Action No.: 1801-10960
E-File Name.: CVQ20PRICEWATERHOUSECOOPERS
Appeal No.: ____________________

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

BETWEEN:

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

Plaintiff

and

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

Defendants

P R O C E E D I N G S

Calgary, Alberta
October 2, 2020

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta
2
3
4 October 2, 2020 Morning Session
5
6 The Honourable Court of Queen's Bench
7 Mr. Justice Nixon of Alberta
8
9 R. de Waal (remote appearance) For PricewaterhouseCoopers Inc.
10 L. Rasmussen (remote appearance) For PricewaterhouseCoopers Inc.
11 D.J. McDonald, QC (remote appearance) For Perpetual Energy Inc., Perpetual Operating
12 Trust and Perpetual Operation Corp.
13 P.G. Chiswell (remote appearance) For Perpetual Energy Inc., Perpetual Operating
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17 G. Benediktsson (remote appearance) For S. Riddell Rose
18 K.T. Lenz, QC (remote appearance) For Orphan Well Association
19 A.N. Stempien (remote appearance) For Orphan Well Association
20 G.S. Watson (remote appearance) For CNRL, Cenovus Energy Inc. and Torxen
21 Energy Ltd.
22 C.W. Ang (remote appearance) For CNRL, Cenovus Energy Inc. and Torxen
23 Energy Ltd.
24 K. O'Brien Court Clerk
25
26
27 THE COURT: Just a couple of housekeeping things for me
28 today and then I'll ask the same from the parties. Number 1, there was a reference
29 yesterday to consolidated transcripts. If someone could forward that, copying the others
30 on this file to my assistant, Kristine Kirby, that'd be appreciated.
31
32 UNIDENTIFIED SPEAKER: We'll do that, My Lord.
33
34 THE COURT: Thank you very much.
35
36 Number 2, if a transcript and a consolidated one is going to be ordered for this, I expect
37 to reserve today and if it's, again, consolidated that would be very much appreciated. I
38 leave that with you as a simple request.
39
40 Anything from the parties before we commence? Hearing none, I will turn it over to Mr.
41 de Waal.

1
2 MR. DE WAAL: Thank you, My Lord.
3
4 THE COURT: At your convenience, Sir.
5
6 **Submissions by Mr. de Waal**
7
8 MR. DE WAAL: My Lord, I addressed the first aspect of our
9 argument yesterday and I propose to take you now to what we say are the
10 (INDISCERNIBLE) of the application or the grounds of the application. And, in my
11 brief, My Lord, that starts at page 14 at the heading is 'B'. And I don't propose to repeat
12 anything I did yesterday, although that will, however, be possible, but the argument is, as
13 we understand it now, is that there was never any transfer because PEOC was the
14 licensee, it always had these liabilities and, therefore, nothing really changed with the
15 asset transaction.
16
17 We said to Your Lordship yesterday that that is inconsistent with the pleadings and I can
18 refer very briefly to paragraph 46 of our brief. But, more importantly, My Lord, to
19 paragraph 48 of the statement of defence which said, and I read this to Your Lordship
20 yesterday, that prior to the transaction, PEOC was a (INDISCERNIBLE) trustee,
21 (INDISCERNIBLE) held the legal interests in POT's oil and gas assets, contracts,
22 licences and permits. It held no beneficial interest in any property and it had no material
23 revenue expenses, assets, or liabilities. That, we say, My Lord, is obviously inconsistent
24 with the position that says well it had all these liabilities all along.
25
26 It's also, My Lord, inconsistent, we say, with the asset transfer agreement and I should
27 take Your Lordship to that document which is Exhibit G to Mr. Darby's affidavit. And for
28 convenience, My Lord, I've summarized in paragraph 49 of our brief, we've summarized
29 aspects of that agreement that we say is inconsistent with any argument that there was no
30 transfer.
31
32 You'll see that "person" is defined as including a trust. So, again, regardless of what --
33 whether a trust is a relationship and regardless of what the cases may say, for the
34 purposes of this transaction with Perpetual Operating Trust and Perpetual Energy
35 Operating Corp., the parties agree that for the purpose of this agreement, "person" would
36 include a trust. And you'll find that in the definition section on page 7 of that agreement.
37
38 On the first page of the agreement, not the (INDISCERNIBLE) or the final page but first
39 page of the agreement, vendor is defined as Perpetual Operating Trust, a trust registered
40 to carry on business in the Province of Alberta and having an office in the City of
41 Calgary in the Province of Alberta. But no reference to PEOC - the trustee.

1
2 Then in 401(b), clause 401(b), which is on page 15 of the agreement, My Lord.
3
4 THE COURT: I'm there, sir.
5
6 MR. DE WAAL: There's a specific provision that says, and this is
7 under "Representations of Warranties": (as read)
8
9 Vendor has the requisite capacity, power and authority to execute
10 this agreement and to perform the obligations to which it thereby
11 becomes subject.
12
13 And under (d), "Execution and Enforceability", POT represents that this agreement, and
14 this is in the second half of that paragraph: (as read)
15
16 This agreement is being validly executed and delivered by a vendor
17 and this agreement is and all other documents executed and
18 delivered on behalf of the vendor hereunder shall constitute valid
19 and binding obligations of vendor. Enforceable in accordance with
20 their respective terms and conditions.
21
22 So the agreement quite clearly says that vendor (INDISCERNIBLE) is actively involved
23 without and it makes a reference to PEOC.
24
25 We say this is inconsistent with the *BIA* and we referred Your Lordship to some of the
26 cases yesterday. The (INDISCERNIBLE), with respect, is summarized in paragraph 53 of
27 our brief.
28
29 THE COURT: I'm there, sir.
30
31 MR. DE WAAL: (as read)
32
33 The Perpetual defendants point out that the definition of "person" in
34 the *BIA* does not refer to a trust, it refers to a corporation. The
35 definition is not exhaustive and includes both a partnership and an
36 unincorporated association, neither of which is traditionally
37 recognized as a separate legal entity.
38
39 And then we refer to the decision of Justice Romaine which says the *BIA's* remedial
40 legislation and should be given such fair, large and liberal construction interpretation as
41 best ensures the attainment of its object. And then the question becomes in the section 96

1 context, what is the object of that section and what -- how should it be interpreted in a
2 fair, large and liberal manner to obtain those objectives.
3
4 In addition to that case, My Lord, and it's in our (INDISCERNIBLE), I'm referring Your
5 Lordship to that specifically, you received a copy of the *Interpretation Act* yesterday.
6
7 THE COURT: Yes.
8
9 MR. DE WAAL: And the *Interpretation Act* says in paragraph 12,
10 or clause 12 -- section 12 I should say: (as read)
11
12 Every enactment is deemed remedial, and shall be given such fair,
13 large, and liberal construction and interpretation as best ensures the
14 attainment of its object.
15
16 So it's not just Justice Romaine who says that, but that's what the Act says.
17
18 My Lord, if the -- if there was no transfer, then, again, back to the agreement for a
19 second, My Lord. We have (INDISCERNIBLE) provision and perhaps this is the one I
20 should refer Your Lordship to specifically, and that is clause 2.06(e) on page 30 of the
21 asset purchase agreement.
22
23 THE COURT: I'm there, sir.
24
25 MR. DE WAAL: It -- just to read the introduction to that
26 paragraph, it says: (as read)
27
28 For the avoidance of (INDISCERNIBLE) parties acknowledge that
29 as a result of the foregoing, the parties agree to attribute no value to
30 the assumption of the abandonment and reclamation obligations and
31 the environment liabilities.
32
33 So, as a result of this agreement, quite clearly there's an assumption of the ARO. And,
34 again, if there was never any transfer, there would never have been any assumption of
35 ARO.
36
37 That's on the transfer, My Lord, and for the argument that there was no transfer and we
38 say there's, first of all, Your Lordship cannot strike that claim on that basis, there's no
39 allegation or no suggestion even in the arguments that the claim is -- it's improperly
40 pleaded or insufficiently pleaded and as far as summarily dismissing that claim, My Lord,
41 on the basis that it references arrangement (INDISCERNIBLE), we'd say there obviously

1 was something that amounted to a transfer or a transaction (INDISCERNIBLE) and Your
2 Lordship cannot simply find, or shouldn't find on the evidence, that PEOC always had
3 these liabilities. The main reason is that's not the Perpetual defendant's case on the
4 pleadings.
5
6 With respect to the allegation that this is not a transfer at undervalue because the ARO
7 are not liabilities, in paragraph 67 of our brief where we deal with that, 67 and further,
8 and we point out that, first of all, it's incorrect to say that ARO necessarily has to be a
9 liability in order to effect the consideration given and received, and inconsistent with
10 *Daishowa* and *Redwater* if, as a result of ARO, whether it's embedded or not, as a result
11 of the ARO, PEOC took on negative assets, negative value assets. That in itself is
12 sufficient, as I say, regardless of whether ARO is regarded a separate liability or not.
13
14 In Exhibit P, and I referred Your Lordship to this yesterday, Exhibit P to the Darby
15 affidavit, I made the point that in a condensed (INDISCERNIBLE) consolidated
16 statements of financial position of Perpetual, even at that point - September 3rd, 2016 -
17 they clearly were two separate values reflected in those financials and the liabilities
18 associated with the assets held for sale far exceeded the value of those same assets.
19 Again, so that means that the two numbers were not consolidated for these purposes and,
20 if they were to be consolidated, there'd be a substantial negative number.
21
22 I've also referred Your Lordship to the previous exhibits, not the (INDISCERNIBLE)
23 exhibit but another exhibit which is Exhibit N in which the note suggests or says that for
24 $5.7 million in positive value for the reserves, only reflected about a quarter or maybe a
25 third of the assets of the actual (INDISCERNIBLE) and that there's no reference in
26 financials or in the number that the defendants now seem to adopt. The ARO associated
27 with those assets embedded or not. In fact, we've not been referred to a single document,
28 as far as I know, My Lord, that indicates, first of all, that in the values reflected in any of
29 these documents, ARO is already embedded, or a single document which says what the
30 net result would be if those two numbers are in fact taken together. In fact, as Your
31 Lordship pointed out on the first round, there was a deliberate attempt to stay away from
32 any value attribute to the assets or the transaction or the consideration.
33
34 There's no evidence to support the argument that ARO, if it's not taken into account,
35 would -- would not -- ARO (INDISCERNIBLE) and undervalue. In fact, the argument
36 simply is that the position of the Trustee is just wrong.
37
38 So, the question still is, what is the effect of taking the ARO associated with all the
39 Goodyear assets into account? What is that effect on the values of those assets? And we
40 don't have that evidence, My Lord.
41

1 The second argument I should make -- second point I should make, My Lord, is that the
2 presumption in section 96 applies so when the Trustee puts forward its best estimate,
3 which it's obliged to do, there's nothing to contradict that except the bald allegation that
4 the Trustee's position is simply wrong.
5
6 So, to take a step back, My Lord, the argument that unless ARO is considered separately,
7 that there is no conclusion and Your Lordship can never find that this is a transaction at
8 undervalue and, therefore, summary dismissal should result. That argument cannot
9 succeed simply on the basis that it does not lead to that result necessarily because ARO,
10 as opposed to the inherent value of the transaction and the consideration, is not the basis
11 for that conclusion of undervalue.
12
13 And, again, as I said to Your Lordship, there's nothing in any of the materials submitted
14 to Your Lordship that suggests what the result would be, the financial result of the
15 transaction, if ARO was in fact (INDISCERNIBLE) in.
16
17 Then, My Lord, the final argument that there can be no insolvency or no conclusion,
18 there can never be a conclusion that PEOC was either insolvent at the time or was
19 rendered insolvent by this transaction unless -- because ARO are not liabilities, My Lord.
20 We, again, we referred Your Lordship to the balance sheet test, my friend has referred to
21 that, and that was in our brief at paragraph 98 (INDISCERNIBLE). And, further, we've
22 referred Your Lordship to some of the new authorities but there's one in tab 47 of our
23 authorities which was provided to Your Lordship, that's (INDISCERNIBLE). It's actually
24 tab 47. This is a decision of *Option Industries,* and it's referred to -- it has been referred to
25 for the sake of paragraph 10: (as read)
26
27 Section 96 is a remedy to reverse an improvident transfer that strips
28 value from the debtor's estate, where its conditions are met.
29
30 I'll refer Your Lordship to paragraph 31.
31
32 THE COURT: Just bear with me for a second, sir. I'm there,
33 sir, go ahead.
34
35 MR. DE WAAL: Thank you, My Lord. So in paragraph 31,
36 Justice Lema says: (as read)
37
38 From a balance-sheet perspective ...
39
40 And this concerned, by the way, concerned a number of journal entries that reflected
41 transactions which may or may not have happened and that was part of the dispute, but

1 the point was whether the net effect of all those transactions in fact triggered a section 96
2 application. So, Justice Lema says in paragraph 31: (as read)
3
4 From a balance-sheet perspective, the asset reductions represented
5 by the various “transfers out” were offset, in full, by the account-
6 payable reductions in equal amounts. OII’s net financial position
7 remained unchanged. The concern addressed by the “transfer at
8 undervalue” provision was accordingly not engaged.
9
10 And the point of this, My Lord, we say is that you should look at the net effect on a
11 balance sheet test. If you look at the balance sheet perspective and there is no change,
12 then that's fine. And if the balance sheet shows that there is in fact a huge discrepancy
13 between the value out and the value in, then that triggers a concern. But for the -- for the
14 purpose for these purposes, we have to look at the balance sheet test.
15
16 If you determine insolvency, in any event, My Lord, we say again you look at the balance
17 sheet. And if I can refer Your Lordship very briefly to the *Stelco* matter again, my friend
18 kind of did take Your Lordship there, but that's at tab 24 of our authorities.
19
20 THE COURT: I'm there.
21
22 MR. DE WAAL: And the reference is to paragraph 50 which is
23 (INDISCERNIBLE): (as read)
24
25 To my view, the preferable interpretation to be given to "sufficient to
26 enable payment of all these obligations due and accruing due" is to
27 be determined in the context of this test as a whole. What is being
28 put up to satisfy those obligations is the debtor's assets and
29 undertaking in total; in other words, the debtor in essence is taken as
30 having sold everything. There would be no residual assets and
31 undertaking to pay off any obligations which would not be
32 encompassed by the phrase "all of his obligations, due and accruing
33 due". Truly they cannot be "orphan" obligations which are left
34 hanging unsatisfied. It seems to me that the intention of due and
35 accruing due was to cover of all obligations, whatever nature, all
36 kinds, and leave nothing in limbo.
37
38 So the suggestion, My Lord, that when you look at insolvency, you cannot look at ARO,
39 you cannot take that into account, it is contradicted by this. And then in paragraph 52,
40 Justice Farley says: (as read)
41

> However contingent and unliquidated claims would be encompassed by the term "obligations".

So it's not just future obligations such as ARO, but even contingent and unliquidated claims.

Then in paragraph 59: (as read)

> It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due".

Certainly that would include ARO we say, My Lord.

The next case in that binder is the case of 4519922 Canada, decision of Justice Newbould and (INDISCERNIBLE) referred to. This is an accounting firm and they were all these obligations, future obligations. Paragraph 27: (as read)

> At present, CLCA’s outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million.

And then in the same paragraph but (v) at the bottom of that paragraph: (as read)

> Contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

So future and contingent liabilities.

Then there's a reference to the two different arguments in paragraph 29: (as read)

> Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.
>
> I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out

> amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo.

And then he says:

> He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.
>
> This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account.

So, in this case, that certainly is not even contingent but that certainly applies to ARO. So for the -- for the insolvency analysis, ARO is certainly to be considered.

I referred Your Lordship to the *Anderson* decision yesterday and I -- perhaps I don't need to do that again, but this is a BC Supreme Court decision where in paragraph 10 the Court said: (as read)

> There was no compelling evidence or arguments suggesting Glenn Anderson was not insolvent in August 2005, if his contingent liabilities on guarantees are to be included as debts accruing due. I agree with the trustee that the weight of authority favours his position that they should be, and thus that element is satisfied.

