose only, as PEOC's sole director, consistent with s. 101(1) of the *ABCA*.

    73.2. The director's resolution does not include any reference to PEI, or its board of directors.

    73.3. The director's resolution expressly approves "the Transaction". However, there is no reference to 198 or the Share Purchase Agreement and "the Transaction" is

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[88] *R. v. Walle*, 2007 ABCA 333, at para. 31 **[Trustee's Authorities, Tab 19]**; *Housen*, *supra*, at para. 27 **[Trustee's Authorities, Tab 14]**
[89] Oral Reasons, p. 11, lines 30-32 **[AR, p. F13]**
[90] *Business Corporations Act*, RSA 2000, c. B-9, s. 101(1) **[Trustee's Authorities, Tab 10]**; *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565, at para. 35 **[Trustee's Authorities, Tab 17]**
[91] *Business Corporations Act*, RSA 2000, c. B-9, ss. 109 and 142 **[Trustee's Authorities, Tab 10]**
[92] October 1, 2016 Director's Resolution of PEOC, Affidavit of P. Darby, at Exhibit Q **[AEKE, p. A205-A206]**

defined only to include the Asset Transaction between PEOC and POT, reflected in "the purchase and sale agreement dated October 1, 2016 at 12:01 a.m. between the Trust, as Vendor, and the Corporation, as purchaser".

74. This resolution, executed by Ms. Rose on October 1, 2016, is directly inconsistent with the Chambers Judge's findings that (i) the Asset Transaction was only part of an "Aggregate Transaction; and (ii) that the decision to enter this "Aggregate Transaction" was made by PEI and its board of directors, not Ms. Rose as PEOC's sole director.[93]

75. The Chambers Judge's finding that the decision to enter into the "Aggregate Transaction" was "that of Perpetual Energy and its board of directors" reflects an error of law in that it is inconsistent with the "fundamental principle" of corporate law that the authority to manage a corporation's affairs rests with its directors, not is shareholders.

76. The finding also reflects an error of fact, in that it was inconsistent with the only evidence on the issue:[94] the PEOC director's resolution executed by Ms. Rose alone and approving only the Asset Transaction with no reference to PEI or its board of directors.[95]

C. The Chambers Judge Erred in Finding that Ms. Rose was Entitled to the Protection of the Business Judgment Rule

1. The Chambers Judge made inconsistent findings

77. The Chambers Judge found 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.[96]

78. These findings by the Chambers Judge are directly inconsistent with the other findings discussed in the previous section that:

78.1. Ms. Rose was *not* the "directing mind" of PEOC, despite being its sole director;[97]

78.2. PEOC was a "special-purpose corporation" and a wholly owned subsidiary of PEI;[98]

78.3. The "ultimate decision" to enter into the "Aggregate Transaction" was "that of" PEI

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[93] Reasons for Judgment, at para. 323.
[94] *Hogberg v. Hoult*, 2004 ABCA 167, at para. 6 **[Trustee's Authorities, Tab 20]**
[95] October 1, 2016 Director's Resolution of PEOC, dated October 1, 2016 **[AEKE, p. A205-A206]**
[96] Oral Reasons, at p. 11, lines 28-30 **[AR, p. F11]**
[97] Oral Reasons, at p. 11, line 24 **[AR, p. F11]**
[98] Oral Reasons, at p. 11, lines 25-26 **[AR, p. F11]**

and its board of directors, not Ms. Rose and PEOC.[99]

79. In finding that Ms. Rose was not the directing mind of PEOC, the Chambers Judge found, in effect, that Ms. Rose exercised no real control and PEOC was merely an extension of PEI, whose board made the "ultimate decision".

80. However, in deferring to Ms. Rose's "business judgment", the Chambers Judge proceeded to find that Ms. Rose not only had "responsibilities as a director and officer of PEOC" but took them "seriously".[100]

81. In effect, the Chambers Judge found that Ms. Rose made no decision, but her decision was nonetheless reasonable and entitled to deference pursuant to the business judgment rule:

    81.1. on the one hand, the claims against Ms. Rose were without merit because PEOC was merely a "special-purpose", wholly owned subsidiary of PEI: the decision to enter into the "Aggregate Transaction" was "that of" PEI and its board, not Ms. Rose;

    81.2. at the same time, Ms. Rose took seriously her "responsibilities" *to PEOC*, considered *PEOC's* "best interests" and then exercised *her business judgment* "to best of her ability".

82. These findings are inconsistent and demonstrate a palpable and overriding error by the Chambers Judge."[101] As stated by this Court in *Wood Group*, appellate courts "not only may -- but must -- set aside all palpable and overriding errors shown to have been made" at a hearing below finally disposing of claims.[102]

2. The Chambers Judge erred in finding that Ms. Rose "exercised her business judgment to the best of her ability" in the face of the uncontradicted evidence

83. It is not clear on what evidence the Chambers Judge found that Ms. Rose had exercised her business judgment with respect to PEOC to the best of her ability or what the benefit of the Asset Transaction was for PEOC.

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[99] Oral Reasons, at p. 11, lines 31-32 **[AR, p. F11]**
[100] Oral Reasons, at p. 11, lines 28-30 **[AR, p. F11]**
[101] *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305 (*Wood Group*), para. 56 **[Trustee's Authorities, Tab 21]**; *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72, at paras. 66-67 **[Trustee's Authorities, Tab 22]**
[102] *Ibid*, at para. 11 **[Trustee's Authorities, Tab 22]**

84. The Trustee's evidence was that the value of the consideration received by PEOC in the Asset Transaction was *at least* $217,570,800 less than the value of the consideration given by PEOC in favour of the other Perpetual Entities.[103]

85. The Trustee also cited the Perpetual Entities' own contemporaneous statements that, as a result of the Asset Transaction: (i) they had disposed of assets including "net asset retirement obligations" of $131.0 million "for nominal proceeds";[104] and (ii) PEI's net asset value would "spike by about $28.5 million as a result of the transaction".[105]

86. The Respondents *did not* provide the Chambers Judge with *any evidence* to contradict the Trustee's evidence, or their own earlier statements, regarding the negative financial effect of the Asset Transaction on PEOC. Rather, the Respondents attempted to dispose of the Trustee's claims based on other "threshold issues" they argued, including that the Asset Transaction was entered into at arm's length and therefore the 1-year limitation period in s. 96 of the *BIA* applied. The Respondents' only evidence with respect to the consideration received by PEOC in the Asset Transaction was that:

> The Defendants *will require factual and expert evidence* to show: (a) the inaccuracy of the figures used by Mr. Darby; and (b) the fair market value of the consideration given by PEOC (as it then was).[106]

87. In addressing the applications to dismiss the Trustee's s. 96 claim, the Chambers Judge confirmed that his "sole focus" was on the arm's length issue, "not on value".[107] However, the Chambers Judge appears to have disregarded the absence of contradictory evidence from the Respondents "on value" in making other findings against the Trustee.