So, My Lord, that's -- that's the argument that we present to Your Lordship in our brief that (INDISCERNIBLE) 117. And, further, with the authorities that support -- we say support (INDISCERNIBLE) conclusion.

Yes. Mr. Rasmussen reminds me that the *Anderson* decision is a specific case that considers that solvency test in the context of the section 96 claim. That's specifically in that context.

1
2 THE COURT: Thank you.
3
4 MR. DE WAAL: Very quickly, if I can take Your Lordship to
5 (INDISCERNIBLE) just to address some of the comments in the reply brief.
6 (INDISCERNIBLE) spending too much time on that. But this is my friend's reply brief
7 that was filed on September 30th. I just want to refer to some of the paragraphs.
8
9 THE COURT: Go ahead, sir.
10
11 MR. DE WAAL: Paragraph 9, my friends make the point that the
12 2016 (INDISCERNIBLE) financial statements perfect the result of the
13 (INDISCERNIBLE) transaction on PEI on a consolidated basis. The statements do not
14 show the effect of the asset transaction by itself. The (INDISCERNIBLE) PEOC's
15 financial statements. Now we recognize that (INDISCERNIBLE) and I don't think we
16 need to (INDISCERNIBLE) these are just the PEOC statements or (INDISCERNIBLE)
17 effects the result of any of the one -- the asset transaction. What it does though, My Lord,
18 in the notes in particular, it specifically clarifies, and I referred Your Lordship, for
19 example, to note 5(a) on page 16, it very specifically refers to the October 1st transaction
20 which was a disposition of 128 million -- $128 million of decommissioning obligations.
21 So, again, to use that (INDISCERNIBLE) embedded in the financial statements are very
22 specific references to the asset transaction. So it's fair to say that this does not just reflect
23 the asset transaction, but for the most part, we've been able to identify the financial
24 results of that particular transaction specifically. We don't have to guess and we don't
25 have to rely on any interpretation of these financial statements. If there was context to be
26 provided or if somebody wanted to qualify this, it is open to my friends to do that. But
27 this represents a financial disclosure of the public company to the public and, on that
28 basis, it means what it says and it refers specifically to this transaction.
29
30 In paragraph 14 of my friends' brief, they say: (as read)
31
32 The difference between the property (INDISCERNIBLE) and
33 equipment and the decommissioning obligations arising from the
34 aggregate transaction leading to an accounting gain on disposition of
35 19.2 million is nothing more than a bookkeeping result of the
36 aggregate transaction solely for the purposes of the 2016 PEI
37 financial statements.
38
39 Now, if I can stop there for a second, My Lord, what are other purposes of the 2016 PEI
40 financial statements? It's obviously to disclose to the market in a transparent and obvious
41 way the financial results of that transaction included in the consolidated statements. So to

1 say it's nothing more than a bookkeeping result is not really making any point. It is a
2 bookkeeping result and that result is what we put in for Your Lordship. It's not a number
3 that has any connection to the fair market value of the asset transaction to PEOC at the
4 time of the asset transaction. Again, that's not a specific analysis only of the asset
5 transaction but it clearly indicates what the asset transaction meant for PEOC in terms of
6 assuming these decommissioning obligations. And if it's not clear that
7 (INDISCERNIBLE) anything in PEOC's world, it's certainly PEOC was the flipside of a
8 coin and insofar as this reflects the financial and positive result for PEI, the only place
9 these decommissioning obligations could've gone was to PEOC. And so, in that sense, we
10 can in fact understand what this meant for PEOC.
11
12 Paragraph 16, My Lord, not a major point but again this is -- this is the nature of the
13 application. It says: (as read)
14
15 The Trustee's brief notes that the 2016 PEI financial statements
16 include provisions in calculating total liabilities, presumably ...
17
18 Now, first of all, that's correct. We do say that the provisions are included in total
19 liabilities because that's what we read on the page. It says: (as read)
20
21 ... presumably to suggest that ARO are not a provision but a liability.
22
23 And the argument, My Lord, is that's not what we suggest. We say that a provision is a
24 liability, it's not an asset, it's not an equity, it falls under liability. It is a specific kind of
25 liability but it's a liability.
26
27 And then in paragraph 17: (as read)
28
29 But the 2016 PEI financial statements did not record ARO as a
30 liability but a provision.
31
32 Now, again, My Lord, if I look at how it's recorded, and this is on the first page, it's
33 certainly shown as one of the current liabilities and its unreliabilities. So it's recorded as a
34 provision, obviously, on its own but it's part of current liabilities and it's also a subsection
35 of liabilities. So to suggest that financial statements did not record ARO as a liability but
36 as a provision, My Lord, is a reading of the financials which presumably we need
37 somebody who understands it better than I do to see, because I don't see that.
38
39 Paragraph 30 of the brief, My Lord, at page 8, the problem with the Trustee's claim that
40 the asset transaction had no impact on the liabilities of PEOC. So, again, the starting
41 point is the Perpetual statement of defence that says PEOC had no assets or liabilities

1 prior to these transactions, and then it says: (as read)
2
3 > Both before and after the asset transaction, PEOC held legal title to
4 > the Goodyear assets. As *Redwater* states, ARO belongs to the
5 > licensee.
6
7 Now, the asset transaction did not dispose of any ARO, PEOC did not assume any ARO.
8 So what is the position then if the ARO, taken into consideration with the value of the
9 asset, in other words embedded as part of the calculation of the value of the estates, if the
10 ARO is not transferred to PEOC in the asset transaction but was always with PEOC, I'm
11 not sure that changes anything, My Lord. That makes PECO, presumably, insolvent on
12 the numbers that we have from the PEOC financial statements even prior to the
13 transaction. It has not assets but it has all these liabilities. The assets belong to the trust
14 but the liabilities belong to PEOC.
15
16 So the fact that you can argue that there was no transfer is self-defeating in the sense that
17 that meant that the liabilities were there before when the assets were not yet there.
18
19 Paragraph 37: (as read)
20
21 > This additions remarkably the Trustee of (INDISCERNIBLE)
22 > accounting (INDISCERNIBLE) self-estimate the ARO associated
23 > with the Goodyear assets.
24
25 I had thought that (INDISCERNIBLE) complaint that the Trustee is in no position to
26 estimate anything and that really the values that the Trustee came up with, with the
27 assistance of consulting others who are perhaps more knowledgeable, were somehow a
28 good thing instead of a criticism. But the Trustee -- the point is, the Trustee did come up
29 with values, it's reflected in the Darby affidavit, and it's not been contradicted. Sections
30 69 -- section 96(2) says that that's -- there's a presumption that's attached to those values.
31
32 Paragraph 48, in fact, My Lord, I should just take you to 39 which we say is obviously
33 the new argument that there never was a transfer. The argument says that PEOC held the
34 same legal interests in the Goodyear assets before and after and that, in paragraph 41: (as
35 read)
36
37 > The Trustee's brief attempted to conflate the asset transaction with
38 > the share transaction when it refers to ARO being a minus and then
39 > states PEOC did not receive anything sufficient to offset this minus.
40 > In the 2016 financial statements, the defendants describe the
41 > transaction as resulting in a gain on disposition of 19.2 million

1 because it involved inter alia assumption of 128 million in
2 decommission.
3
4 (INDISCERNIBLE) that's what it says. And then it says: (as read)
5
6 The Trustee's conclusion has a false premise, mainly, that the
7 assumption of 128 million of decommission obligations referred to
8 PEI's financial statements relates to PEOC assuming ARO. This is
9 incorrect.
10
11 Well, the complete answer to that, I would submit, is the clause that I referred Your
12 Lordship to a few minutes ago in the -- in the purchase and sale agreement is
13 (INDISCERNIBLE) to the Darby affidavit which says that: (as read)
14
15 The parties agree to attribute no value to the assumption of the
16 abandonment and reclamation obligations and the environmental
17 obligations.
18
19 So to say that the assumption of these decommissioning obligations referred to in the
20 financial statements relates to something else other than PEOC assuming ARO is
21 surprising where the agreement specifically refers to the assumption of ARO by PEOC.
22
23 The question obviously is if that's not what the financials referred to, where is that
24 assumption referred to and how is it accounted for? A more obvious explanation is that's
25 exactly what it says and what it refers to.
26
27 Finally, paragraph 56, paragraph 56 the statement is simply made that a provision is not
28 something due and accruing, period. And I've referred you to the *Stelco* decision, there's
29 no authority of that statement, it's just set out there in paragraph 56 as a truth in itself, but
30 then when you look at the *Stelco* decision at paragraph 59, Justice Farley disagreed to that
31 and he says: (as read)
32
33 The phrase "accruing due" has been interpreted by the courts as
34 broadly identifying obligations that will "become due".
35
36 And that's exactly what a provision is. It reflects present value in terms of the Perpetual
37 financials at page 9, significant estimates, provisions for decommission obligations, says:
38 (as read)
39
40 The provision represents management's best estimate of the present
41 value of the future abandonment and reclamation costs required.

1
2 That's the provision. And if that provision pursuant to the -- or in accordance with the
3 Farley decision is something that (INDISCERNIBLE) in paragraph 56 of the -- my
4 friends' brief, My Lord, is just not correct.
5
6 Those are my submissions, My Lord, subject to (INDISCERNIBLE). Thank you, My
7 Lord.
8
9 THE COURT: Thank you, Mr. de Waal.
10
11 As I mentioned earlier yesterday, and I will undoubtedly have questions, but I'll hold
12 those until the end.
13
14 Intervenors, would you like to speak now? Mr. Watson? Mr. Lenz?
15
16 MR. WATSON: Yes, Sir. I wanted to tell you exactly the
17 conversation that occurred between myself and Mr. Lenz about who was going to go first,
18 it's not very flattering to me. But, anyway, I'll speak first, Sir.
19
20 **Submissions by Mr. Watson**
21
22 MR. WATSON: The written argument of the industry
23 Intervenors filed September 25th sets out the three main areas that these Intervenors are
24 interested in and sets it out thoroughly and succinctly. I won't repeat it, I'll simply try to
25 emphasize some of the more important matters that I want this Court to emphasize.
26
27 At the outset, let's make sure we're both clear, these industry members never claimed to
28 possess and expertise in bankruptcy or section 96. That was certainly not part of the
29 reason why they're granted status. Rather, these individual members claim to have a
30 unique and fresh perspective on how the industry treats and characterizes asset
31 (INDISCERNIBLE) obligations - the ARO - and how it plays into the valuation of assets
32 and liabilities.
33
34 All three of these industry applicants have varying liability and exposure to the orphan
35 well fund levy and they're all directly impacted by the (INDISCERNIBLE) Trustee in
36 this matter.
37
38 One of the first issues of concern was, as indicated in the argument, these industry
39 Intervenors believed that there in fact was a transfer or disposition as identified in section
40 96. Now that position, as you just heard this morning, was more fully argued by the
41 Trustee and I won't repeat what the Trustee said, but my clients agreed with those

1 arguments.
2
3 But, in addition, let me emphasize that it's the defendant's position that there was no
4 transfer and that is wholly inconsistent with the express wording and the intention behind
5 the purchase and sale agreement. Under the purchase and sale agreement paragraph 2.01,
6 sale of assets, Sir, states: (as read)
7
8 > Upon the terms, subject to the conditions of this agreement,
9 > (INDISCERNIBLE) hereby sells, assigns, transfers, conveys and
10 > sets over to the purchaser.
11
12 Words matter, as we all know. The words expressed intention and the intention of the
13 parties is gleaned from what they wrote down and agreed to. It flies in the face of
14 consistency to suggest that those words don't indicate the parties intent to transfer assets.
15
16 Indeed, Sir, the very existence of the purchase and sale agreement, as necessity in the
17 extended transaction or as even part of the asset transaction alone, speaks to the fact that
18 there was a transfer. Speaks against the argument that there was no transfer.
19
20 The second point raised in our argument is that all three of these industry members -
21 CNRL, Cenovus, and Torxen, agree that an ARO is treated as an obligation and a liability
22 attaching to oil and gas assets forms a critical element in the fair market valuation of
23 those assets whenever they're transferred. ARO, as set out in the affidavit evidence which
24 remains uncontroverted, is included by all these members of their financial statements
25 and as a critical and certain part of asset valuation. In fact, Perpetual defendants now
26 agree that the ARO is embedded in the value of the assets and has an effect of depressing
27 value.
28
29 This is -- and this recognition by the industry members was also recognized by the
30 Supreme Court in the *Redwater* decision, paragraph 119 and 120 when they're discussing
31 the *Abitibi* two-stage process.
32
33 The point that I don't know that was covered specifically by Mr. de Waal but I want to
34 emphasize, is that although conceding that ARO is embedded in the value and embedded
35 in the $5.6 million value assigned by McDaniels to these assets, in fact, the ARO is not
36 embedded in the 5.6 million. Mr. de Waal too you to clause 2.06(e) of the PSA and I
37 intended to do the same thing, I won't because it would be redundant, but there the parties
38 clearly agree to attribute no value to the assumption of the abandonment and reclamation
39 obligations. Two important points: (1) that clause says that they're being assumed --
40 they're being assumed in this agreement, not prior, in this agreement, and if they attribute
41 zero value, subtracting zero from 5.6 million is not giving any recognition of the ARO. It

1 appears, Sir, and it's our submission, that it's clearly a triable issue in these proceedings
2 whether or not a proper ARO is or was related to this transaction or was considered.
3 There's a clear factual dispute between whether an ARO was or was not given
4 consideration or was embedded in the 5.6. To embed a zero is not to embed something.
5
6 Sir, the third and final point relates to what I just was saying and that's that when
7 considering the fair valuation of the PEOC property for the purpose of assessing whether
8 or not the PEOC was rendered insolvent or considered insolvent by the asset transaction,
9 the ARO associated with the assets must be considered, not simply zeroed. But that is
10 part of the triable issue which I suggest faces this Court.
11
12 Those are my brief submissions, Sir.
13
14 THE COURT: Thank you, Mr. Watson. Again, I will
15 undoubtedly have some questions later.
16
17 Mr. Lenz, at your convenience.
18
19 **Submissions by Mr. Lenz**
20
21 MR. LENZ: Good morning, My Lord. First, on behalf of the
22 Orphan Well Association, we'd like to thank the Court for allowing us to present today.
23 As stated by Mr. DePoe in his affidavit, there's a virtual certainty that the responsibility
24 of the Goodyear ARO will end up with the Orphan Well Association and so the Orphan
25 Well Association has a keen interest in the outcome of these proceedings.
26
27 The primary legal issue of importance to the Orphan Well Association is whether ARO
28 ought to be taken into consideration as an obligation that can make a company insolvent
29 on applying section 96 of the *Bankruptcy Insolvency Act.* And before I turn to that
30 particular issue, I'd like to say a few words about *Redwater* because I think that it seems
31 to come up again and again. But I believe that there -- I have a different take on some of
32 the points made by my friends.
33
34 The ratio, or the essence, of *Redwater,* in my submission, is that for the purpose of the
35 priority scheme under the *Bankruptcy and Insolvency Act* or the *Company Credit*
36 *Arrangement Act,* the Court should not lightly convert regulatory obligations into claims
37 provable in bankruptcy. Because, to do so, undermines the regulatory system and
38 undermines the constitutional authority of the provinces to regulate in this area.
39
40 Now, I've chosen my words carefully in saying some of those things. One of the words
41 I've chosen carefully that *Redwater* dealt with is claims provable in bankruptcy. That, if