88. Although the Trustee's *uncontradicted* evidence was that the Asset Transaction resulted in a net loss of at least $217,570,800 for PEOC, the Chambers Judge was nonetheless prepared to find "based on the evidence before [him]" that Ms. Rose "considered the best of interests of PEOC" and then "exercised her business judgment to the best of her ability."[108]

89. In *Sphere Energy*, the Court considered whether the defendant directors' valuation of the

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[103] Affidavit of P. Darby, at para. 44 **[AEKE, p. A8]**
[104] PEI November 7, 2016 News Release, p. 1, Exhibit 6 to Transcript of S. Rose **[AEKE, p. A1083]**
[105] September 27, 2016 Calgary Herald Article, p. 2, Exhibit 7 to Transcript of S. Rose **[AEKE, p. A1104]**
[106] Affidavit of M. Schweitzer, at paras. 20 and 23 **[AEKE, pp. A211-212]**
[107] Oral Reasons, at p. 4, lines 37-40, p. 5, lines 38-40, **[AR, p. F6-7]**
[108] Oral Reasons, at p. 11, lines 28-30 **[AR, p. F13]**

plaintiff's shares was entitled to deference under the business judgment rule.[109] The Court found that the directors were not entitled to rely on the business judgment rule because, although they relied on a valuation of the shares, the valuation had been prepared by an employee of the corporation's majority shareholder and was potentially biased.[110]

90. The reasoning in *Sphere Energy* applies even more forcefully in the present case, to preclude Ms. Rose from relying on the business judgment rule:

90.1. On October 1, 2016, when Ms. Rose caused PEOC to enter into the Asset Transaction, she could only rely on the information regarding the Asset Transaction available to her, and the Perpetual Defendants, at the time.

90.2. This is the information which had been prepared by the Perpetual Defendants, and which is relied on by the Trustee to show that the Asset Transaction was highly beneficial to the Perpetual Defendants, but disastrous for PEOC.[111]

90.3. The Defendants do not suggest their own contemporaneous valuation of the Asset Transaction is of any assistance to them. Instead they say that "they will require" factual and expert evidence to refute the Trustee's claim that the Asset Transaction was at undervalue.[112]

91. The only contemporaneous information upon which Ms. Rose could have relied showed that the Asset Transaction would prejudice PEOC, for the benefit the Perpetual Defendants.

92. In finding that Ms. Rose "considered the best of interests of PEOC" and then "exercised her business judgment to the best of her ability"[113], the Chambers Judge:

92.1. Committed an extricable error of law[114] in failing to consider the "process" used by Ms. Rose in approving the Asset Transaction,[115] in particular the contemporaneous information regarding the Asset Transaction upon which she relied; and/or

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[109] *Tarrant v. Sphere Energy Corp.*, 2018 ABQB 492 (*Sphere Energy*), at para. 41 **[Trustee's Authorities, Tab 23]**
[110] *Ibid*, at paras. 47-48 **[Trustee's Authorities, Tab 23]**
[111] September 27, 2016 Calgary Herald Article, p. 2, Exhibit 7 to Transcript of S. Rose **[AEKE, p. A1104]**; September 27, 2016 Calgary Herald Article, p. 2, Exhibit 7 to Transcript of S. Rose **[AEKE, p. A1104]**;
[112] Affidavit of M. Schweitzer, at paras. 20 and 23 **[AEKE, pp. A211-212]**
[113] Oral Reasons, at p. 11, lines 28-30 **[AR, p. F13]**
[114] *Housen*, *supra*, at para. 36 **[Trustee's Authorities, Tab 14]**
[115] *Sphere Energy*, *supra*, at paras. 46-47 **[Trustee's Authorities, Tab 23]**

92.2. Committed a palpable and overriding error in failing to consider that *all* of the contemporaneous information that *could have been* considered by Ms. Rose showed that the Asset Transaction would benefit the other Perpetual Entities at the expense of PEOC.[116]

93. Accordingly, the Chambers Judge's finding that Ms. Rose "exercised her business judgment to the best of her ability" is not entitled to deference and should be set aside.

D. The Chambers Judge Erred in Finding that Ms. Rose did not Breach Her Fiduciary Duty and Duty of Care to PEOC in Approving the Asset Transaction

1. The Chambers Judge erred in law in his interpretation of *Redwater*

94. The Chambers Judge reached the conclusion that Ms. Rose did not breach her fiduciary duty or duty of care to PEOC by adopting the following reasoning proposed by the Respondents:

> The Trustee asserts that Ms. Rose failed, as a director of PEOC, to consider the implications of ARO as a liability of PEOC.
>
> Ms. Rose asserts that the claims against her are moot because the ARO does not equate to a liability as that term is understood in law.
>
> As I read *Redwater*, the ARO associated with PEOC is not a liability. Indeed, in the course of oral argument, the Trustee conceded to me that the ARO associated with PEOC is not a liability.
>
> Given the facts and the analysis above, I find Ms. Rose owed no duties to PEOC in relation to the ARO as a liability.[117]

95. This analysis reflects various errors. The most salient is that the Chambers Judge erred in law in his interpretation of the Supreme Court of Canada's decision in *Redwater*. Far from confirming that ARO are "not a liability", the Supreme Court in *Redwater* specifically refers to the "end of life of obligations" associated with oil and gas assets as "associated liabilities".[118]

96. The Supreme Court in *Redwater* confirmed that this "understanding" was consistent with its earlier decision regarding the characterization of "end of life obligations" in *Daishowa*.[119] In *Daishowa*, the Supreme Court uses the terms "reforestation obligations" and "reforestation

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[116] *Hogberg*, *supra*, at para. 6 **[Trustee's Authorities, Tab 20]**
[117] Oral Reasons, at p. 13, lines 12-23 **[AR, p. F15]**
[118] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*), at para. 157 **[Trustee's Authorities, Tab 24]**
[119] *Ibid*, at para. 157 **[Trustee's Authorities, Tab 24]**

liabilities" interchangeably.[120]

97. Although the Chambers Judge refers to the paragraph 157 in *Redwater*, in which the Supreme Court uses the words "associated liabilities" to describe end of life obligations, he does not address that comment.[121] Instead, the Chambers Judge held that the Supreme Court's comments implicitly acknowledge "that the ARO is not a *current* debt or liability."[122] This is a significant a qualification of the finding in the Chambers Judges' oral reasons that the Supreme Court in *Redwater* held that ARO are "not a liability" at all.[123]

98. Having determined that ARO is not a *current* liability, the Chambers Judge proceeded to hold that "a contingent liability is not a liability in law" citing paragraph 40 of the *Daishowa* decision.[124] This was an error of law reviewable on a correctness standard.[125]