1 Your Lordship looks at *Redwater* decision, occasionally there's some slip of language,
2 but, you know, paragraphs 34 through 38 and the discussion of the *Abitibi Bowater* case
3 come back to claims provable in bankruptcy which, in our submission, is a subset of the
4 term "obligations".
5
6 *Redwater* does not say that for all purposes under *BIA,* obligations should not be
7 considered, like regulatory obligations. What it says is that for the purposes of the priority
8 scheme, the Court should not lightly confirm -- convert regulatory obligations into claims
9 because then they can get -- be wiped out.
10
11 *Redwater* does say ARO is an obligation. It says it expressly. If you look at your reasons
12 in the earlier hearing, which were the superior application, I think it's paragraph 149 of
13 your reasons you cite paragraph 145 of *Redwater* and I will read what you cited: (as read)
14
15 The Regulator is not in the business of performing ...
16
17 Sorry, I've got the wrong quotation. I'll come back to that, Sir, but -- one moment, Sir.
18 Here we go. Yes, in paragraph 149 of your reasons, you cite *Redwater* of the Supreme
19 Court of Canada in this passage: (as read)
20
21 The Regulator is not in the business of performing abandonments. It
22 has no statutory duty to do so. Abandonment is instead an obligation
23 of the licensee.
24
25 THE COURT: And what paragraph of *Redwater* is that?
26
27 MR. LENZ: You say it's at paragraph 145.
28
29 THE COURT: One-forty-five, thank you.
30
31 MR. LENZ: I guess the final point I'd like to make on
32 *Redwater* and I'm not sure where it goes, but there's been a lot of discussion about the
33 idea that first appeared I think in *Northern Badger* and Justice Laycraft where he talked
34 about these liabilities being inchoate and I think in *Redwater* it talks -- there's some
35 discussion about them being embedded in the assets or -- and so on. My take on that is a
36 little different than that of my friends. I think what that means is that these obligations
37 and the assets only arise by virtue of there being a regulatory system. When you get a
38 lease of mineral interests from the Crown, the obligation to restore the property to its
39 original condition is part of the lease. When you get a licence from the AER, the
40 obligation to restore the property to its original condition is part of the licence.
41

1 And the lease and the licence are no good at all without a regulatory scheme that
2 facilitates the development of oil and gas that allows, you know, surface rights to be
3 compelled to be surrendered, and so you have a kind of asset in which the regulatory
4 obligations are part and parcel of the asset. That's what I think it means. I don't think it
5 means that, for accounting purposes, the value or the ARO, the obligations are somehow
6 always setoff or netted off the value of the assets. And, in fact, that's just wrong. We see
7 it in Perpetual's financial statements, we've heard it from all the industry Intervenors,
8 certainly the Orphan Well Association has calculations of the probable costs of
9 outstanding ARO in the industry and, in fact, industry players pay their share of the
10 orphan levy according to their proportion of that probable cost.
11
12 Sir, those are my comments on *Redwater,* let me turn to the argument. And, like my
13 friends, I'm not going to go through my brief in detail, I'm going to hit some high points
14 though.
15
16 The question, again, is should ARO be taken to an account for the purposes of section 96
17 of the *Bankruptcy and Insolvency Act?* And the first thing we should do is look at the
18 words of section 96 in the Act. I have duplicated section 96 and paragraph 2, definition of
19 insolvency person, in my brief under tab 1.
20
21 THE COURT: I'm there, sir.
22
23 MR. LENZ: Referring first to section 96, and I don't know if
24 we have to get into the words too much, but the issue is whether the debtor is insolvent at
25 the time of the transaction or rendered insolvent by the transaction. It's right at paragraph
26 2 that's critical and the definition of insolvent person which is the second page under tab
27 1.
28
29 THE COURT: I'm there.
30
31 MR. LENZ: And there, there's a two-part test. The first part
32 of the test is that there have to be liabilities to creditors provable as claims under this Act
33 in the amount of at least $1,000. Liabilities to creditors provable as claims. That is what
34 *Redwater* talked about. If Your Lordship looks at *Redwater* again, that is what that case
35 was about, is ARO a liability provable as a claim?
36
37 And then, in addition, you have to meet either (a), (b), or (c), one of which is the balance
38 sheet test being: (as read)
39
40 The aggregate whose property is not, at a fair value, sufficient, or, if
41 disposed of at a fairly conducted sale under legal process would not

1 be sufficient to enable payment of all his obligations, due and
2 accruing due.
3
4 So, Sir, the word "obligations" follows in the following three paragraphs and you've
5 heard the Supreme Court of Canada refer to ARO as an obligation, abandonment and
6 reclamation obligations is the name of it, and I think that the question -- on the plain
7 words of the statute, our submission is it's to be taken into account.
8
9 And in the brief, and now I guess I say to Your Lordship, that an obligation can render a
10 company insolvent as readily as a provable claim, as a liability, as a contingent liability,
11 all of those things. A few examples I came up with in addition to ARO would be if there
12 was a regulatory requirement of a building owner to remove asbestos. If there was a
13 regulatory requirement of a car manufacturer to do significant repairs on an unsafe
14 vehicle. There would be other examples as well, but those would be regulatory
15 obligations, not provable claims, that could render a company insolvent. And, in these
16 cases, the *Bankruptcy Act* should come to bear.
17
18 And then once the Court considers the plain meaning or the ordinary meaning of section
19 96 and section 2 of the *BIA,* you should look at, in my submission, the purpose of the
20 section. And the purpose, I don't think there's any disagreement among counsel, is to
21 prevent persons, you know, from making or accepting transfers that will diminish the
22 estate to the prejudice of stakeholders of the estate. And the law has made decisions on
23 certain presumptions depending on seasoning period or the length of time from the
24 transfer and that's reflected in section 96.
25
26 It's -- this is a problem that has been ancient in the law as you can see from the *Statute of*
27 *Elizabeth*. It's a longstanding principle of law that says mischief ought to be remedied and
28 avoided. And, as my friend pointed out in the Justice Romaine quote and the
29 *Interpretation Act,* if that's the object of the legislation, a broad interpretation consistent
30 with the object should be applied in this case. And consistent with that, abandonment and
31 reclamation obligations should be considered.
32
33 Now, I think the question I would ask myself if I were in your shoes, Justice Nixon, is,
34 okay, well, how do I place the value on it if I'm supposed to consider it given what the
35 Supreme Court of Canada said about its uncertainty applying the tests in *Abitibi*
36 *Bowater?* And I think that's a fair point. But I think the point is answered completely by
37 Perpetual's admission that this is a provision for accounting purposes, and that appears in
38 their financial statements which are of course required to be -- hold true in plain
39 disclosure.
40
41 And if I can turn Your Lordship to page 2 of our reply brief, which is the very short one

1 with only two tabs.
2
3 THE COURT: I'm there, sir.
4
5 MR. LENZ: You know, there we duplicate certain portions
6 of the CPA Canada Handbook dealing with the term "provision" and I note from my
7 friend's reply to this brief that they say these financial statements were prepared under
8 IFRS, there is a slightly different handbook for IFRS, I say there's no material difference
9 between the two tests that are applied and, if there is -- if my friends -- if there is, my
10 friends can say so and I'm happy to send you the IFRS equivalent to what's set out here in
11 the CPA Canada Handbook. But, essentially, the provision is a liability of uncertain
12 timing or amount. That's what it's defined as. That's what the accountants say it is, that's
13 what Perpetual must say it is, because that's what they put in their financial statements
14 which they sent to the world.
15
16 But, more importantly, when is a provision recognized? A provision is recognized when
17 (a), this is -- I'm referring now to paragraph 4 of our brief, but an entity has a present
18 obligation, legal or constructive, as a result of a past event, which exists with ARO; it's
19 probable that an outflow of resources embodying economic benefits will be required to
20 settle the obligation which was required for ARO. But, last but most importantly, a
21 reliable estimate can be made of the amount of the obligation.
22
23 So, we know that Perpetual, in its public disclosure, believed that a reliable estimate to be
24 made of the amount of the obligation to correct the (INDISCERNIBLE). It may not rise
25 to the level of certainty required by the Court for a provable claim, but it does rise to the
26 level of certainty required for the public markets, for accounting purposes, all of my
27 industry Intervenor friends do it in their financial statements, and I submit the Court can
28 use those values in determining the size of the obligation and the financial impact of the
29 obligation for the purposes of section 96.
30
31 So to summarize, My Lord, the Court is able to take ARO into account as an obligation
32 because it's consistent with the words of the statute, it's consistent with *Redwater,* it's
33 consistent with the purpose of the statute, and it's consistent with the practice in both the
34 industry and accounting to assigned values to this type of obligation.
35
36 Subject to any questions, Sir, those are my submissions.
37
38 THE COURT: Thank you, sir. Again, I will have questions
39 later I suspect.
40
41 I'd like to turn it now back to Mr. McDonald.

1
2 MR. LENZ: My Lord, would it be possible to take a 10-
3 minute break before Mr. McDonald starts his --
4
5 THE COURT: Certainly fine with me. Does that work for all of
6 the parties? Maybe let's take a 15-minute break. Mr. McDonald?
7
8 MR. MCDONALD: That's fine with me. Fifteen minutes makes
9 sense, thank you.
10
11 THE COURT: Okay. Thank you.
12
13 (ADJOURNMENT)
14
15 THE COURT: Unless there's any other business, I'll turn it
16 over to Mr. McDonald. At your convenience, sir.
17
18 **Submissions by Mr. McDonald (Reply)**
19
20 MR. MCDONALD: Thank you, My Lord. I must say I'm scrambling
21 to try to collect my thoughts on how I want to respond to at least what I've heard this
22 morning and I'll do my best, but I apologize in advance that it may be somewhat
23 disjointed in that all of my friends make arguments on the same general topics and some
24 are related and some are separate.
25
26 Where I'd like to start is on the reliance on the financial statements that we've heard a lot
27 of yesterday and this morning and I'd like to use my brief that was filed on September 20
28 -- September 30th as a guide and, while we're going through that, I hope to be able to
29 address some of the specific points that were made that directly or indirectly arise from
30 financial statements.
31
32 THE COURT: I'm there, sir.
33
34 MR. MCDONALD: Do you have --
35
36 THE COURT: I do indeed, yes.
37
38 MR. MCDONALD: And so I'll -- the section I'm going to start at is
39 under the heading (b), the 2016 PEI financial statements starting at paragraph 7. We
40 played out, initially, that they were prepared in accordance with IFRS standards. I don't
41 have any reason to disagree with Mr. Lenz that, for this purpose, there's a material -- not

1 a material difference. But I think, as he included the CICA provisions in his brief, we
2 should probably provide you with the IFRS just so that the Court has the proper
3 documents. So, if that's acceptable, we'll send that to you after the hearing today or over
4 the lunch break if that's -- if we could do that.
5
6 THE COURT: Certainly. As long as there's no objection to that
7 from the other parties. Hearing none, thank you.
8
9 MR. MCDONALD: Okay. I'll make a note to do it over the lunch
10 break and we'll copy our friends so that if there -- if there's anything that arises from it, it
11 can be addressed this afternoon.
12
13 THE COURT: Thank you very much, sir.
14
15 MR. MCDONALD: It is perfectly clear in the PEI financial
16 statements that the transaction that is being addressed is the aggregate transaction on PEI
17 and it is not addressing the financial effect of the asset transaction. And I'll get to in the
18 brief some references that will assist you on that.
19
20 It's also perfectly clear to all of us that the financial statements do not record the fair
21 market value of the Goodyear asset. You don't have to be an accountant to know that
22 assets are on a balance sheet in the case of Property, Plant and Equipment,
23 (INDISCERNIBLE) fair value but at purchase price, as I understand it, less depreciation.
24 So I'm not telling you anything you don't know. And I'm going to speak about the
25 provision for ARO in a moment but it's equally clear that that is not on the balance sheet
26 at fair market value.
27
28 And perhaps I should, actually at this point, address that because that's where my friend,
29 Mr. Lenz, finished his submissions. And he said to you, If I was a Judge, how would I
30 place a value on the ARO given the uncertainty about it? And, essentially, he asked you
31 to use the provision amount in this case of $128 million as the fair value that you would
32 put on the ARO. And he pointed out that Perpetual Energy Inc. had said that it was a
33 reliable estimate so even though uncertain, if they say it's a reliable estimate, then you
34 should consider it as something reflecting fair value, and there's a leap there that's not
35 possible to take. Because a company says that its financial statements include reliable
36 estimates does not mean that its financial statements, when they make those reliable
37 estimates, reflect fair value.
38
39 And one of the things that is important, critically important, in the case of the ARO is the
40 discount rate that's used. And IFRS requires the specific discount rate or a, not a specific
41 number, excuse me, but a discount rate and there are -- I think this is reflected certainly in

1 the financial statements and perhaps in the cross-examination of some -- of Mr. Lang and
2 perhaps others, a company has a choice between a risk-free rate or a credit adjusted rate.
3 You will have seen in the PEI statements they used a risk-free rate of 2.3 percent I
4 believe it was, and you'll see in the CNRL or Cenovus statements rates in the 3.8 to 4.5 or
5 so range I think for that purpose, albeit, at a different time but different rates dictated by
6 the requirements of how one values this for financial statement purposes. And we all
7 know that a difference between 2.3 percent and 3 or 4 percent on a present value
8 calculation can make a dramatic difference in the present value. And we also know that in
9 the market one does not use a risk-free rate or a credit adjusted rate when making ones
10 assessment of ARO or making ones assessment of the value of assets.
11
12 What -- one way that this is highlighted, and this too is disclosed I believe in note 5(b) of
13 the Perpetual financial statements, is the discount raised -- rate used for the assets. The
14 assets are discounted at between 12 and 20 percent and the ARO discounted at 2.3
15 percent. The effect of those rates will be clear to you but the significance of the
16 difference in the rates on the different sides of the balance sheet simply -- further
17 illustrates that you can't use financial statements as a proxy for fair market value. They
18 were not intended for that purpose, they're not designed for that purpose, and the math
19 doesn't work that way.
20
21 And so when my friend, Mr. Lenz, says this is what you should do, this is how you
22 should analyze it and, effectively, says you should take the $128 million on the Perpetual
23 Energy Inc. balance sheet and use it as the value that you should attribute to ARO for the
24 purposes of this transaction in this lawsuit, in my submission, that's totally unsupported.
25
26 I'm going to return to my brief and just run through some of the accounting issues and, at
27 the same time, try to address some of the points that my friends make related to the
28 accounting issues. Paragraph 11 just points out that accounting judgments and estimates
29 are part of the process that one goes through in preparing financial statements. And with
30 respect to provision for commissioning obligations, item B in paragraph 11 of the brief, it
31 -- we just highlighted part of the note that -- note 2(c) that shows that actual abandonment
32 reclamation costs could be materially different from estimated amounts. So, yes, the
33 estimates are reasonable for accounting statement purposes, they're not a proxy for
34 reflection of what is expected actually to be spent.
35
36 I should also point out, and I'm -- I understand this to be true but I can't give you the
37 reference in the financial statements but I expect it's in the notes, that the number on
38 financial statements does not include a value for salvage which is a real value that market
39 participants would consider when assessing the value of ARO for the purposes of a
40 transaction.
41