99. Paragraph 40 of the *Daishowa* decision does not stand for the proposition that "a contingent liability is not a liability in law." The issue before the Court was whether reforestation obligation was a liability the assumption of which by the buyer *should be included in the vendor taxpayer's "proceeds of disposition" for tax purposes.*[126] The Court held it should not, regardless of whether the liability was contingent or absolute, and an argument based on that distinction was "misplaced".[127]

100. However, in the preceding paragraph, omitted from the excerpt in the Reasons for Judgment,[128] the Court in *Daishowa* confirmed that a contingent liability is a form of liability:

> A contingent liability is a "liability which depends for its existence upon an event which may or may not happen": [citation omitted]. This Court has recognized that *the contingent nature of a liability* may have implications on the tax treatment *of the liability*.[129]

101. The *Daishowa* decision does not support the proposition for which it is cited, that "a

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[120] *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29 (*Daishowa*), at paras. 22-23, 30 **[Trustee's Authorities, Tab 25]**
[121] Reasons for Judgment, at para. 357, citing *Redwater*, *supra*, at para. 157 **[Trustee's Authorities, Tab 24]**
[122] Reasons for Judgment, at para. 357
[123] Oral Reasons, at p. 13, lines 12-23 **[AR, p. F15]**
[124] Reasons for Judgment, at para. 360, citing *Daishowa*, *supra*, at para. 40 **[Trustee's Authorities, Tab X]**
[125] Reasons for Judgment, at para. 360, citing *Daishowa*, *supra*, at para. 40 **[Trustee's Authorities, Tab X]**
[126] *Daishowa*, *supra*, at paras. 25, 26 and 38 **[Trustee's Authorities, Tab 25]**
[127] *Ibid*, at para. 40 **[Trustee's Authorities, Tab 25]**
[128] Reasons for Judgment, at para. 340.
[129] *Ibid*, at para. 39 **[Trustee's Authorities, Tab 25]**

contingent liability is not a liability in law".[130] The Chambers Judge's incorrect interpretation of a binding precedent is an error of law, reviewable on a correctness standard.[131]

102. Having held that a contingent liability is not a liability in law, the Chambers Judge proceeded to hold that the ARO was not a liability because:

102.1. "absent a creditor, there cannot be liability";[132] and

102.2. the AER was not a creditor because PEOC was not subject to "a current or enforceable liability" in respect of the ARO.[133]

103. In support of these conclusions, the Chambers Judge cites the *Hordo* decision for the proposition that "a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor".[134] This was an error of law.

104. The ARO of an oil and gas licensee are not analogous to a "speculative claim" by a potential judgment creditor, as in *Hordo*, who will only obtain a judgment if the "action is successful."[135] As recognized in *Daishowa* and *Redwater*, the ARO are a "future cost embedded in the forest tenure" that serves to "depress the tenure's value *at the time of sale*."[136]

105. The Chambers Judge's reasoning is also based on his incorrect holding that *Daishowa* stands for the proposition that a contingent liability is "not a liability in law". It would follow that if the ARO are not a "current or enforceable liability" they are not "not a liability in law".

106. The Supreme Court in *Redwater* confirmed that, although the AER was not a "creditor" with "provable claims" within the meaning of the *BIA*, a licensee's regulator obligations were still liabilities:[137]

> All licenses held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the

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[130] Reasons for Judgment, at para. 360, citing *Daishowa*, *supra*, at para. 40 **[Trustee's Authorities, Tab 25]**
[131] *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229 (*Mammoet*), at para. 15 **[Trustee's Authorities, Tab 26]**
[132] Reasons for Judgment, at para. 361.
[133] Reasons for Judgment, at para. 363.
[134] Reasons for Judgment, at para. 361, citing *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR 2d 86 (Ont Ct J (Gen Div)) (*Hordo*), at para. 15 **[Trustee's Authorities, Tab 27]**
[135] *Hordo*, *supra*, at para. 15 **[Trustee's Authorities, Tab 27]**
[136] *Daishowa*, *supra*, at para. 29 **[Trustee's Authorities, Tab 25]**; *Redwater*, supra, at para. 157 **[Trustee's Authorities, Tab 24]**
[137] *Redwater*, *supra*, at paras. 135 and 161 **[Trustee's Authorities, Tab 24]**

> value of the licensed assets, *the same as if the associated costs had been paid up front.* Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid *the associated liabilities.* [Emphasis added.][138]

107. In his oral reasons, the Chambers Judge stated the conclusion that *Redwater* stands for the proposition that ARO are simply "not a liability" at all.[139] The written reasons qualify that conclusion materially by stating that *Redwater* stands for the proposition that ARO are not a "current" debt or liability, implicitly acknowledging the Supreme Court reference to ARO as being a "future cost" and "associated liabilities".[140]

108. Proceeding from this varied premise, the Chambers Judge nonetheless maintains the same conclusion: that ARO "does not represent a liability".[141] The key link in the logical chain is the holding that *Daishowa* stands for a the proposition that "a contingent liability is not a liability in law", meaning that if the ARO are not a "current or enforceable liability" they are not liabilities at all.[142]

109. The flaw in this reasoning is that it is inconsistent with both *Daishowa* and *Redwater*. *Daishowa* specifically confirms that contingent liabilities *are liabilities*.[143] *Redwater*, citing *Daishowa*, confirms that ARO are "associated liabilities", affecting present value, even though they are a "future cost".[144]

110. The Chambers Judge's holding that ARO are not a liability is based on a misreading of two Supreme Court precedents. He erred in law[145] and his finding that the Director Claim against Ms. Rose could be dismissed because it was "premised on the ARO being a liability" should be set aside.[146]

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[138] *Redwater*, *supra*, at para. 157 **[Trustee's Authorities, Tab 24]**
[139] Oral Reasons, at p. 13, lines 12-23 **[AR, p. F15]**
[140] Reasons for Judgment, at para. 357, citing *Redwater*, at para. 157 **[Trustee's Authorities, Tab 24]**
[141] Reasons for Judgment, at para. 356.
[142] Reasons for Judgment, at para. 360 and 363
[143] *Daishowa*, *supra*, at para. 29 **[Trustee's Authorities, Tab 25]**
[144] *Redwater*, *supra*, at para. 157, citing *Redwater*, at para. 29 **[Trustee's Authorities, Tab 24]**
[145] *Mammoet*, *supra*, at para. 15 **[Trustee's Authorities, Tab 26]**
[146] Reasons for Judgment, at para. 370.

2. The Chambers Judge erred in law in his determination of the "financial result" of the *Redwater* decision

111. Proceeding from his incorrect interpretation of the *Daishowa* and *Redwater* decision, the Chambers Judge analyzed the "financial result" of the *Redwater* decision for the Asset Transaction. He determined that "Post-*Redwater*" the ARO assumed by PEOC as part of the Asset Transaction could simply be assigned a value of "NIL" and, as a result, the Asset Transaction resulted in a net transfer of $4,109,931 in favour of PEOC.[147]

112. The Chambers Judge's determination that $218,958,274 in ARO associated with the assets transferred to PEOC could be assigned a value of "NIL" reveals the extent to which he misinterpreted *Daishowa* and *Redwater*. The decisions emphasize that regulatory obligations are a future cost that has a *present effect* on the value of the property. Referring to *Daishowa*, the Court in *Redwater* stated that the regulatory obligations at issue constituted "a future cost embedded in the forest tenure that *serves to depress the tenure's value at the time of sale*."[148]

113. Contrary to this clear guidance from the Supreme Court, the Chambers Judge assigned the future cost of complying with PEOC's ARO a value of "NIL".[149] This finding is directly inconsistent with *Redwater*, a binding precedent, and should be set aside.

3. The Chambers Judge erred in dismissing the Trustee's claims on a basis inconsistent with the Defendants' own pleadings

114. The final basis for the Chambers Judge's holding that ARO is not a liability is the "unqualified admission" by the Trustee "to the effect that ARO associated with the Goodyear Assets was not a PEOC liability."[150] The Chambers Judge questioned the Trustee's counsel regarding paragraph 5 of the Trustee's Statement of Claim and asked "do we have a liability here?". The Trustee's counsel replied "No, My Lord".[151]

115. The above exchange occurred on November 8, 2018,[152] more than two months before the Supreme Court released its decision in *Redwater*, confirming that ARO were "associated

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[147] Reasons for Judgment, at para. 368.
[148] *Redwater*, *supra*, at para. 157, citing *Daishowa*, *supra*, at para. 29 **[Trustee's Authorities, Tabs 24, 25]**
[149] Reasons for Judgment, at para. 368.
[150] Reasons for Judgment, at para. 362.
[151] Transcript, p. 80, lines 10-38 **[Transcript, p. 80]**
[152] Transcript, p. 1 **[Transcript, p. 1]**

liabilities.[153] Following the release of the *Redwater*, the Trustee confirmed that the decision supported the conclusion that ARO were liabilities.[154]

116. More significantly, although the Chambers Judge questioned the Trustee's counsel regarding the allegations in the Trustee's Statement of Claim that ARO were a liability, neither the Perpetual Defendants nor Ms. Rose pleaded that ARO were not liabilities.

117. In fact they pleaded the opposite. Paragraph 44(c) of the Perpetual Defendants' Statement of Defence states that:

> PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for the other other producing assets, and were considered in the value of the Goodyear Assets;[155]

118. In paragraph 44(d), the Perpetual Defendants plead that the value of PEOC's liabilities was approximately equal to the value of its assets.[156] There was no suggestion that these future abandonment and reclamation costs were not liabilities or that any of the Trustee's claim could be dismissed on that basis. In paragraph 4 of her own Statement of Defence, Ms. Rose expressly incorporates the Perpetual Defendants' Statement of Defence.[157] This position is reflected in the Defendants' applications, which make no reference to any argument that ARO were not liabilities.[158]

119. The position pleaded and adopted by the Defendants in seeking summary dismissal, that ARO were liabilities, was consistent with the Defendants internal documents and external reporting to the market at the time of the Asset Transaction and Share Transaction, discussed in detail in the Statement of Facts. Ms. Rose and the Perpetual Respondents could not report to the market, for example, that PEI had improved its liability management ratio with the AER by disposing of "all of the liabilities" associated with the Goodyear Assets, and then go on to plead that the ARO were not liabilities after all.[159]

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[153] *Redwater*, *supra*, at p. 1 **[Trustee's Authorities, Tab 17]**
[154] Reasons for Judgment, at para. 362.
[155] Statement of Defence of the Perpetual Defendants, at para. 44(c) **[AR, p. P28]**
[156] Statement of Defence of the Perpetual Defendants, at para. 44(d) **[AR., p. P28]**
[157] Statement of Defence of Ms. Rose, at para. 4 **[AR, p. P35]**
[158] Perpetual Defendants' Application for Summary Dismissal **[AR, p. P43]**; Ms. Rose's Amended, Amended Application for Summary Dismissal and Striking Pleadings **[AR, p. P51]**
[159] October 3, 2016 Press Release, Transcript of Cross-Examination of S. Rose, Exhibit 5 **[AEKE, p. A1113]**

120. The Chambers Judge erred in finding that ARO were not liabilities, contrary to the binding precedents in *Daishowa* and *Redwater*. If that was not an error, then the Chambers Judge erred in dismissing claims against Ms. Rose on the basis that ARO were not liabilities when (i) Ms. Rose had not sought summary dismissal on that basis; and (ii) her own Statement of Defence acknowledged that ARO were liabilities.[160]

E. The Chambers Judge Erred in Law in Striking the Trustee's Oppression Claim

1. The Chambers Judge's Decision

121. The Chambers Judge struck the Trustee's oppression claim for failing to disclose a reasonable cause of action.[161]

> While I am not satisfied that the Oppression issues satisfy the prerequisites for summary dismissal, I am satisfied that it should be struck under Rule 3.68 on the basis that it discloses no reasonable claim. I make that statement because the application for complainant status or the suggestion that there's complainant status in this case goes well beyond what the law currently provides for.[162]

122. Thus, the Chambers Judge found that the Trustee's oppression claim could not be dismissed summarily, but it could be struck for failing to disclose a reasonable cause of action. The Chambers Judge found that "the Trustee is not entitled to the status of a 'complainant". In reaching that conclusion, the Chambers Judge discussed the evidence he considered:

122.1. The Chambers Judge stated that "I find there are neither liabilities nor provable claims outstanding" and therefore "no creditor exists in respect of the alleged ARO obligation."[163]

122.2. There was "neither evidence of any municipality being in a position analogous to a minority shareholder nor there is there any evidence that any municipality had a particular legitimate interest in the manner in which the affairs of the corporation are managed."[164]

2. The Chambers Judge erred in law by considering evidence and failing to assume that the facts alleged by the Trustee were true

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[160] *Paniccia Estate v Toal*, 2012 ABCA 397, para. 32 **[Trustee's Authorities, Tab 28]**; *Elan Construction Limited v South Fish Creek Recreational Association*, 2016 ABCA 215, at paras. 22-23 **[Trustee's Authorities Tab 29]**
[161] Oral Reasons, at p. 7, lines 40-41, p. 8, lines 1-3
[162] Oral Reasons, at p. 7, lines 40-41, p. 8, lines 1-3 **[AR, p. F11, F12]**
[163] Oral Reasons, p. 7, lines 27-28 **[AR, p. F11]**
[164] Oral Reasons, p. 7, lines 27-38 **[AR, p. F11]**