1 I think we've heard so much about provisions and liabilities and obligations, I won't
2 spend anymore time on that. We debated that at the last hearing and I think you've heard
3 the arguments on it.
4
5 Paragraphs 12 and 13, I just make the point that I made a moment ago that the -- on the
6 asset side of the balance sheet, the PP&E is not intended to represent fair market value.
7
8 My friend, Mr. de Waal, took issue with our reference at paragraph 14 to the
9 bookkeeping result of taking PP&E and deducting decommissioning obligations. And, in
10 fact, a large part of the essence of his new analysis of transfer and undervalue being
11 reflected by the 19.2 million difference between those two figures is the inherent
12 assumption that each side of that equation - the asset side and the provision side -
13 represent market values and the so the difference represents the transferred undervalue
14 which of course is a market value concept. It's simply not possible to translate what we,
15 in my submission, fairly call a bookkeeping result calculated as you see in paragraph 14
16 and pretend it's fair value and it reflects transferred undervalue.
17
18 My friends have also made reference to the concept of obligations disposed, the wording
19 that's used in one of the notes of the financial statements. We address that at paragraph
20 15. And whatever you might draw from that expression, it refers to the aggregate
21 transaction, that is the transaction between Perpetual Energy Inc. and 198, and giving it
22 its best characterization from my friend's perspective, it still doesn't deal with the internal
23 reorganization pursuant to the asset transaction. It's nothing at all to do with that.
24
25 There's a section starting at paragraph 22 of this brief that addresses better than I just did
26 orally the estimate ARO in the financial statements. And while I made note of the effect
27 of the difference in discount rates, there's also another variable that has a significant
28 effect and that's time, and that's illustrated by the contrast between the PEI financial
29 statements that consider ARO over a 25-year period and the CNRL statements that
30 consider it over a 60-year period. And, again, it's obvious to all of us what the effect of
31 doubling the time period is on a present value calculation.
32
33 I'm going to stop here while we're -- I know I'm on the topic of financial statements but
34 on the topic of ARO in a market concept, you'll have seen from the transcript of the
35 cross-examination I believe of Mr. Lang, his agreement with me that it is in the eye of the
36 beholder and there are variables that one can consider or one does consider -- sorry, I'm
37 just going to try and provide a reference to you. Were highlighted during the cross-
38 examination of the industry (INDISCERNIBLE) and for that purpose I'd like to take the
39 brief we filed on September 28th. I'm referring to paragraph 18 and following under the
40 heading "Value of ARO".
41

1 THE COURT: Okay. Thank you. Go ahead.
2
3 MR. MCDONALD: And this isn't, I don't believe, a section that
4 addresses financial statements, at least not exclusively, but it addresses all the variables
5 that go into it. The point being that in the transaction between the purchaser team and the
6 vendor team, each one would've had its own estimate of ARO and would have
7 considered, among other things, the purpose. The vendor might have a different view
8 than a purchaser. Their own knowledge, their experience, the efficiencies and costing that
9 they would apply to it, impact of inflation, operating practices, reserve life, date of
10 abandonment. All those things are necessarily considered in an assessment by a -- by a
11 purchaser and by a vendor. And it was a reflection of that, that what we see in paragraph
12 2.06 of the asset purchase and sale agreement that the parties reflected that there are these
13 uncertainties and it also reflected of course that ARO was an intrinsic part of, another
14 way of stating embedded, in the value of the assets and that, for that reason, they
15 attributed no value to it. They would not have been able to reach agreement because each
16 party would've brought its own perspective and its own analysis into the effect of the
17 future abandonment liabilities on the assets that were being purchased.
18
19 So there's a high degree of uncertainty and subjectivity and we tried to illustrate that in
20 here which really plays into the many reasons you concluded that, in your reasons, that
21 the ARO on the -- I don't want to misstate you, well, a couple points that you made - that
22 the financial statements record an account provision for various obligations do not in and
23 of themselves create a liability, and *Redwater* extinguishes the Trustee's assertion that the
24 asset transaction resulted in a significant debt deficit. All the -- and your other point -
25 ARO referenced in the statement of claim is a mere assumption.
26
27 Now, as I said at the start, I'm going to be a little disjointed and I just left my brief and
28 the financial statement analysis, I'd like to return to that now and ask you to go to
29 paragraph 28. And, again, this is in the September 30th brief.
30
31 THE COURT: I'm there, sir.
32
33 MR. MCDONALD: Think paragraph 20, even 30, reflect what I just
34 said a moment ago that the statements reflect the aggregate transaction.
35
36 I should address something I believe Mr. de Waal said, and for that, I have to refer you to
37 note 5(a) in the financial statements which are Exhibit A to Mr. Darby's new affidavit.
38
39 THE COURT: Just bear with me, sir.
40
41 MR. MCDONALD: And Mr. Darby took you to the note at the

1 bottom of the page.
2
3 THE COURT: Give me that reference again, sir.
4
5 MR. MCDONALD: Note 5(a), page 16 of Exhibit A to the new
6 Darby affidavit.
7
8 THE COURT: I'm there.
9
10 MR. MCDONALD: And he said one -- he referenced the note that
11 starts: (as read)
12
13 On October 1, 2016, the company disposed of a significant portion
14 of the company's shell and gas properties and goes on to say
15 resulting in a gain on disposition of $19.2 million.
16
17 And he said, well this just shows the effect of the asset transaction without taking you to
18 the definition of "company" which is in the first line of note 1.
19
20 THE COURT: I'm there, sir.
21
22 MR. MCDONALD: It's Perpetual Energy Inc. and this just reflects,
23 once again, that the statements are dealing with the aggregate transaction, not the asset
24 transaction, and there's nothing to be drawn from the note that my friend seeks to rely on
25 for the purposes of this application.
26
27 We -- in the September 30th brief, I won't take you further through the financial
28 statement discussion generally, but we then start at page 9 to deal with each of the
29 (INDISCERNIBLE) argument and, essentially, address the financial statement arguments
30 that are now made by my friends as the impact issues 1, issues 2, and issue 3 as I referred
31 to them yesterday. The only point I would like to make before I move on is, or maybe a
32 couple of points, are dealing with the issue 2 - no transfer at undervalue - and,
33 specifically, paragraph 50 and note 3(a)(v) of the statements.
34
35 THE COURT: Noted.
36
37 MR. MCDONALD: It just reconfirms what I've said several times in
38 the last few minutes, that intercompany transactions are eliminated in preparing the
39 consolidated financial statements. So, it couldn't state much more clearly that the
40 accounting that all my friends seek to rely on for various purposes but for bear value,
41 market value purposes, doesn't consider the intercompany transaction that is the asset

1 transaction.
2
3 There's more in the brief on discount rates and that sort of thing but I won't -- won't
4 belabour that point.
5
6 I'll turn to a separate point briefly and that is the lengthy argument yesterday and referred
7 to again somewhat today that in spite of what you said, perhaps -- certainly more than
8 five times in your reasons, that ARO is not a liability, my friend, Mr. de Waal continues
9 to argue that ARO is a liability. And part of that argument is to say, well, look at the
10 Perpetual statement of defence and in paragraph 44(c) Perpetual said among these
11 liabilities were the ARO. And certainly with the benefit of your reasons, we would've
12 drafted that paragraph differently, but that drafting in a statement of defence prepared 25
13 days after the statement of claim and 8 months before *Redwater,* does not make ARO a
14 liability.
15
16 As a matter of law, it is what it is, and you have said what it is already. Statement of
17 defence hasn't changed that nor, in fairness, does the argument my friend made yesterday
18 about whether Mr. Darby admitted it. We say he acknowledged it, as I read the transcript
19 that was your understanding, Mr. de Waal takes the point that, well, it wasn't really an
20 acknowledgement or it was a conditional acknowledgement. The real point is, at law,
21 what is ARO? And the real answer is it is not a liability. And the fact that it comes under
22 a heading of liabilities on a balance sheet or for accounting purposes the definition of
23 provision includes the word "liability", doesn't convert it to something that it's not.
24
25 I'd like to turn then next to the McDaniel report briefly because the Trustee points out, I
26 believe I said yesterday as well, that it addresses not all the Goodyear assets but
27 specifically the -- it refers to the 65 wells. Well, that's the evidence before you of the
28 value of the consideration received. The Trustee has an obligation under section 96(2) of
29 the *BIA* to provide the value of the consideration given and received and that's what he's
30 done. And for the purposes of this application, we're prepared to accept that and that's all
31 you have and that, indeed, is what, in my submission, you need to consider as part of the
32 equation. And it is beyond a doubt that McDaniel included ARO in the calculation. That
33 is, the embedded ARO is included in the McDaniel number of $5.6 million.
34
35 And that's the case or one of the foundations of the case that my friends are using to try to
36 illustrate the -- either the transfer at undervalue or the insolvency, the math of 5.6 million
37 less 220, and no one has addressed the point I made yesterday that indeed we do have
38 now much better evidence of the fair market value and that the transaction was at fair
39 market value, not at undervalue. And that's based on your finding that Perpetual and 198
40 Co. were arm's length parties and, as arm's length parties, they negotiated the arm's length
41 share transaction at fair market value and they closed that transaction 2 minutes after the

1 asset transaction was closed. You'll recall from Ms. Rose's affidavit that the purchaser
2 team and the asset team also negotiated the asset transaction. And the consideration in the
3 asset transaction mirrors the consideration in the share transaction. So if you wanted the
4 best estimate of whether the transaction was at undervalue, you'd look at the effect of the
5 arm's length transaction and then it reflects a perfect proxy for the asset transaction. That
6 argument is developed in the brief of September 25th, I believe, or 28th. The 28th.
7
8 I'll just very briefly comment on *Stelco.* My friends referred yesterday and said, well,
9 *Stelco* in fact was bankrupt, I guess to try to illustrate that it wasn't a *CCAA* restructuring
10 but a bankruptcy wind-up case. *Stelco,* so far as I can tell from the case, was not bankrupt
11 at all and it was an assessment for the purposes of a *CCAA* analysis and the restructuring
12 of Stelco, and that's a very different purpose than your assessment when you're
13 considering Sequoia.
14
15 My friend also, a couple of times, referred to the *Re: Anderson.* That's my friend, Mr. de
16 Waal. And in this case, what we had was a contingent liability on a guarantee and the
17 Court found that the weight of authority, as the Court refers to it, essentially, the *Stelco*
18 line of authority should be considered in terms of the assessment of a contingent liability
19 on a guarantee. In my submission, that, too, is a significantly different type of obligation
20 than the assumption that we know is the ARO. The uncertainties that are involved in
21 ARO.
22
23 My friends also referred to the *Option Industry* case that I'd like to address if I could find.
24 I'll ask my colleagues to help out. Where's the *Option Industry* case? Right, I'm sorry, My
25 Lord, it's at tab 47 of the brief filed by the Trustee on September 25th.
26
27 THE COURT: I'm there, sir.
28
29 MR. MCDONALD: I took it from the reference to paragraph 31 in
30 that statement that my friend was drawing an analogy to financial -- the balance sheet on
31 a financial statement and that somehow this decision of Justice Lema gives support for
32 using the financial statements as a reflection of fair value. You've heard all my arguments
33 on that. But as I read the case, this -- this description does not at all refer to presentation
34 on financial statements and refers, if you go through it, to bookkeeping entries relating to
35 advances made -- financial advances made by a party in return for reductions in a payable
36 account. And two points that are important, one is it's journal entries, not financial
37 presentation -- financial statement presentation pursuant to IFRS; and, secondly, they're
38 defined specific financial amounts that have a specific value. They're not the uncertain
39 estimate of ARO that we've been talking about. So the case, in my submission, is of no
40 assistance to my friends.
41

1 If you can just bear with me for a moment, My Lord, I'll try to eliminate some points that
2 I don't need to address.
3
4 THE COURT: Certainly, sir.
5
6 MR. MCDONALD: Very briefly, Mr. de Waal concluded his
7 submission with, again, I believe reference to the financial statements, but perhaps this
8 was more connected to our pleading. But he said, well, perhaps the assets belonged to the
9 trust and the liabilities belonged to PEOC. I don't think there's any logic to that
10 proposition and I suggest the law of trusts is clear that the assets and liabilities are those
11 of the Trustee. But even if you accept entirely what my friends said - so the liabilities
12 were always in PEOC and the only transfer was the transfer of the assets - well, certainly
13 there's no transfer at undervalue on that.
14
15 I have just one more point and then I'd like to take a 2-minute break just to consult with
16 my colleagues to see if I've missed anything that they consider important, but the -- the
17 one last point I'd like to address is -- arises out of the abuse of process argument and the
18 reference we heard yesterday to the *Pocklington* decision. So *Pocklington* is at tab 3 of
19 my friend's authorities.
20
21 THE COURT: I'm there, sir.
22
23 MR. MCDONALD: And I probably should've addressed this earlier
24 but Mr. de Waal raised it and I did, I believe, say well *Pocklington* relates to relitigating
25 the same issue. And what I neglected to address was the points that the Court makes in
26 paragraph 8 that even if you are relitigating the same issue, which we are not, there are
27 certain circumstances when you'd be allowed to do that. And the Court sets out
28 paragraphs -- well, I'll look at -- we'll look at the quote near the bottom of page 4 where
29 Justice McDonald is quoting from the (INDISCERNIBLE) and, well, four lines into after
30 he continued: (as read)
31
32 It will not be unjust and unreasonable to allow the second
33 application to be heard for what is involved is not a re-litigation of
34 an identical fact in certain circumstances.
35
36 And sub (d) is:
37
38 .... if there is a material change of circumstances of a non-evidentiary
39 nature.
40
41 So even if you concluded that we were seeking to relitigate the same issue, which we are

1 not, in my submission, there has been a material change of circumstances as a result of
2 the *Redwater* decision. And you will recall that we filed our application in late August
3 2018, we argued in November and December, you reserved and the *Redwater* decision
4 was issued several months later and, of course, the Supreme Court of Canada reversed the
5 Alberta Court of Appeal in *Redwater.* And we all know from our repeated references to
6 *Redwater* what a significant impact that case has on the arguments of all parties here.
7 But, in my submission, that's one of the things that is contemplated by the *Pocklington*
8 four factors, and the fourth factor in particular, and that was a material change in
9 circumstances. We had your finding that -- sorry, we had the Court's clarification on
10 liabilities, the Court's clarification and reaffirmation of what we'd seen in *Daishowa.* \
11
12 And as I understood my friend, Mr. de Waal, yesterday I believe it was, well, maybe we
13 should have, as soon as *Redwater* came down, hold everything and revisit our earlier
14 application. In my submission, that's totally unreasonable and would've been met with
15 outrage. The idea that we would've filed an application, argued it on an evidentiary
16 record, Court have heard all the arguments, reserved its decision, and then we would
17 amend our application and start over again makes no sense. And what makes far more
18 sense, is exactly what you see here. With the benefit of *Redwater,* and then equally
19 important with the benefit of your reasons having also considered the implications of
20 *Redwater,* a second summary dismissal application was brought on completely separate
21 issues. And I just point out, without taking you to them, that your reasons in paragraph
22 104 and 239 recognize the narrowness of the issue brought before you the first time and
23 reflect why -- or an understanding of why it was brought that narrowly and, in my
24 submission, reflect an understanding of how the landscape was changed as a result of
25 *Redwater.*
26
27 So, it's not an abuse of process for many reasons - the broader policy reasons. And it's not
28 being sensible not to consider this case now but defer it for trial, it's not an abuse of
29 process because it's not the same issue. If you disagree with those things, then it's an
30 understandable second application because of the change of circumstances reflected in
31 *Pocklington.*
32
33 My Lord, may I just go on mute and perhaps stop my video for 2 to 5 minutes and see if
34 my colleagues have anything they want me to put before you?
35
36 THE COURT: Certainly. Why don't we just adjourn for 5
37 minutes, sir, just to accommodate you? Unless there's any objection. But I certainly don't
38 have a problem with that.
39
40 MR. MCDONALD: Thank you very much.
41

1 THE COURT: Thank you.
2
3 Madam clerk adjourn for 5 minutes.
4
5 (ADJOURNMENT)
6
7 THE COURT: At your convenience, Mr. McDonald.
8
9 MR. MCDONALD: Nothing further. Thank you very much, My
10 Lord.
11
12 THE COURT: Thank you. That being the case, unless there's
13 any other business, I'd like to adjourn until 2:00 at which time I will address a number of
14 questions that I have identified going through and I may have more that I reflect on
15 between now and then. Any other business that we should address before we adjourn?
16
17 MR. MCDONALD: No, My Lord.
18
19 THE COURT: Thank you. Hearing none, we will adjourn to
20 2:00.
21

22
23 PROCEEDINGS ADJOURNED UNTIL 2:00 PM
24

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Certificate of Record

I, Katherine O'Brien, certify that this recording is the record made of the evidence of the proceedings in Court of Queen's Bench, held in courtroom 1203 at Calgary, Alberta, on the 2nd day of October, 2020, and that I was the court official in charge of the sound recording machine during these proceedings.