123. The law applicable under Rule 3.68(2)(b) is discussed at length above: in determining whether a claim should be struck for failing to disclose a reasonable cause of action, the Court must assume that the facts pleaded are true and cannot consider evidence.[165]

124. Instead, the Chambers Judge considered the evidence and assessed whether, *based on his own factual findings*, the Trustee's had advanced a reasonable claim for oppression. This represents a fundamental error of law, reflected in the Chambers Judge's statement that he could *not dismiss the Trustee's claim summarily*, but he could *strike the claim for failing to disclose a reasonable cause of action.*[166]

125. Had the Chambers Judge considered the evidence and granted summary dismissal of the oppression claim, his finding would be entitled to deference absent an extricable error of law. However, he expressly found that summary judgment was not appropriate.[167]

126. In contrast, the Chambers Judge's finding that the Trustee's oppression claim fails to disclose a reasonable cause of action would not be entitled to any deference,[168] even if it was not based on errors of law. [169]

3. The Chambers Judge erred in law by striking the Trustee's oppression claim on the basis of evidence that was not before him

127. The Reasons for Judgment confirm that the Chambers Judge struck's the Trustee's oppression claim pursuant to Rule 3.68(2)(b), for failing to disclose a reasonable cause of action.[170] The Chambers Judge confirmed that a decision to strike under Rule 3.68(2)(b) could only be based (i) the facts alleged in the commencement document, which must be assumed to be true, and (ii) the applicable statutory and common law.[171]

128. Although the Chambers Judge stated that he was "not permitted to look for evidence outside of the four corners of the Trustee SOC" under Rule 3.68(2)(b),[172] he began his analysis of

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[165] *Grenon v Canada Revenue Agency*, 2017 ABCA 96 (*Grenon*), at para. 6 **[Trustee's Authorities, Tab 30]**
[166] Oral Reasons, at p. 7, lines 40-41, p. 8, lines 1-3
[167] Oral Reasons, p. 7, lines 40-41 **[AR, p. F9]**
[168] *Grenon*, *supra*, at para. 4 **[Trustee's Authorities, Tab 30]**
[169] *Ibid*, at para. 6 **[Trustee's Authorities, Tab 30]**; *HOOPP Realty v. Guarantee Co. of North America*, 2015 ABCA 336 (*HOOPP*), at para. 10 **[Trustee's Authorities, Tab 31]**
[170] Reasons for Judgment, at paras. 181 and 236.
[171] Reasons for Judgment, at para. 181.
[172] Reasons for Judgment, at para. 203.

the Trustee's oppression claim by considering a 1989 report submitted by the Energy Resources Conservation Board ("**ERCB**"), predecessor to the AER, and a 1990 report by an industry task force.[173] The Chambers Judge found that:

> 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 prior licensee [sic] should be liable for abandoned wells.[174]

129. The material referred to by the Chambers Judge was not in evidence and was not provided by the Parties. Had they been in evidence, it would still have been an error of law for the Chambers Judge to consider them in the context of a Rule 3.68(2)(b) application.[175]

4. The Chambers Judge erred in law in striking the Trustee's claim under Rule 3.68(2)(b) for failing to satisfy the "*Hordo* Factors"

130. The Chambers Judge determined that Rule 3.68(2)(b) prevented him from considering evidence outside the "four corners of the Trustee's SOC" that might assist the Trustee in establishing that it was a "proper person" entitled to be a "complainant" under the *ABCA*.[176]

131. The Chambers Judge applied the "*Hordo* Factors" and determined none of the prerequisites were addressed in the Trustee SOC:

> 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 and 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 the prerequisites were addressed the Trustee SOC [sic].[177]

132. The Reasons for Judgment do not analyze the allegations in Statement of Claim and explain why they do not satisfy the "*Hordo* Factors". The Trustee pleads, *inter alia*, that, as a result of the Transactions and the Asset Transaction, PEOC became liable for, but unable to pay, the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*.[178] The Trustee also pleads, *inter alia*, that this was carried out by Ms. Rose,

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[173] Reasons for Judgment, at paras. 121-122.
[174] Reasons for Judgment, at paras. 123-125.
[175] *Grenon*, *supra*, at para. 6 **[Trustee's Authorities, Tab 30]**; *HOOPP*, *supra*, at para. 10 **[Trustee's Authorities, Tab 31]**
[176] Reasons for Judgment, at para. 203.
[177] Reasons for Judgment, at para. 202.
[178] Statement of Claim, at paras. 19 and 20 **[AR, p. P7]**

PEI and POC for their own benefit.[179]

133. *Hordo* itself concerned a prospective complainant who acquired a small number of shares in the corporate respondent after the events complained of and while pursuing a speculative, unliquidated damages claim against it.[180] However, *Hordo* was cited with approval in *Gestion Trans-Tek* a decision holding that a judgment creditor was a proper complainant where the corporate debtor had become judgment-proof as a result of a reorganization.[181] Citing *Downtown Eatery* and *Hordo*, the Court found that "at the time of the transfer, the Applicants were much more than holders of a speculative claim to become creditors in the future."[182]

134. The Trustee alleges that, as a result of the Transactions and the Asset Transaction in particular, PEOC became "liable for, but unable to pay" the municipal tax liabilities and this was done for the benefit Ms. Rose, PEI and POC. On a Rule 3.68(2)(b) standard, this is sufficient to satisfy the "*Hordo* Factors", as applied in *Gestion Trans-Tek*, one of the decisions relied on by Ms. Rose. [183]

135. It was an error of law reviewable on a correctness standard for the Chambers Judge to strike the Trustee's oppression claim for failing to satisfy the "*Hordo* Factors".[184]

5. The Chambers Judge erred in law in striking the Trustee's oppression claim for failing to include "other creditors"[185]

136. It is a fundamental principle that a party is not entitled to relief from oppression if it lacked a sufficient connection to the corporation at the time of the oppressive conduct. In *Hordo*, for example, a party could not acquire shares after the fact and then rely on its status as a shareholder to seek relief from oppression.[186] This is the first "Hordo Factor" cited by the Chambers Judge. [187]

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[179] Statement of Claim, at paras. 19 and 20 **[AR, p. P7]**
[180] *Hordo*, *supra*, at paras. 2, 3, 7 and 11 **[Trustee's Authorities, Tab 27]**
[181] *Gestion Trans-Tek Inc. v Shipment Systems Strategies Ltd.*, [2001] O.T.C. 860, at paras. 6-13 **[Trustee's Authorities, Tab 32]**
[182] *Ibid*, at para. 33 **[Trustee's Authorities, Tab 32]**
[183] Reasons for Judgment, at para. 181; Transcript, p. 76, lines 24-34 **[Transcript, p. 76]**
[184] *Grenon*, *supra*, at paras. 4 and 6 **[Trustee's Authorities, Tab 30]**
[185] Reasons for Judgment, at para. 208.
[186] *Hordo*, *supra*, at para. 11 **[Trustee's Authorities, Tab 27]**
[187] Reasons for Judgment, at para. 202.