1 **Certificate of Transcript**
2
3 I, Nicole Carpendale, certify that
4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate
7 transcript of the contents of the record, and
8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.
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17 TEZZ TRANSCRIPTION, Transcriber
18 Order Number: AL2444
19 Dated: October 9, 2020
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta
2 ____
3
4 October 2, 2020 Afternoon Session
5
6 The Honourable Court of Queen's Bench
7 Mr. Justice Nixon of Alberta
8
9 R. de Waal (remote appearance) For PricewaterhouseCoopers Inc.
10 L. Rasmussen (remote appearance) For PricewaterhouseCoopers Inc.
11 D.J. McDonald, QC (remote appearance) For Perpetual Energy Inc., Perpetual Operating
12 Trust and Perpetual Operation Corp.
13 P.G. Chiswell (remote appearance) For Perpetual Energy Inc., Perpetual Operating
14 Trust and Perpetual Operation Corp.
15 M. Deyholos (remote appearance) For Perpetual Energy Inc., Perpetual Operating
16 Trust and Perpetual Operation Corp.
17 G. Benediktsson (remote appearance) For S. Riddell Rose
18 K.T. Lenz, QC (remote appearance) For Orphan Well Association
19 A.N. Stempien (remote appearance) For Orphan Well Association
20 G.S. Watson (remote appearance) For CNRL, Cenovus Energy Inc. and Torxen
21 Energy Ltd.
22 C.W. Ang (remote appearance) For CNRL, Cenovus Energy Inc. and Torxen
23 Energy Ltd.
24 K. O'Brien Court Clerk
25 ____
26
27 **Discussion**
28
29 THE COURT: I'll now turn to a number of questions that I
30 have. Just a couple of preliminary comments: (1) I do appreciate the briefs that were
31 provided to the Court by all parties and the submissions that we've had in the last couple
32 of days; (2) these questions are not in any particular order, in large part, because I was
33 taking them and noting them as we were proceeding over the last couple of days
34 including this morning. In terms of structure, there is no focus on these questions, I have
35 not made my mind up, I'm very much open to the feedback that I received in the last
36 couple of days and, importantly, the feedback I'm going to receive from the questions.
37
38 First question, Mr. de Waal, do you have any particular comments for the Court given
39 Mr. McDonald's assertions concerning the *Pocklington* decision that he made at the end
40 of his submissions today?
41

1 MR. DE WAAL: Yes, My Lord. The -- I think he limited -- my
2 recollection is he limited his submission to one of the exceptions based on the fact that
3 *Redwater* -- the *Redwater* decision (INDISCERNIBLE) later on, after we in fact argued
4 the case. And if that's (INDISCERNIBLE) referring to --
5
6 THE COURT: It is.
7
8 MR. DE WAAL: The response, My Lord, is that *Redwater* as
9 well as *Weir-Jones,* and Your Lordship had given copies and an opportunity to address
10 those --
11
12 THE COURT: Can I just -- Mr. de Waal, can I just pause you
13 there? I'm getting echoes and it's hard to hear you. Just a test, Mr. McDonald, can you
14 speak and just see if it's just Mr. de Waal's office?
15
16 MR. MCDONALD: Yes, this is me speaking.
17
18 THE COURT: Thank you. Mr. McDonald is clear so I'm just
19 wondering if there's some reason for the feedback on your side, and that's just a question,
20 Mr. de Waal.
21
22 MR. DE WAAL: Well, I believe Mr. McDonald is not muted and
23 that could be the issue.
24
25 THE COURT: Perhaps. If everyone could mute except for Mr.
26 de Waal, let's test that.
27
28 MR. DE WAAL: Yeah, My Lord, that should be better.
29
30 THE COURT: That is indeed better. Thank you, sir. Go ahead.
31
32 MR. DE WAAL: So, My Lord, again, the submission related to
33 the release of the *Redwater* decision after we had argued this but before Your Lordship
34 had released the decision, and in response to that as well as the release of the *Weir-Jones*
35 decision Your Lordship had written to the parties and we had in fact made additional
36 submissions, so to the extent that the argument is that *Redwater* was released and that
37 constitutes enough of a change to not make another application on the same -- for the
38 same relief and abuse, we say that's just not the case because everyone got to say what
39 they wanted to say about *Redwater* because Your Lordship made the decision.
40
41 THE COURT: Okay. Thank you, sir.

1
2 Mr. McDonald, in the Intervenor's -- pardon me, the brief of the respondent
3 Pricewaterhouse concerning the Intervenor's evidence, in paragraph 26 the comment
4 there, although it was put to him that AROs are not a liability on the audited financial
5 statements, Mr. Brannen (phonetic) explained that: (as read)
6
7 ARO are "definite financial liabilities" because they are "minus" that
8 must be considered in determining the "net worth" of an asset. They
9 are not owed to a particular creditor; instead, they are "part of the
10 asset". Any particular comments on that?
11
12 MR. MCDONALD: None that had occurred to me previously, My
13 Lord. There are a couple thoughts that I might start with. My memory of Mr. Brannen's
14 evidence is that while he's a long-term oil and gas executive, he is far from an accountant,
15 didn't profess any particular technical knowledge about ARO, and knew nothing about
16 the transaction other than what, as he says, what he historically read in the paper about
17 the transaction occurring. So, and I'm reading from his transcript at page 16, line 9 to 17.
18 So my submission is, when you look at his background and his experience and expertise,
19 he needs nothing technical about definite financial liabilities and he really has nothing to
20 offer on the question of whether ARO is a liability.
21
22 In terms of the more colloquial, if I can call it that, concept that ARO are a minus in
23 considering the net worth of an asset, well, I think that's just a businessman's statement of
24 what the Court in *Daishowa* and *Redwater,* and you, have said that ARO is real, it's
25 embedded in the asset, and it serves to depress the value of the asset.
26
27 As to who they are owed to, not a particular creditor, but just part of the asset, we had a
28 lengthy discussion in November, December of 2018 about that and I think it was clear
29 from that discussion that they are not owed to a particular creditor and he's confirming by
30 reference to part of the asset the embedded nature of ARO.
31
32 THE COURT: Thank you for that.
33
34 MR. MCDONALD: My Lord, I hate to interrupt your --
35
36 THE COURT: Go ahead, sir.
37
38 MR. MCDONALD: I hate to interrupt your train of thought but I
39 neglected to say what I had intended to say at the start of the hearing which is that we
40 said we would send you the IFRS standard over the lunch break, we've been in touch with
41 Mr. Lenz's office back and forth and I think we are agreed that the schedule to the OWA

1 reply brief that, while attached as part of the CPA Handbook, is in fact the accurate
2 statement of International Accounting Standard 37 which is the relevant IFS standards.
3
4 THE COURT: Okay. Thank you for that, sir.
5
6 Paragraph 28, this is just a request for clarification, Mr. de Waal, I wasn't sure that I
7 understood that: (as read)
8
9 Contrary to the defendant's submission, section 96 not only applied
10 to assist a Trustee in "recovering assets" that the debtor disposed of
11 in advance of bankruptcy for little or no consideration.
12
13 Are there some words missing? When I was reading it, I seem to be left hanging just a bit
14 and I just wanted to make sure I wasn't overlooking something.
15
16 MR. DE WAAL: Well, again, if Mr. McDonald would mute.
17 There, he's muted now. Could Your Lordship just give us the reference again?
18
19 THE COURT: Certainly. Paragraph 28 of your brief of the
20 respondent Pricewaterhouse Inc. LIT (Intervenor Evidence) and it was February --
21 September 25th, 2020 is when it was filed.
22
23 MR. DE WAAL: Yes, My Lord. I have that and it should say
24 certainly "for little or no consideration" instead of "not consideration". I believe it's in
25 reference to (INDISCERNIBLE).
26
27 THE COURT: Okay. And I note that, I had implicitly read that
28 in, but it says: (as read)
29
30 Contrary to the defendant's submissions, section 96 does not only
31 apply to assist a Trustee in recovering assets that the debtor disposed
32 of in advance of bankruptcy for little or no consideration.
33
34 I'm just going to leave that with you. You might want, you or Mr. Rasmussen might want
35 to reflect on that, I just think there's some words missing and I would like it to be tabled
36 for the benefit of all parties. If I'm incorrect, just advise me.
37
38 MR. DE WAAL: My Lord, the intention of that submission, I can
39 tell Your Lordship, is that this is not -- section 96 is not restricted to assisting a Trustee in
40 recovering assets, that the -- but also applies when a debtor disposed of assets in advance
41 of a bankruptcy for little or no consideration. So, what -- I'll get back to Your Lordship

1 on that.
2
3 THE COURT: Okay. And if you do so after the hearing, please
4 copy all of your friends on that matter. Again, that's just --
5
6 MR. DE WAAL: I will do so.
7
8 THE COURT: Thank you. Again, that's just clarification.
9
10 Paragraph 36 of that same document, and I know this is a repeat of what I said before,
11 Mr. McDonald, but it's repeated from paragraph 26. You didn't address it specifically so
12 I'm going to highlight it for you just, again, just for the benefit of the Court, Mr. Brannen
13 was also cross-examined regarding his statement that ARO are considered "definite
14 financial liabilities by industry members". Any comments with respect to that phrase
15 "definite financial liabilities"?
16
17 MR. MCDONALD: I'm just -- while I'm starting my answer, I'll ask
18 Mr. Chiswell to see if he can pull up the cross-examination on that.
19
20 THE COURT: Certainly.
21
22 MR. MCDONALD: My, I don't mean to be glib, but my initial
23 comment is it's a meaningless expression. There's no such thing. But, more than that, it's,
24 as I read it in the affidavit and as I recall it from the cross-examinations of Mr. Brannen,
25 and I believe Mr. Lang and Mr. Jackson probably also used that phrase, it was used in a
26 heading and then also in the text, and to try to give more weight to the concept of what
27 ARO is other than -- beyond what you had said in your reasons, quite frankly. And we
28 know from your reasons and from the discussion with counsel at the last hearings, the
29 various competing issues on whether ARO is a liability, and we know your reasons for
30 explaining why it was not, which I think I can highlight for you if I can get the -- I won't
31 have the -- bear with me. Right. Paragraphs 169 to 173 of your reasons. My submission is
32 that Mr. Brannen adds nothing to that discussion other than what I said in answer to your
33 first question, that ARO is an obligation in the sense that it's part of the asset, or
34 embedded in the asset, and it depresses the value as we know from *Daishowa* and
35 *Redwater.*
36
37 In terms of the cross-examination, I don't know if I have anything helpful for you.
38
39 THE COURT: Okay. Thank you, sir, for that.
40
41 MR. MCDONALD: Right.

1
2 THE COURT: Go ahead.
3
4 MR. MCDONALD: Do you have that? It should be attached as one
5 of the tabs to our brief filed September 28th. Mr. Brannen, I think, is at tab C.
6
7 THE COURT: Just bear with me here. You're talking about the
8 questioning of Mr. Brannen?
9
10 MR. MCDONALD: Yes, I am. And if I could ask you to turn to
11 page 41?
12
13 THE COURT: I'm there, sir.
14
15 MR. MCDONALD: First, just to point out at line 10, he
16 acknowledges that he is not an accountant.
17
18 THE COURT: Noted. Thank you.
19
20 MR. MCDONALD: And then at line 23, Mr. Chiswell was
21 conducting the questioning and he says: (as read)
22
23 Sir, the heading of paragraph 26 of your August 12th affidavit, you
24 say ARO are considered definite financial liabilities by industry
25 members.
26
27 And then Mr. Chiswell refers to provisions in the next few lines and there's a discussion
28 among counsel, and then at line 13, Mr. Chiswell: (as read)
29
30 But, in any event, sir, what do you mean by "definite financial
31 liabilities" with your heading of paragraph 6?
32
33 And he goes on, I won't read it, but to say that you look at pluses and minuses when
34 you're looking at an asset.
35
36 And then at the top of page 43, line 2: (as read)
37
38 Q Okay. What do you mean by definite financial liabilities as
39 opposed to financial liabilities?
40 A Well maybe it shouldn't be capitalized. Maybe it should be that
41 they are definitely a financial liability.

1
2 Q Well, what do you mean by that?
3
4 And at line 13:
5
6 Q Okay. I understand. To whom is the liability owed, sir?
7 A To the shareholder.
8
9 I think -- my point in reading that, is that illustrates that Mr. Brannen doesn't really know,
10 at least from a legal or accounting perspective, what a financial liability is. He didn't have
11 any particular meaning when he called them "definite financial liabilities" and he might
12 have some sense of his own understanding of corporate law, I suppose, that the liability's
13 owed to the shareholders, but it's not.
14
15 THE COURT: Thank you, sir.
16
17 In paragraph -- this is a question for all parties, in question 53 of the brief of the
18 respondent Pricewaterhouse Inc. in terms of this matter, it states, and this was referred to
19 a couple of times over the last couple of days, or a handful of times: (as read)
20
21 The *BIA* is remedial legislation that should be given such fair, large,
22 and liberal construction and interpretation as best ensures its
23 attainment of its objectives.
24
25 Does anyone take exception to that particular statement? And I'll give you some context,
26 I'm going to be referring to that later on and I want to make sure that I understand the
27 position of the parties. Is that accepted? Given the silence, I'll just take that under
28 advisement.
29
30 MR. MCDONALD: Sir, I'm prepared to -- I'll let Mr. Watson go
31 ahead while I look through what I'm --
32
33 THE COURT: Certainly.
34
35 MR. MCDONALD: Go ahead, Mr. Watson.
36
37 MR. WATSON: I'm not as adept with a mouse as I probably
38 should be, but what we accept of course is the proposition about the fair and liberal
39 interpretation of the *Act,* and so we're in agreement with that.
40
41 I -- Mr. de Waal made a point which I thought was crucial in respect of this which was

1 that if you look at the Act, you may sort of need to somehow interpret persons and try to
2 figure out who the Act gets to apply to. But, even more importantly, look at the purchase
3 and sale agreement which includes trusts in this definition of course. And so the parties
4 were prepared to take a further liberal approach to who was capable of transferring assets
5 and that may be informative to interpreting that comment in paragraph 53.
6
7 THE COURT: Thank you, Mr. Watson.
8
9 MR. MCDONALD: My Lord, I mean, I don't quarrel with Justice
10 Romaine's words or the propositions that she -- or the propositions that she has there, but
11 it begs the question of what are -- what are the objects of that part of the Act that we are
12 considering. The succinct statement I can find quickly is the one from Industry Canada -
13 the Government of Canada - it's attached as tab 4 to our first brief.
14
15 THE COURT: I recall it, sir.
16
17 MR. MCDONALD: And it's Bill C-12 clause by clause analysis and
18 it's when section 96 was amended in 2005. On the third or fourth page -- oh, on page 6 of
19 14 in the upper right-hand corner of the pages, it says, "Rationale". The transfer, and this
20 ties into an earlier question you had: (as read)
21
22 The transfer at undervalue provision is an anti-abuse mechanism
23 intended to assist the Trustee in recovering assets that the debtor
24 disposed of in advance of bankruptcy for little or no consideration;
25 thereby, depriving the estate of value that would've otherwise been
26 available for distribution to the creditors.
27
28 So I think that's the relevant object of the Act that we need to keep in mind. And if I
29 could add to that, that phrase is found in paragraph 15(3) of the Trustee's brief as
30 attempted support for the argument I suppose that if one gave a fair, large and liberal
31 interpretation to the *BIA,* one would conclude that the definition of "person" includes a
32 trust. And, in my submission, those things do not follow and there is a way that one
33 interprets legislation, whether fair and liberal, or strict and otherwise, and that you start
34 with the plain ordinary meaning of the words used. And the plain ordinary meaning of the
35 word used in the definition of "person" does not include trust, unlike the example I
36 showed you from the *Canada Business Corporations Act* where it does. And I also
37 included in our authorities the implied exclusion rule, or expressio exclusio, that is a
38 guide for statutory interpretation. So, I think, however you -- even applying a fair, large,
39 and liberal interpretation to that definition doesn't get you where Mr. de Waal wants you
40 to go.
41

1 THE COURT: Thank you --
2
3 MR. DE WAAL: If I could add a comment or two?
4
5 THE COURT: Certainly, sir.
6
7 MR. DE WAAL: We've referred in our authorities to the *Option*
8 *Industry* case at tab 47, which quoted from the *Urbancorp* decision of the Ontario Court
9 of Appeal at paragraph 10 of the *Option Industry* decision, and it says: (as read)
10
11 Section 96 is a remedy to reverse an improvident transfer that strips
12 value from the debtor's estate, where its conditions are met.
13
14 So anything that takes away from the debtor's estate is followed by section 96 and it
15 doesn't have to be a transfer by the debtor or -- it's not qualified in any other way. That's
16 the objective of section 96 according to the Ontario Court of Appeal.
17
18 And the second comment ties into what Mr. Watson had said and I think was referred to
19 by Mr. McDonald, although not directly, and that's the case that you find in the Perpetual
20 brief at tab 7. The -- you'll recall this from yesterday, the Quebec case, which is the only
21 case that's been referred to for the proposition that a trust is not a person. And the one
22 thing I want to point out to Your Lordship, and this is again in the headnote, we've
23 actually read the case but it's in a headnote, that says: (as read)
24
25 Trust CP ...
26
27 This is on the second page, My Lord.
28
29 Trust CP was created under article 12 (INDISCERNIBLE) of the
30 Civil Code of Quebec.
31
32 That's a specific created under the Civil Code and at that particular trust in this case, and I
33 believe this is at paragraph 6, I don't read the French but I -- I have somebody who can,
34 that says even in this case the trust accumulated debts. So that's one aspect of it. And then
35 Houlden and Morawetz reference to this particular case that I believe Mr. McDonald
36 referred to yesterday as well confirms that this case was decided under the Quebec Civil
37 Code and, pursuant to that Code, the trust is a statutory trust and is not given legal
38 personality by the Legislature.
39
40 So I don't believe, My Lord, this case stands for a general proposition that's applicable in
41 our case that a trust is never a person. And that's the, as I say, the only authority that we

1 have from our friends to support that proposition. Thank you, My Lord.
2
3 THE COURT: Thank you, sir.
4
5 Couple of times yesterday, Mr. de Waal, you refer to the phrase or used the phrase "these
6 are real numbers". Can you expand on that? And, just to remind you of the context, I
7 think you are, in each case, referring to financial statements.
8
9 MR. DE WAAL: Yes, My Lord. What I mean by that is as
10 opposed to the submission you had from Mr. McDonald this morning, the numbers on the
11 financial statements may be subject to all kinds of adjustments or we've heard about
12 discount rates and depreciation. In fact, what we were dealing with for provisions and
13 you're looking at the Perpetual financial statements and you're dealing with a provision,
14 you're not dealing with a number that somebody just made up while calculated on some
15 basis. We're dealing with a number that represents management's best estimate of the
16 present value, so we don't have to worry about further discounting that, present value of
17 the future abandonment and reclamation costs. And it's a number, if you look at the IFRS
18 statement that you've just been referred to, My Lord, they have an obligation, and I'll just
19 find the reference, they have an obligation on the company in the Perpetual -- in the
20 earlier OWA brief --
21
22 THE COURT: Yes. I remember it. It's got the three stages to
23 it.
24
25 MR. DE WAAL: Yes, My Lord. At page 1153, and this is at tab
26 B -- tab 1, I apologize, tab 1 of the OWA brief filed on September 29.
27
28 THE COURT: Go ahead, sir.
29
30 MR. DE WAAL: And at page 1153 under the heading "Best
31 Estimates": (as read)
32
33 The amount recognizes the provision shall be the best estimate of the
34 expenditure required to settle the present obligation at the end of the
35 reporting period. The best estimate of the expenditure required to
36 settle the present obligation is the amount that an entity would
37 rationally pay to settle the obligation at the end of the reporting
38 period or to transfer it to a third party at that time.
39
40 So when I say it's a real number, My Lord, it's not an exact number that you'd find on an
41 invoice, but it's not just a notional number either. It represents the best estimate of

1 management based on all the information presumably that management has available to
2 it, of the amount that it would rationally pay to settle that obligation. In that sense, My
3 Lord, as I say, it's a real number, it's not a deemed or a fictional number that you can
4 disregard because of all the contingencies that have not been taken into account. This is --
5 when Perpetual says it's $132 million, it's very close to $132 million.
6
7 THE COURT: So is your position, and over the last couple of
8 days we've referred, I'm using "we" in the royal sense, we've referred to liabilities, we've
9 referred to obligations, and we have referred to provisions, and, as I understand it,
10 notwithstanding in the Perpetual Energy Inc.'s financial statements which are a
11 consolidated financial statement, notwithstanding we have the word provision (note 13),
12 that the total liability line, your view is, on behalf of your client, that that is a liability.
13
14 MR. DE WAAL: My Lord, it's -- as far as the financial statements
15 go, it's not an asset, it's not equity, it's a liability.
16
17 THE COURT: Yes. Well, we're not talking about assets, we're
18 not talking about equity, although I might ask you a question about that. We're talking
19 about that one line that's phrased as provisions, and it's in the -- under the heading
20 "Liability", is it your position that that is a liability or is it an obligation? Or is it a
21 provision?
22
23 MR. DE WAAL: It is a provision, My Lord, which is defined as
24 liabilities of uncertain timing or amount.
25
26 THE COURT: Okay. And your view is that it is an obligation
27 that should be taken into account for purposes of insolvent person, the balance sheet test,
28 in section 2 of the *BIA;* is that correct?
29
30 MR. DE WAAL: Yes, My Lord. And, again, if I can refer Your
31 Lordship to the -- to that tab in my friend's, Mr. Lenz's, brief tab 1, the IFRS -- the extract
32 at page 1149 --
33
34 THE COURT: Go ahead.
35
36 MR. DE WAAL: -- you'll have the definition of "provision".
37
38 THE COURT: Yes.
39
40 MR. DE WAAL: And it says: (as read)
41

1 Provision shall be recognized when (a) an entity has a present
2 obligation (legal or constructive) as a result of past events ...
3
4 THE COURT: Yes.
5
6 MR. DE WAAL: Et cetera, et cetera. "And a reliable estimate can
7 be made of the amount of the obligation."
8
9 THE COURT: Yes, I know what the -- I know what Mr. Lenz's
10 brief has said. I'm asking you, on behalf of your client, is that your position?
11
12 MR. DE WAAL: Yes, My Lord.
13
14 THE COURT: Thank you.
15
16 So, and I'm just exploring matters here, so if we look at the consolidated balance sheet for
17 Cenovus, and I'm going there because we don't have a deferred income tax line in
18 Perpetual, we've got a note that talks about it but it comes to zero, so I just want to focus
19 on Cenovus and I want to focus on CNRL. In both cases, we have a deferred income tax
20 line that's under liabilities. Is that a liability? Is that an obligation? Or is that a provision?
21 And I'm asking for -- just in the context of the definition of insolvent person.
22
23 MR. DE WAAL: Well it's certainly an obligation. The question is
24 whether it's certain with respect to time or amount. But it's certainly a liability and it's an
25 obligation.
26
27 THE COURT: Okay.
28
29 MR. DE WAAL: It's just a deferred --
30
31 THE COURT: Okay. You've used two terms there. You've said
32 it's certainly an obligation and then you said it's certainly a liability. Which box is it in?
33
34 MR. DE WAAL: My Lord --
35
36 THE COURT: And why do you say that?
37
38 MR. DE WAAL: It's in the liability box, My Lord. But
39 obligations can be liabilities, too. So these are not mutually exclusive and we say it's
40 certainly an obligation but it's definitely also a liability.
41

1 THE COURT: So when you're -- if you were determining
2 solvency of a company that has $10 million of deferred taxes, would that be relevant for
3 purposes of the insolvency test? The balance sheet test under item C?
4
5 MR. DE WAAL: Yes, My Lord.
6
7 THE COURT: Why?
8
9 MR. DE WAAL: Because it's an obligation that is taken into
10 account in determining whether, for the purposes of section 96, that company is able to
11 meet that obligation.
12
13 THE COURT: Okay. Let me take that under advisement.
14
15 I want to take all parties to Bennett on Bankruptcy. I'm very cognizant of *Stelco* and the
16 decision of Justice Farley, and we're going to talk about that in a minute, and another
17 decision by Justice Newbould. Now, historically, I'm just going to give you a bit of an
18 overview because something arose in the last 24 hours, or since we started this session
19 yesterday, that has caught my attention. But if you look at, and I had this in my file for
20 historic reasons in Pricewaterhouse, I looked at the definition of insolvent person initially
21 in the one I had in my office which was 2019, 2018, and on page -- I'm just going to give
22 you a history here and there's a reason for it. In the 21st edition of Bennett on Bankruptcy
23 issued back in 2019, the definition of insolvent person on page 51 over to page 52 lays
24 out the two-prong test that was -- that's been touched on here. And in that two-prong test,
25 and I appreciate that those on the phone will not have a copy of this which is why I'm
26 giving you a history, it states in respect of item C, which is -- it's paraphrased here as: (as
27 read)
28 Insufficient assets if liquidated to pay debts (balance sheet or
29 liquidation test).
30
31 The narrative says: (as read)
32
33 This is often referred to as "the balance sheet or liquidation test". In
34 calculating the debtor's net worth, one has to include obligations
35 currently payable and one does not have to include claims accruing
36 due.
37
38 And the footnote to that is footnote 31 and the case reference is *Enterprise Capital*
39 *Management Inc.* Now, if you have occasion to look at that, the preceding footnote refers
40 to *Stelco* but that refers to paragraph A. So, that's the narrative there.
41

1 The same narrative, and I will concede I haven't looked at it word for word, but I think
2 it's exactly the same narrative and case reference in the 2016. That was the one I looked
3 at. So it says, again, and I'll just paraphrase here: (as read)
4
5 > With respect to the balance sheet test (and factor C), property if sold
6 > at fair valuation would not be sufficient to pay his or her debts,
7 > refers to the net worth statement where the creditor needs to
8 > establish if a debtor does not have sufficient assets, if liquidated at
9 > fair value to satisfy the debts. This is often referred to ...
10
11 And here's the key sentence:
12
13 > ... as the balance sheet or liquidation test. In calculating the debtor's
14 > net worth, one has to include obligations currently payable and one
15 > does not have to include claims accruing due.
16
17 Footnote 24 in this edition, and of course just to repeat myself for clarity, if you want to
18 have a look at it, this is the 18th edition on Bennett on Bankruptcy 2016.
19
20 So, I'm not asking you a question yet but I will be, so I have had that in my historic file, I
21 had asked the library some time ago for the 2020 edition and since we started the
22 proceedings yesterday, because we didn't have it in the library and my edition has not yet
23 been delivered to me - the one I purchased for my own purposes because I write in them -
24 it showed up in my basket - my in-basket. It has the following, and it's changed. And,
25 again, this is the 22nd edition issued in 2020, Bennett on Bankruptcy. It has an expanded
26 commentary which includes *Stelco* in more detail with respect to paragraph A - the
27 cashflow test. With respect to paragraph C, and this incidentally, for your benefit, is on
28 page 48 and 49 of this 22nd edition, and it says again, although there's more paragraphs
29 here, in the text it reads as follows. There's a lot of parallels to what I just stated but I'm
30 going to read it and then I'm going to read you the footnote because instead of just
31 referring to *Enterprise Capital,* it has now two paragraphs and it refers not only to
32 *Enterprise Capital,* it also refers to *Stelco.* So this ties right into I think what we've been
33 discussing over the last couple of days, and I would appreciate your comments on it. So
34 the paragraph that's relevant in the narrative before the footnote, and I'll come to the
35 footnote in a second, is as follows: (as read)
36
37 > And factor (c) "property if sold at fair market value would not be
38 > sufficient to pay his or her debts" refers to a net worth statement
39 > where the creditor needs to establish that the debtor does not have
40 > sufficient assets, if liquidated at fair market sale, to satisfy the debts.
41 > It is often referred to as the "balance sheet or liquidation" test. In

1 calculating the debtor's net worth, one has to include obligations
2 currently payable and one does not have to include claims accruing
3 due. Reference footnote 31.
4
5 There's one more sentence to that paragraph and it just says, "Factor (a) is the most
6 common in practice." So I'm going to go -- I'm sticking with paragraph C.
7
8 So I go down to footnote 31 and, again, to repeat myself, it no longer just refers to
9 *Enterprise Capital,* it now refers to more cases. I'm going to take a second to read it and
10 I'd like you to think about this and provide your thoughts. Again, footnote 31: (as read)
11
12 *Enterprise Capital Management Inc. v. Semi-Tech Corp.,* a second
13 case is now added, *Royal Bank of Canada v. Oxford Medical*
14 *Imaging ...*
15
16 Gives a citation. The narrative continues:
17
18 Where the Court, in following the *Enterprise Capital* case stated at
19 paragraph 39 that:
20
21 It is inappropriate to include every debt payable at some
22 future date for the purposes of determining insolvency. This
23 would render numerous corporations insolvent. Rather, debt
24 obligations ought to be measured against the fair valuation of
25 the company's property and limited to obligations currently
26 payable or properly chargeable.
27
28 Second paragraph to that footnote: (as read)
29
30 On the other hand, if the debtor is facing a liquidity crisis, the Court
31 will take that factor into consideration where debts are payable at
32 some future date. See, for example, *Re: Stelco Inc.,* leave to appeal
33 to the Court of Appeal refused, for a comprehensive review of the
34 factors and law regarding whether a debtor company is insolvent.
35 The Court reviewed variations of the insolvency test to determine
36 whether a debtor will be insolvent if it cannot meet its future
37 obligations or would be facing a liquidity crisis if it could not meet
38 its obligations as they become due within a short period of time.
39
40 End footnote. I pause to give you that because it, in large part, overlaps with many of the
41 submissions today and I would appreciate your comments on the distinction that's drawn

1 there, and that question is open to all parties.
2
3 And I'll caveat it by saying that if you want to take some time to review this and give me
4 a page or two of written submission, I'm certainly open to it because this certainly was
5 not in my hands from our library until the last 24 hours. Indeed, and about the last 48
6 hours, I was asked if I wanted to put a hold on the book when it came in and I just said
7 "yes", not expecting it to actually tie so closely into what we're talking about today
8 insofar as it refers to both *Enterprise Capital,* which Mr. McDonald highlighted, and
9 *Stelco,* which Mr. de Waal highlighted. Comments?
10
11 MR. LENZ: My Lord, it's Ken Lenz, I can make a couple
12 comments perhaps?
13
14 THE COURT: Certainly.
15
16 MR. LENZ: So the definition of insolvent person also has
17 that requirement that you have to have provable claims amounting to at least $1,000, and
18 in those cases, if a company with long-term liabilities, you know, someone brought a
19 petition against them, they could just pay off that debt and have the petition discharged
20 because they wouldn't get to the second part of the test. I think that the ambiguity arises
21 because, maybe as Mr. de Waal pointed out, this definition is used both for determining
22 when a person should properly be put into bankruptcy. And I'm reading -- or listening to
23 what you say from Bennett. It seems to be permissive for the Court to not take into
24 account long-term obligations if the company otherwise seems to be functioning.
25
26 Unfortunately, the definition is also there to deal with the situation in which there's a
27 preference or a transferred undervalue. And, in those circumstances, I would argue that a
28 fairly more strict application of the section would be required. It's one Act and I think
29 that, of course we struggle with applying the same definition, but I think if I'm listening --
30 if I'm hearing you correctly, all Mr. Bennett says is that it -- the Judge has some
31 discretion to not consider long-term obligations that aren't currently due, not that he
32 ought to in all cases or he ought not to in all cases. And then I won't repeat my arguments
33 on why a particular view of it should be taken in this case, but I'll let -- I'm not sure that's
34 helpful but that would be my comments on those conflicting authorities.
35
36 THE COURT: Thank you, Mr. Lenz.
37
38 Other comments?
39
40 MR. MCDONALD: My Lord, I'll start perhaps by saying that I think
41 that we should take you up on your offer of a one or two-page written response. Trying to