137. The damages claim for safety, environmental, investigative and other costs pleaded in paragraphs 17.2 and 17.3 of the Trustee's Statement of Claim are not the proper subject of an oppression claim because those services were provided *after* the Goodyear Assets were transferred to PEOC in the Asset Transaction. A safety service provider, for example, could not make a claim for oppression if the allegedly oppressive conduct occurred before the services were provided.

138. It was an error of law for the Chambers Judge to determine that the Trustee' oppression claim did not satisfy the "collective requirement" because it excluded these "other creditors".[188]

6. The Chambers Judge erred in striking the Trustee's oppression claim on the basis of the *Redwater* decision

139. The Chambers Judge stated that:

> Given the above analysis, all of which pivots on the content of the Trustee's SOC, I find that the ARO is not a liability for the purposes of the Oppression Claim. I see no reason why the character of a 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.
>
> 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's SOC is not a liability. Instead, it is a mere assumption, which can be disregarded for the purposes of considering whether to strike or dismiss the Oppression Claim. Restated, I find that *Redwater* has nullified the Oppression Claim.[189]

140. The Chambers Judge's holding that ARO is not liability based on *Redwater* is an error of law, as discussed above. The Court in *Redwater*, citing *Daishowa*, referred to ARO as "associated liabilities" which are a "future cost" that serves to depress the tenure's value "at the time of sale."[190] The present effect of ARO on the value of an asset cannot simply be "disregarded", as in the Chambers Judge's "post-*Redwater*" financial review.[191]

141. The other error of law reflected in the Chambers Judge's analysis of the ARO issue in

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[188] Reasons for Judgment, at paras. 208-209.
[189] Reasons for Judgment, at paras. 225-226.
[190] *Redwater*, *supra*, at para. 157 **[Trustee's Authorities, Tab 24]**
[191] Reasons for Judgment, at para. 368.

relation to the oppression claim is reflected in the comment that he saw "no reason" that ARO's character as a future obligation should be different "as between a bankrupt context and an oppression context." The Chambers Judge relied on the finding in *Redwater* that the AER was not a "creditor" within the meaning of the BIA, meaning an entity with "provable claims" under the *BIA*, for the proposition that the AER could not be a creditor for oppression purposes. [192]

142. If the same definition of "creditor" applied under the *BIA* and the various corporate statutes, then any party seeking relief from oppression would need to satisfy the *Abitibi* test discussed in *Redwater*.[193] The "*Hordo* Factors" discussed at length in the Reasons for Judgment would be irrelevant because any party would have to pass the more stringent *Abitibi* test in order to seek relief from oppression.[194]

143. Contingent creditors can be allowed to seek relief from oppression and there is no authority for the proposition that they must have "provable claims" within the meaning of the *BIA*. In *Gestion Trans-Tek*, for example, the creditor was only a potential judgment creditor at the time of the oppressive conduct, but it was granted complainant status.[195] The Ontario Court of Appeal's seminal decision in *Downtown Eatery* is another example of a case where a corporate reorganization was found to be oppressive even though the claimant was only a potential judgment creditor at the time of the oppressive conduct.[196]

144. The Chambers Judge erred in law in striking the Trustee's oppression claim on the basis that the AER could not be creditor for the purposes of the oppression remedy if it was not a creditor within the meaning of the *BIA*.

F. The Chambers Judge Erred in Law in Striking the Trustee's Public Policy and Statutory Illegality Claims

1. The Chambers Judge's Decision

145. In its Statement of Claim, the Trustee defines the "Transactions" as the Asset Transaction,

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[192] Reasons for Judgment, at para. 225; *Redwater, supra*, at paras. 33-34 and 161 **[Trustee's Authorities, Tab 24]**
[193] *Redwater, supra*, at para. 159 **[Trustee's Authorities, Tab 24]**
[194] Reasons for Judgment, at paras. 191 and 202.
[195] *Gestion Trans-Tek, supra*, at para. 33 **[Trustee's Authorities, Tab 32]**
[196] *Downtown Eatery (1993) Ltd. v Ontario*, 200 DLR (4th) 289, at paras. 53-63 **[Trustee's Authorities, Tab 33]**

the Share Transaction and the "Retained Interests Transaction".[197] With respect to the Retained Interests Transaction, the Trustee pleads that:

> [10] Pursuant to a Retained Interests Agreement with PEOC, also dated October 1, 2016 (the "**Retained Interests Agreement**"), POT, by its new trustee, POC, and PEOC agreed, *inter alia*, that:
>
> [10.1] PEOC would retain an undivided 1% legal interest in certainly highly productive gas assets (the "**Retained Interests**") and the right to be the licensee of record with respect to the wells associated with those assets;
>
> [10.2] PEOC would hold the Retained Interests as bare trustee in trust for POT;
>
> [10.3] POT would retain 100% of the beneficial interest in the Retained Interests, in contemplation of the eventual transfer of the Retained Interests from PEOC to POT; and that
>
> [10.4] PEOC would transfer the Retained Interests back to POT if, one year after the closing date, PEOC's LLR, calculated without reference to the Retained Interests, was 1.1 or higher.
>
> [11] The objective of the transaction contemplated by the Retained Interests Agreement (the "**Retained Interests Transaction**") was to support the LLR rating for PEOC, as determined by the Alberta Energy Regulator ("**AER**"), to allow the Asset Transaction and Share Transaction to be completed without regulatory intervention by the AER.[198]

146. The Trustee pleads that the Transactions, including the Retained Interests Transaction, are void (i) on the basis that they were contrary to the public policy reflected in the Regulatory Regime, including *Directive 006*; and (ii) on the basis of statutory illegality, because they were expressly or impliedly prohibited by the same Regulatory Regime.[199]

147. The Chambers Judge struck the Trustee's public policy and statutory illegality claims for failing to disclose a reasonable cause of action, stating that:

> Concerning the alleged "public policy breaches" and the alleged "statutory illegality," there is *nothing* in the Trustee's Statement of Claim which provides *any particulars* that *the Aggregate Transaction*:
>
> a. is prohibited by the Regulatory Regime;
>
> b. is expressly or by necessary implication rendered illegal; or
>
> c. could conceivably *bring an agreement to transfer corporate shares within any of the recognized categories of agreements that are contrary to public policy*. Those categories are (i) contracts that are injurious to the state; (ii) injurious to the system of justice; (iii) encouraging immorality, (iv) affecting marriage, (v) in restraint of trade, and (vi) restrictive of personal liberties.
>
> I find the absence of particulars to exist even if I assume everything in the Statement of Claim is true.