1 listen and interpret a passage in a footnote, I, at least, am finding somewhat difficult and I
2 think I could benefit from thinking about it and reading -- reading the passage. So if you
3 don't mind, we'd like to address it in writing.
4
5 But could I just say two things today? The first, is why we're even talking about this, and
6 we're talking about this of course because the *Stelco* case was included in the Trustee's
7 brief and so we studied it and tried to get a better understanding of the law and presented
8 to you the *Enterprise* case, and also in our authorities was the *Royal Bank v. Oxford* case.
9 But you don't even get to this analysis if you accept that ARO is embedded in the value
10 of the asset. It's only if you don't accept that proposition, and my submission it's beyond a
11 doubt but I know my friends say, no, there's a -- you have to look at ARO separately as a
12 separate deduction, it's only if you decide you have to look at ARO separately as a
13 separate deduction that you then have to assess whether it's the *Stelco* line that's most
14 appropriate to apply to (INDISCERNIBLE) a provision like ARO, or whether it's the
15 *Enterprise* line. And I'm taking it from what you just read to us, that Bennett is generally
16 referring, at least in the circumstances that we have, the *Enterprise* line. But, as I say, I'm
17 struggling to listen and write and think all at the same time. It seems to be too much for
18 me.
19
20 THE COURT: Yes, and I certainly appreciate you being
21 interesting in taking up the offer and of course that's available to your friends. I just
22 wanted to highlight that particular point because it ties right into the jurisprudence that
23 we had been looking at.
24
25 Any other comments? Mr. de Waal, would you be of the same mind? And, again, that's a
26 question, that's not a directive, sir.
27
28 MR. DE WAAL: No, I'll take exactly the same position as Mr.
29 McDonald. I'll say a few things and then I'll (INDISCERNIBLE) the right to give you
30 something in writing. But maybe make one or two comments?
31
32 THE COURT: Certainly.
33
34 MR. DE WAAL: It sounded to me from what you've read that
35 they are in fact two different situations. The first, is where there's a concern about
36 whether a company or corporation should be rendered insolvent, and that's -- those are
37 the words used in that context. So if there's a concern about the fact that many
38 corporations may be rendered insolvent, you require a narrower test because you don't
39 want that and you don't want future liabilities that could otherwise be addressed in due
40 course to suddenly make a corporation that's relatively healthy insolvent. And there's a
41 reference also to the debtor company as opposed to the insolvent company or the

1 bankrupt company. So we say that's the one line, before you get into bankruptcy, you
2 apply that test and for good reason. We can understand why that is the position.
3
4 However, as soon as you have a company in bankruptcy, we have a different test and
5 that's *Stelco* and that is *Anderson.* And *Anderson,* in fact, is a section 96 case that we've
6 referred you that says specifically that contingent liabilities aren't (INDISCERNIBLE) to
7 be included. So now we have a broader perspective because of the remedial nature of the
8 legislation and the broad interpretation that that requires.
9
10 My Lord, as I say, those are just preliminary comments and we'll take you up on your
11 offer to give you one or two pages just to address that.
12
13 THE COURT: Okay. Thank you.
14
15 And if there's --
16
17 MR. WATSON: Sir, it's Scott Watson. I'm in agreement with
18 your offer to provide a few pages of written comment.
19
20 THE COURT: Thank you, Mr. Watson.
21
22 Mr. McDonald, do you have any comments on the deferred tax question I raised in terms
23 of whether it is a liability, an obligation, or a provision that would be relevant for
24 purposes of the definition of insolvent person?
25
26 MR. MCDONALD: Well, I do have some comments, to be candid. I
27 don't have any expertise in deferred income taxes and their financial statement
28 presentation but if I understand it it's really a notional accounting umbrella and is not an
29 amount payable and would not be considered an insolvency analysis.
30
31 THE COURT: Okay. I'm going to open up the offer I had in
32 respect of the Bennett on Bankruptcy. If the parties wish to include -- this is to my mind
33 an important point that would assist the Court in its analysis of the provision for ARO.
34 So, Mr. McDonald, Mr. de Wall, Mr. Lenz, and Mr. Watson, if you want to add a bit with
35 respect to deferred income taxes which do show up, it's a footnote in the Perpetual
36 financial statements consolidated, it's an actual line item in Cenovus and CNRL -- I'm
37 just referring those two just for reference. We could continue on but I cut it off at those
38 two. So the Court again would benefit from that additional input. And I'll note just for the
39 record that other liabilities in the Cenovus financial statements is above deferred income
40 taxes. Other long-term liabilities in CNRL is above deferred income taxes. I'm not saying
41 that's relevant, I'm just noting that for your further consideration.

1
2 Did you have any comments, Mr. Lenz or Mr. Watson, on deferred taxes? And certainly
3 don't feel obligated to respond.
4
5 MR. LENZ: My Lord, I'm perhaps even worse off than Mr.
6 McDonald when you start mentioning things about tax so I will reserve my right there,
7 thank you.
8
9 THE COURT: Certainly, thank you. Mr. Watson?
10
11 MR. WATSON: I'm in a similar position. I know I paid a whole
12 bunch last month and that's about as close as I come so I'll defer and include something in
13 writing.
14
15 THE COURT: Okay, thank you, sir. I'd like to turn back to
16 Perpetual Energy Inc. financial statements again. It's still along the same narrative. I'm
17 going to direct this question to Mr. de Waal. We have a lot of items listed under liabilities
18 and then we've got some additional matters, line items under equity. Is it -- let me put this
19 into a question. What is your view, Mr. de Waal, on the commitments footnote near the
20 bottom, and it's phrased "Commitments (Note 14)." And when I go to Note 14 I see, "At
21 December 31st, 2016, the company's contractual obligations over the next 5 years and
22 thereafter are as follows," and it lists a whole bunch 2017. We'll just focus on 2017.
23 We've got obligations there. What's your position on those items vis-à-vis insolvency at a
24 point in time?
25
26 MR. DE WAAL: My Lord, again, consistent with what we said
27 earlier about it, I think it depends on whether you're looking at this to determine whether
28 Perpetual should be rendered insolvent -- in that case I'll take a narrow view of future
29 commitments, contractual commitments -- or whether you already have a bankruptcy
30 situation and you then look at how that would apply, for example, in the section 96
31 scenario. Again, this has nothing to do with the financial statements directly. But with
32 respect to solvency, again, if we look at -- and if we're dealing with Perpetual in a section
33 96 context, for example, and that's not the case here but if we were dealing with Perpetual
34 in a section 96 context, those we say pursuant to *Stelco* will be relevant.
35
36 THE COURT: Okay, thank you.
37
38 MR. DE WAAL: My Lord --
39
40 THE COURT: So -- go ahead, sir.
41

1 MR. DE WAAL: -- can I just -- I misspoke. Ms. Rasmussen just
2 corrected me again. But I just want to make sure that -- that the distinction between
3 obviously bankruptcy and insolvency, and when I say going into insolvency what I mean
4 is going into bankruptcy as opposed to insolvency. I'm not sure whether that was a real
5 issue but I misspoke and I apologize for that.
6
7 THE COURT: Thank you, sir. Mr. McDonald, in the brief that
8 the industry interveners provided in paragraph 12 of the document that was filed on
9 September 25th it states, and I'm paraphrasing a bit here and seeking your comments, if
10 any: (as read)
11
12 The Supreme Court of Canada acknowledge that the second part of
13 the *Abitibi* test was met in *Redwater*, namely that ARO were a debt,
14 liability or obligation that was incurred before the debtor became
15 bankrupt. While the Supreme Court of Canada ultimately concluded
16 in *Redwater* that ARO was not a claim provable in bankruptcy, the
17 Court still recognized that ARO are a debt, liability, or obligation for
18 the purposes of considering the value of an asset.
19
20 Any comments on that?
21
22 MR. MCDONALD: … in the first line that --
23
24 THE COURT CLERK: Mr. McDonald, you were muted that whole
25 time. You'll have to start over.
26
27 MR. MCDONALD: I'm sorry, My Lord.
28
29 THE COURT: Go ahead. Is Mr. McDonald muted now?
30
31 MR. MCDONALD: I'm struggling with my mute button, my
32 apologies.
33
34 THE COURT: That's okay.
35
36 MR. MCDONALD: I had started saying that I note just from my
37 own notes when I read that that it seems quite correct to say what is said in the first
38 sentence, that the second part of the *Abitibi* test the Court agreed was met. My note at the
39 end of the next sentence, which says, "While the Supreme Court of Canada ultimately
40 concluded …" et cetera, is that it doesn't say that. The reference had been to paragraph 29
41 of *Redwater* and as I read what is being referred to the Court is just saying what I've been

1 saying repeatedly. And I know I read this passage to you but what Alberta has chosen is a
2 licensing regime which makes such costs, meaning environment costs of ARO, an
3 inherent part of the value of the licensed assets.
4
5 So if what my friend is saying in the brief is ARO need be considered in determining the
6 value of the assets, I think he's --I think it's correct. But that's not what the statement says
7 and, in my submission, it goes too far and is wrong when my friends says the Court
8 recognized in paragraph 29 that ARO are a debt, liability, or obligation. And I don't know
9 if we're -- maybe we don't need to continue any further on the difference between liability
10 and obligation. We know ARO is not a debt and it is indeed considered as part of the
11 value in considering the value of the asset in the very way that the Court says it at
12 paragraph 29 and in the way Mr. McDaniel's report treated it.
13
14 THE COURT: Thank you. Mr. Watson, in paragraph 16 -- and
15 I'm just seeking clarification here. Paragraph 16, the second sentence, "However, ARO is
16 not a statutory fiction or a liability traded solely as a result of statute or an AER
17 directive." Can you explain what you mean by that? And I'm focused on the phrase or the
18 word "not." "ARO is not a statutory fiction [but more importantly] or a liability traded
19 solely as result of a statute."
20
21 MR. WATSON: Pardon me. I believe the first part of that
22 sentence is addressing a comment you made in a late September application and I think it
23 related to the fact that AER said "deemed" and then I believe the Court's comment was,
24 "When I see deemed I think it's a statutory fiction." We are trying to address that, which
25 it's not. And it's a liability -- it is a legislated liability that it can't be avoided. But the real
26 reference is that all -- the follow sentence, "All three industry interveners confirm that it
27 is an industry practise, a recognized liability that depresses the value."
28
29 THE COURT: Okay.
30
31 MR. WATSON: So the second sentence I refer to kind of
32 modifies the first sentence that you referred to.
33
34 THE COURT: Just let me maybe probe it a bit more here.
35 Would there be an ARO liability recorded on the balance sheet if there was not some
36 statutory framework?
37
38 MR. WATSON: I'm not exactly certain I can answer that
39 because I certainly did not ask the industry members that hypothetical. But --
40
41 THE COURT: Yes, and I'm not trying to trap you, Mr. Watson.

1 I'm just trying to understand why that statement is phrased the way it is to make sure I'm
2 not misconstruing it, that's all. And if for some reason you don't want to answer it, that's
3 fine.
4
5 MR. WATSON: Well, I don't think that's ever acceptable to tell a
6 Court they're not going to answer something.
7
8 THE COURT: Well --
9
10 MR. WATSON: Let me try.
11
12 THE COURT: Certainly.
13
14 MR. WATSON: It's not a statutory fiction. The AOR is in fact a
15 recognized in the industry aspect of an assets value determination and it would always be
16 recognized as such whether or not there was an AER directive or not.
17
18 THE COURT: Yes.
19
20 MR. WATSON: So the point being industry recognizes that
21 these end of life responsibilities are there. For instance, in this case there's no present
22 AER designation or directive that these particular wells are going to be -- or are presently
23 orphaned, although, my clients are confident that it's a certainty that that's where they're
24 headed. I believe that's also the position of the Orphan Well Association.
25
26 So it is a legislated liability presently but it’s not an AER directive presently. It is an
27 element of the industry that they recognize it as a liability in the calculation and
28 determination of the value of assets.
29
30 THE COURT: Okay.
31
32 MR. WATSON: I think that was the point we're trying to make
33 there.
34
35 THE COURT: Okay. And I understand what you've said. Is the
36 "not" to go to both the statutory fiction and the liability or is the "not" only to go to the
37 statutory fiction?
38
39 MR. WATSON: Statutory fiction only. I see the ambiguity.
40
41 THE COURT: Okay, that makes sense to me, sir.

1
2 MR. WATSON: It's not a statutory fiction.
3
4 THE COURT: That --
5
6 MR. WATSON: Yeah.
7
8 THE COURT: -- okay.
9
10 MR. WATSON: I'm sorry, I -- now that I read it again, I can see
11 where someone might interpret the "not" as running through the (INDISCERNIBLE).
12
13 THE COURT: Yes, okay. Thank you. But you've touched on
14 something that is embedded in my questions later and I may as well raise it now. In
15 *Redwater* there was an AER directive, was there not?
16
17 MR. WATSON: There was an AER -- I thought it was called a
18 Disposition Notice (INDISCERNIBLE) --
19
20 THE COURT: Well, let me -- yes. And again, this is just part
21 of narrative. I'm not trying to trap anyone. I try never to trap people. I just want to make
22 sure I understand. I had always understood -- and I looked at this some time ago, I didn't
23 go back and look at it today when I was preparing the questions -- but my recollection is
24 that there was a notice of some sort that had been issued vis-à-vis the *Redwater* wells.
25
26 MR. WATSON: Yes, that's my understanding as well.
27
28 THE COURT: Okay. And my question -- my question to Mr.
29 McDonald and to Mr. de Waal and to the interveners if they wish to comment, does it
30 matter -- for purposes of the analysis does it matter whether or not a notice has been
31 issued by an authoritative body vis-à-vis this alleged obligation? I'm going to use the
32 term obligation for now. And I'll tell you why I'm asking the question. I reviewed some
33 old jurisprudence, and I'll touch on it in a minute, and there seems to be a threat years ago
34 -- and this provision in the statute hasn't changed for over 100 years -- that would suggest
35 to me that you have to have something more than just an accounting entry. And that's
36 open for discussion but I'm phrasing it as a question right now. Mr. McDonald.
37
38 MR. MCDONALD: My Lord --
39
40 THE COURT: Sorry, go ahead.
41

1 MR. MCDONALD: I'm not sure if I'm answering that last question
2 that you said does it have to be more than an account entry but I've probably said that so
3 many times you're tired of hearing me say that, and I say you said it too in your reasons at
4 paragraph 358. But to address the question about that's what happened in *Redwater*, my
5 recollection -- and I didn't pull it up while you were asking the question -- is that there
6 was an abandonment order in *Redwater* which made the abandonment of those wells
7 required and inevitable. And there is no abandonment order in the case of Sequoia. And
8 that really draws me to something that I put in our September 26th brief and neglected to
9 include that concept, and could I ask you to turn to that brief at page -- or paragraph 4.
10
11 THE COURT: Which brief is that, sir?
12
13 MR. MCDONALD: September 26th.
14
15 THE COURT: September 26th.
16
17 MR. MCDONALD: It's the one in response to the interveners.
18
19 THE COURT: I'm going to just bring it up electronically here,
20 just a second. I may have taken it downstairs. I do have it here, sorry. Go ahead, what
21 paragraph again, sir?
22
23 MR. MCDONALD: Paragraph 4, page 1.
24
25 THE COURT: I'm there.
26
27 MR. MCDONALD: And we're making the point in the overview
28 here that when the interveners said in order to get permission to participate in these
29 proceedings that they would be directly and significantly affected. That it's not quite so
30 clear and indeed it's very much conditional and speculative. And the -- but I'm drawing
31 your attention to it now and in conjunction with the abandonment order aspect of your
32 question to show how uncertain the -- or full of assumptions the idea that -- of the -- the
33 amount or the quantification or the certainty of the ARO is.
34
35 And that is -- this will only come home to roost on OWA or the industry participants if
36 the trust loses this case. And then if the Trustee doesn't sell the Goodyear assets, which it
37 has not tried to do, then I suppose I can add in there, although it's not in the document, if
38 abandonment orders are issued and if the AER declares the Goodyear assets to be
39 orphans, and then in the case of the industry participants if the AER increases the levy as
40 a result of the declaration that they are orphans. So the absence of an abandonment order
41 in this case makes the ARO even more uncertain, if I can put it that way.