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[197] Statement of Claim, at para. 12 **[AR, p. P8]**
[198] Statement of Claim, at paras. 10-11 **[AR, p. P8]**
[199] Statement of Claim, at para. 24 **[AR, p. P12]**

> If what is intended as being illegal or contrary to public policy is the alleged objective of the Retained Interest Agreement to support the LLR rating for PEOC to allow the Transaction to be completed without regulatory intervention, I am not aware of anything that would make that objective, expressly or by necessary inference, prohibited.[200] [Emphasis added.]

148. Accordingly, the Chambers Judge found two alternative bases for striking the Trustee's statutory illegality claim:

148.1. First, there is an "Aggregate Transaction" and the Trustee fails to provide "any particulars" that "could conceivably" make "an agreement to transfer corporate shares" contrary to public policy or illegal.[201]

148.2. Second, if the alleged objective of the Retained Interests Transaction that makes it illegal or contrary to public policy then he is "not aware of anything that would make that objective, expressly or by necessary inference, prohibited."

149. Both bases for striking these claims reflect errors of law, as discussed below.

2. The Chambers Judge erred in law by misapprehending the Trustee's claims and failing to assume that the facts, as pleaded, were true

150. Whether a pleading discloses a claim is a question of law reviewable on a correctness standard.[202] In determining whether a pleading discloses a reasonable claim, the Court is not permitted to consider any evidence and must accept the allegations of fact as true unless they are "patently ridiculous or incapable of proof".[203] The Chambers Judge's interpretation of Rule 3.68(2)(b) is also reviewable on a correctness standard.[204]

151. The Chambers Judge made two errors of law in arriving at the conclusion that the Trustee failed to provide "any particulars" that "could conceivably" make the "Aggregate Transaction", an "agreement to transfer corporate shares", contrary to public policy or illegal.

152. Firstly, instead of assuming that the facts pleaded by the Trustee were true and refraining from considering evidence, as required by Rule 3.68(2)(b), the Chambers Judge analyzed

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[200] Oral Reasons, p. 8, lines 18-41, p. 9, lines 1-9 **[AR, p. F10-11]**
[201] Oral Reasons, p. 8, lines 31-39 **[AR, p. F10]**
[202] *Grenon, supra,* at para. 4 **[Trustee's Authorities, Tab 30]**
[203] *Ibid,* at para. 6 **[Trustee's Authorities, Tab 30]**
[204] *HOOPP, supra,* at para. 10 (*HOOPP*) **[Trustee's Authorities, Tab 31]**

the Trustee's claim based on his own *factual findings* that there were not three transaction, as alleged by the Trustee,[205] but a single "Aggregate Transaction" that "involved multiple steps, all of which were structured in sequence".[206]

153. Then, having found, *contrary to the allegations in the Trustee's Statement of Claim*, that there was "an Aggregate Transaction", the Chambers Judge proceeds to note that the Trustee failed to provide "any particulars" that this Aggregate Transaction is prohibited by the Regulatory Regime or contrary to public policy.[207]

154. Rather than taking the Trustee's claim at face value, as required by Rule 3.68(2)(b),[208] the Chambers Judge analyzed a version of the Trustee's claim reflecting his findings of fact based on all the evidence. This reflects an error of law.

3. The Chambers Judge erred in misapprehending the Trustee's claim

155. The Chambers Judge's alternative basis for striking the Trustee's public policy and statutory illegality claims was that he was "not aware of anything" that would prohibit the alleged objective of the Retained Interests Agreement: avoiding regulatory intervention.[209]

156. In stating that he was "not aware of anything" that would prohibit the Respondents from structuring the Retained Interests Transaction to avoid regulatory intervention, the Chambers Judge failed to consider the Trustee's response to his request that the Trustee identify the specific legislative provisions at issue.[210] As the Trustee pointed out to the Chambers Judge in response, the purpose of the AER's LLR program, as set out in *Directive 006*, is:

> [T]o 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.[211]

157. In its Statement of Claim, the Trustee alleges that the objective of the Retained Interests Transaction was to deliberately boost PEOC's LLR rating, to allow the Asset Transaction

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[205] Statement of Claim, at para. 11 **[AR, p. P8]**
[206] Oral Reasons, at p. 5, lines 17-19 **[AR, p. F7]**
[207] Oral Reasons, at p. 8, lines 31-41, p. 9, line 1 **[AR, p. F10-11]**
[208] *Grenon*, *supra*, at para. 6 **[Trustee's Authorities, Tab 30]**
[209] Oral Reasons, p. 9, lines 6-9 **[AR, p. F11]**
[210] Trustee's Answer to Written Questions at paras. 28 and 29.
[211] *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process*, at para. 1 **[Trustee's Authorities, Tab 34]**

and Share Transaction to be completed without regulatory intervention from the AER.[212]

158. The Chambers Judge concluded that he was "not aware of anything that would make that objective, expressly or by necessary inference, prohibited."[213] This finding reflects an error of law reviewable on a correctness standard.

159. The purpose of the Regulatory Regime, and in particular the LLR program reflected in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* ("***Directive 006***"), is to ensure that unfunded ARO liabilities are not passed on to the public of Alberta.[214] The Trustee alleges that the objective of the Retained Interests Agreement was to boost PEOC's LLR rating, to allow the Asset Transaction to proceed without regulatory intervention by the AER.[215]

160. *Directive 006* is intended to apply to all licensees in Alberta: in enacting this legislative scheme, the Legislature "could not have intended" to allow parties to structure their transactions to avoid the application of the LLR program.[216]

161. The Chambers Judge appears to have interpreted the Regulatory Regime, including Directive 006, as permitting agreements intended to circumvent the Regulatory Regime. This interpretation is incorrect and is reviewable on a correctness standard.[217]

G. The Chambers Judge Erred in Law in Striking the Trustee's Equitable Rescission Claim

1. The Chambers Judge's Decision

162. As with the Trustee's public policy and statutory illegality claim, the Chambers Judge struck the Trustee's equitable rescission claim under Rule 3.68(2)(b) on the basis of his own finding that the Asset Transaction was merely a "step" in a single "Aggregate Transaction,"[218] rather than a discrete transaction, as alleged by the Trustee. This was an error of law.

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[212] Statement of Claim, at paras. 10-11 **[AR, p. P8]**
[213] Oral Reasons, at p. 9, lines 6-9 **[p. F11]**
[214] *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process*, at para. 1 **[Trustee's Authorities, Tab 34]**; *Redwater*, *supra*, at paras. 18-19 **[Trustee's Authorities, Tab 24]**
[215] Statement of Claim, at paras. 10-11 **[AR, p. P8]**
[216] *Niedermeyer v. Charlton*, 2014 BCCA 165, at para. 93 **[Trustee's Authorities, Tab 35]**
[217] *Ibid* **[Trustee's Authorities, Tab 35]**; *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107, at para. 10 **[Trustee's Authorities, Tab 16]**
[218] Reasons for Judgment, at paras. 17, 277 and 329.

2. The Chambers Judge's erred in failing to consider the Trustee's entire Statement of Claim

163. As noted by this Court in *HOOPP*, a chambers judge considering an application to strike a claim for failing to disclose a reasonable cause of action is required to consider the "entire context of the pleading."[219]

164. The Chambers Judge noted that equitable rescission is a remedy available where an agreement was "obtained by some unconscionable act". However, he proceeds to state that the Trustee has not alleged "any facts" that would support such claims.[220]

165. The Chambers Judge does not refer to what is actually pled in the Trustee's Statement of Claim: that the Transaction are void "on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim".[221]

166. Rather than examining paragraph 24 of the Trustee's Statement of Claim in isolation, the Chambers Judge should have examined those allegations "in the entire context of the pleading."[222] The unconscionable acts pleaded by the Trustee include Ms. Rose causing PEOC to enter into the Asset Transaction in breach of her fiduciary duty as its sole director, for her own benefit and the benefit of the other Respondents at the expense of PEOC.[223]

167. The Chambers Judge erred in law in striking the Trustee's equitable rescission claim on the basis that the Trustee failed to allege "any facts" that would support such a claim.[224]

3. The Chambers Judge erred in law in considering evidence and failing to assume that the Trustee's factual allegations were true

168. The Chambers Judge was not permitted to consider evidence in striking the Trustee's equitable rescission claim. The Chambers Judge was also required to assume that the Trustee's factual allegations were true. [225]

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[219] *HOOPP*, *supra*, at para. 14 **[Trustee's Authorities, Tab 31]**
[220] Oral Reasons, p. 9, lines 26-29 **[AR, p. F11]**
[221] Statement of Claim, at para. 24.3 **[AR, p. P8]**
[222] *HOOPP*, supra, at para. 14 **[Trustee's Authorities, Tab 31]**
[223] Statement of Claim, at paras. 15, 16.3 and 16.4; *Pioneer Corp. v Godfrey*, 2019 SCC 42, at para. 54 **[Trustee's Authorities, Tab 36]**
[224] Oral Reasons, at p. 9, lines 26-29 **[AR, p. F11]**
[225] *Grenon*, *supra*, at para. 6 **[Trustee's Authorities, Tab 30]**

169. Instead, on the basis of his own finding that the Asset Transaction was merely a "step" in a single "Aggregate Transaction,"[226] the Chambers Judge stated that:

> *Notwithstanding that the Trustee stated that it was only challenging the Asset Transaction* [...] its application of equitable rescission" *would have to* apply to the Aggregate Transaction, including the shares of PEOC.[227] [Emphasis added.]

170. The Chambers Judge proceeded to strike the Trustee's claim on the basis that it was seeking rescission of this "Aggregate Transaction", which included the Share Purchase Transaction:

170.1. The Chambers Judge was "not sure" it was possible to restore "the parties", including 198, to the "precontract position", presumably because SRC was bankrupt and its shares could not be transferred back to PEI from 198;

170.2. The Trustee was improperly seeking "partial rescission", again because the Chambers Judge had determined that the Asset Transaction was merely part of the "Aggregate Transaction"; and

170.3. PEOC/SRC was "not a party to the Share Purchase Agreement" and this was a "fatal bar" to any rescission of the "Transactions".[228]

171. The Chambers Judge's analysis was inconsistent with Rule 3.68(2)(b). Instead of refraining from considering evidence and assuming the facts pleaded were true, the Chambers Judge considered a version of the Trustee's claim reflecting his own findings of fact, based on all the evidence. He erred in law in proceeding to strike this version of the claims pleaded by the Trustee.

PART V – RELIEF SOUGHT

172. The Appellant respectfully requests that the appeal be allowed, with costs.

Calgary, Alberta
May 29, 2020

Estimated Time for
Argument: 45 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____

Rinus de Waal/Luke Rasmussen
Counsel for the Appellant

[226] Reasons for Judgment, at paras. 17, 277 and 329.
[227] Reasons for Judgment, at para. 277.
[228] Reasons for Judgment, at paras. 277-279.

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1. *Biancaniello v DMCT LLP*, 2017 ONCA 386
2. *Van Hooydonk v Jonker*, 2009 ABQB 8
3. *McCallum v Jackson*, 2019 ONSC 7077
4. *Salna v Awad*, 2011 ABCA 20
5. *Bankruptcy and Insolvent Act*, R.S.C. 1985, c B-3, s. 96
6. *Montor Business Corporation v Goldfinger*, 2016 ONCA 406
7. *Kerzner v American Iron & Metal Company Inc*, 2018 ONCA 989
8. *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(3)
9. *Business Corporations Act*, RSO 1990, c B-16, s. 134(3)
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11. *McKay-Cocker Construction Ltd. v. McMurdo (2001)*, 109 A.C.W.S. (3d) 245 (ONSCJ)
12. *Brick Protection Corporation v. Alberta (Provincial Treasurer)*, 2011 ABCA 214
13. *Tran v. Kerr*, 2014 ABCA 350
14. *Housen v. Nikolaisen*, 2002 SCC 33
15. *Rhône v. Peter A.B.Widener*, [1993] 1 S.C.R. 497
16. *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107
17. *Simonelli v. Ayron Developments Inc.*, 2010 ABQB 565
18. *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037
19. *R. v. Walle*, 2007 ABCA 333
20. *Hogberg v. Hoult*, 2004 ABCA 167
21. *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305
22. *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72

23. *Tarrant v. Sphere Energy Corp.*, 2018 ABQB 492

24. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5

25. *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29

26. *Mammoet 13220-33 Street NE Limited v. Edmonton (City)*, 2014 ABCA 229

27. *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR 2d 86 (Ont Ct J (Gen Div))

28. *Paniccia Estate v Toal*, 2012 ABCA 397

29. *Elan Construction Limited v South Fish Creek Recreational Association*, 2016 ABCA 215

30. *Grenon v. Canada Revenue Agency*, 2017 ABCA 96

31. *HOOPP Realty v. Guarantee Co. of North America*, 2015 ABCA 336

32. *Gestion Trans-Tek Inc. v Shipment Systems Strategies Ltd.*, [2001] O.T.C. 860

33. *Downtown Eatery (1993) Ltd. v Ontario*, 200 DLR (4th) 289 (ONCA)

34. Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process

35. *Niedermeyer v. Charlton*, 2014 BCCA 165

36. *Pioneer Corp v Godfrey*, 2019 SCC 42