1
2 THE COURT: Thank you for that. Mr. --
3
4 MR. LENZ: My Lord, may I speak to this briefly?
5
6 THE COURT: Certainly, sir. Go ahead.
7
8 MR. LENZ: Yes, I believe that there were some orders
9 directing that certain things be done in *Redwater*. I believe that has to effect whatsoever
10 on this case. The reason the AER issues those orders is because it triggers their ability to
11 use other remedies against the directors and officers, sort of the name and chain
12 provisions of the Act. The ability to prevent them from getting licenses in the future, they
13 have to have an order that's breached in order to do that So they do that as a way of
14 leverage. But the actual obligation to clean up is, you know, as I said in my submissions
15 it's part the lease from the Crown, it's part of the license from the AER, it's part of -- you
16 know, you accept that obligation when you start the well. It's not something that's
17 dependent on an order that's being issued. But, you know, I will say something in favour
18 of what Mr. McDonald is saying, it's pretty clear that the debt to the AER does not arise
19 until they actually perform the work and create the debt. You know, it's not -- you know,
20 they don't have an immediate right even though there is an obligation to sue on the debt
21 whether or not they issue an order. I hope that's helpful, Sir.
22
23 THE COURT: Thank you, sir. Mr. de Waal.
24
25 MR. DE WAAL: My Lord, if I could go back to the IFRS
26 Standards that's at tab 1 of Mr. Lenz's brief I think the answer is in there, at least as we
27 see it, My Lord, at page 1149.
28
29 THE COURT: Just bear with me here, sir. Go ahead.
30
31 MR. DE WAAL: It's again under Provisions: (as read)
32
33 A provision shall be recognized when:
34
35 And there are three requirements: (as read)
36
37 (a) An entity has a (INDISCERNIBLE) obligation, legal or
38 constructive, as a result of past events [and]
39
40 And I'm reading "and" in because it's conjunctive: (as read)
41

1 It's probable that an outflow of resources embodying
2 economic benefits will be required to settle the obligation and
3 a reliable instrument can be made of the amount of the
4 obligation.
5
6 If these conditions are not met no provision shall be recognized.
7
8 So that means that if there's a provision in the Perpetual Energy financials, that means
9 that entity recognizes that it has a present obligation -- and that addresses the notice
10 requirement -- but it's a present obligation that it sees and it's probable that it will have to
11 pay, and it can make a reliable estimate. And then if you go over the page to the top of
12 the next page it says, starting in fact at the bottom of the previous page: (as read)
13
14 In such a case an entity determines whether a present obligation
15 exists by taking account of all the available evidence, including, for
16 example, the opinion of evidence. [And then] If the evidence shows
17 --
18
19 And then we have the two scenarios at the top of page 1150: (as read)
20
21 -- where it is more likely than not that a present obligation exists at
22 the end of the reporting period. The entity recognizes a provision if
23 the recognition criteria are met and where it's more likely than not
24 that no present obligation exists at the end of the reporting period,
25 the entity discloses a contingent liability and the possibility of an
26 outflow of resources embodying an economic benefit is removed.
27
28 That's paragraph 86. So to answer your question, My Lord, the fact that we have these
29 provisions in the Perpetual financial statements show that Perpetual recognized a present
30 obligation and a probability that they would have to pay at the end of that to settle the
31 obligation and to recognize that they had enough information to make a reliable estimate.
32 And so whether a notice is required or not is perhaps subsumed in these requirements but
33 that's the test.
34
35 MR. WATSON: My Lord --
36
37 THE COURT: Go ahead.
38
39 MR. WATSON: -- I'm sorry to jump in again. Might I just give
40 you a couple of references to the *Redwater* decision on this (INDISCERNBLE) notice
41 point. Paragraph 51 points out that the abandonment -- or makes reference to the

1 abandonment orders, as does paragraph 52. And there's a section starting at paragraph
2 142, and this is all in -- it's part of the analysis of the *Abitibi* test -- but the second
3 sentence in 142 says: (as read)
4
5 In my view it is not established either by the chamber judge's factual
6 findings or by the evidence that it is sufficiently certain that the
7 regulator will perform the abandonments and advance the claim for
8 reimbursement.
9
10 So even with the benefit of an abandonment order in *Redwater*, the Court found there
11 wasn't sufficient certainty that basically they will become -- or the regulator will abandon
12 them and seek reimbursement.
13
14 THE COURT: Thank you, sir. Anything else on that. Mr.
15 Watson?
16
17 MR. WATSON: My Lord, it's Scott Watson.
18
19 THE COURT: Yes, sir.
20
21 MR. WATSON: A couple of points. It's set out in paragraph 10
22 of our brief we talk about *Redwater* and two paragraph, 157 and 158. And in those two
23 paragraphs the Court goes on to characterize the AOR obligations as forming a
24 fundamental part of the value. And as these regulatory conditions also
25 (INDISCERNIBLE) the value and they are essential to the productive life cycle of the
26 assets. Those are the conclusions which I direct the Court to that do not refer to the
27 issuance of an abandonment order at all and there's statements made independent of the
28 abandonment order.
29
30 The abandonment order, and I believe this was something that Mr. Lenz was hinting at, is
31 actually about when, not if. And we heard Mr. McDonald talk about the ifs and the
32 uncertainties and the like. I want to make sure that the Court is aware of this argument.
33 There is a distinction to be drawn between a conditional liability and a contingent
34 liability. The Court in *Redwater* when talking, albeit in the context of the *Bankruptcy Act,*
35 said at paragraph 36: (as read)
36
37 A claim may be provable in bankruptcy proceeding even if it's a
38 contingent claim. A "contingent claim" is a claim which may or may
39 not ever ripen into a debt according to some future event that does or
40 does not happen.
41

1 That's a contingent claim. A conditional liability is a liability that arises when certain
2 conditions arise. It's clear that the AROs are certain obligations and unavoidable.
3 *Redwater* calls them inevitable at paragraphs 157 and 158. And so they're not contingent,
4 they're, as the industry member said, real and certain. However, they are conditional upon
5 the life of the asset, its decline factors. Perhaps the AER's designation and the clean-up
6 carried out by other parties and the claim being advanced, the orphan well claim. Those
7 are conditions which start to solidify and crystalize the obligation, the obligation which is
8 inevitable, certain, and exists and relates exactly to the value of the assets.
9
10 So I think that's a crucial distinction and I wouldn't want the Court to lose sight of it, that
11 contingent and conditional are two different things and I believe what we're talking here
12 -- I submit that's what we are talking about here -- with ARO is that it exists and its
13 operation and quantification is conditional upon the occurrence of some subsequent
14 events. But that doesn't detract from the industry member's evidence that it's a certain
15 obligation. So I just want to make sure that that distinction is brought to the Court's
16 attention. I think it's an important one. And I think it puts in focus the discussion about
17 whether or not abandonment orders, where they fit in the timeline of events. Because I
18 think we're all agreed that this ARO obligation attaches the assets and is immediate. As
19 soon as the asset's there, a license is issued, there's that liability, that obligation. When
20 and how it becomes either as firm as a debt or is acted upon are all based on some
21 conditions but that doesn't make it conclusive.
22
23 That does not mean that -- it may or may not ever ripen into a debt. The industry
24 member's evidence, which is uncontroverted, was not touched on cross-examination, was
25 that these are certainties. The industry views them that way. And they don't depend on
26 whether a future event does or doesn't happen. We all know that every well's gonna
27 decline and is gonna have to be shut and abandoned and reclaimed. It's an axiom of the
28 industry. So I suggest that we'll keep using the term contingent, a more proper term
29 would be conditional. Those are my submissions.
30
31 THE COURT: Thank you.
32
33 MR. LENZ: And, Sir, it's Ken Lenz again. One more point. I
34 just as a practical matter once Sequoia's ARO or wells are orphaned, which they will be
35 and we all know that with a 99 percent certainty, the Orphan Well Association will do the
36 clean-up of those wells. That will take place over a period of years. By the time it's done
37 and the AER would be in a position to make a claim, Sequoia will be long gone. So as a
38 practical matter what happens is the wells get orphaned and then they go into an
39 inventory and, you know, the bankrupt company is long gone. There's no point in making
40 a claim. That's how it actually happens, for your information.
41

1 THE COURT: Thank you. Any comments, Mr. McDonald?
2
3 MR. MCDONALD: Sorry, My Lord, just one point just on Mr.
4 Lenz's comment. He says it's a 99 percent certainty that these wells will become orphans.
5 And, of course, we don't know, but we do know that there's been no effort to sell them.
6 And we don't know when the Trustee is going to try to sell them and we don't know the
7 price of gas when the Trustee tries to sell them. And so to ask the Court to rely on the
8 inevitability that they will become orphans when an essential step before they are is the
9 Trustee tries to sell them and somebody looking at them is going to run some economics
10 with whatever that purchasers view of the future price of gas is and the costs that are
11 going to be incurred to produce them and other related costs. So in my submission it's not
12 fair to state it's inevitable. It's uncertain.
13
14 THE COURT: Thank you, sir. Moving on, and this question
15 overlaps with what we've just talked about and I was going to direct it to Mr. Lenz. In
16 paragraph 12 of your brief that was filed on September the 25th you bolded the phrase,
17 "The duty is owed as a public duty by all of the citizens of the community to their fellow
18 citizens." In this circumstance when do the public duties crystalize an obligation that is
19 caught by obligation due or accruing due? And incidentally, that was a quote from the
20 *Northern Badger* case.
21
22 MR. LENZ: Yeah, and I think we included the quote for the
23 purpose of showing that the stakeholders to whom the *Bankruptcy and Insolvency Act* is
24 concerned with is a broad collection of people and it isn't limited to people with provable
25 claims or creditors. That's the point we were trying to make. But your question, Sir, is
26 when does this obligation ripen into an obligation due or occurring due and on that point I
27 think that as I believe former Justice Laycraft said in *Northern Badger*, and I'd have to
28 find a reference but I believe the Supreme Court of Canada echoed in *Redwater*, the
29 obligation arises at the time you engage in this activity. Right from the beginning of
30 acquiring the wells or the license -- pardon me, the lease from Crown, it's written right
31 into that, it arises then. Some people have said, well, it arises when you spud the well and
32 I suppose that's when it really arises, when you spud the well.
33
34 The more difficult question is when is it due or accruing due, and that is something that is
35 subject to regulation. I mean, my understanding now is companies have to have a well
36 abandonment and reclamation program and deal with these over a period of time and the
37 flaw in the regulation historically is that they kick them down the road or were able to.
38 Under the regulations they kicked them down the road a long time so long as they were
39 doing certain things. It's going to be subject to the regulation as to when it's actually -- the
40 obligation has to be fulfilled. And that can change but it doesn't detract from the fact that
41 there is in an obligation and probably if you took a particular well out of somebody's

1 inventory today I think you could go to the regulator and say when does that have to be
2 abandoned and reclaimed and they would be -- you know, they'd have some kind of
3 schedule. But in the past they didn't, or at least they didn't have a rigorously enforced
4 schedule.
5
6 MR. DE WAAL: My Lord, if I can just add to that. Rinus de
7 Wall. If I can just add to that by referring to the *Stelco* case in paragraph 50 Judge Farley
8 says: (as read)
9
10 What is being put up to satisfy those obligations is the debtor's
11 assets and undertaking in total; in other words, the debtor in essence
12 is taken as having sold everything.
13
14 So whenever these debts may have become due and payable, eventually for the purposes
15 of the solvency analysis it's taken as if everything is sold at that point when the
16 determination is made. And it follows that up in paragraph 59 by saying: (as read)
17
18 It seems to me that the phrase "accruing due" has been interpreted
19 by the courts as broadly identifying obligations that will "become
20 due" at least at some point in the future. Again, I would refer to my
21 conclusion above that every obligation of the corporation in the
22 hypothetical or notional sale must be treated as "accruing due."
23
24 So for the purposes of that analysis the relevant time is when the analysis is made.
25
26 THE COURT: Sorry, give me that last sentence, Mr. de Waal?
27
28 MR. DE WAAL: So for the purposes of the analysis, My Lord,
29 the debts or the obligations accruing are assessed as if there was that notional sale on the
30 date that the determination is made. The crystalizes the assets and all these -- the other
31 obligations.
32
33 MR. LENZ: If I may make one more point, My Lord. The --
34 so leaving aside the *Bankruptcy and Insolvency Act,* if the regulatory system works as it
35 should in good times when gas prices or oil prices are high they would accelerate the
36 requirements to abandon and reclaim wells and in bad times they would lighten up.
37 Because otherwise you get more insolvencies you have a bigger problem than there is. I
38 make the point that there's flexibility in the regulatory regime but the obligation is always
39 there.
40
41 MR. MCDONALD: My Lord, if I may address that question.

1
2 THE COURT: Certainly, sir.
3
4 MR. MCDONALD: We are back to *Stelco* versus *Enterprise* and my
5 friend Mr. de Waal says I take it that ARO is analogous to the wind-up valuation of the
6 pension liabilities for *Stelco* and the *Stelco* analysis should apply. In my submission ARO
7 is not analogous to wind up pension liabilities and my memory of a going concern versus
8 the wind up method that you -- that an actuary calculates pension liabilities is more than a
9 little rusty but I believe as a result of legislation there's a specific amount determined and
10 on a wind up calculation accelerated for the purposes of a pension calculation when a
11 company is winding up or was in *Stelco's* position. You get an amount akin to a debt.
12
13 That's far from what ARO is and to treat the obligation to abandoned wells that arises out
14 of the ownership of the license as something that should be accelerated and immediately
15 due and payable in this analysis is very artificial, I suppose is the word that comes to
16 mind. And if we just think for a moment about the potential in its financial statements
17 when it was considering -- ARO considered a 25-year time period. *Canadian Natural*, on
18 the other hand, considered a 60-year time period. On Mr. de Waal's analysis as I
19 understand it if CNRL happened to be in insolvency proceedings right now you'd
20 accelerate all 60 years' worth of abandonments to today and consider that in the analysis
21 of whether the company as insolvent. And that's one of the reasons why you should
22 prefer in my submission the *Enterprise* approach which considered those amounts
23 payable in the next year -- I'm paraphrasing Justice (INDISCERNIBLE) but that's
24 essentially what he said and not all those due in the next 60 years.
25
26 Just on unrelated point concerning Mr. Lenz's comment, and I don't know if this
27 addresses your question but if we're looking at the debt due to the regulator it only occurs
28 when all the regulatory obligations have been fulfilled, as he said, and the regulator
29 performs the abandonment and the debt is incurred under the *Statute of Regulations*. And
30 as I've said, that's far from a certainty in this case.
31
32 THE COURT: Thank you, Mr. McDonald. Mr. de Waal, in the
33 submission provided by the OWA, and this is the one that was filed on February --
34 pardon me, September 29th, 2020. Reply brief, paragraph 4 it states there: (as read)
35
36 ARO is a provision, not a liability. OWA submits, first, that the
37 relevant question is whether ARO is an obligation, not whether it is a
38 liability.
39
40 Do you agree with that?
41

1 MR. DE WAAL: My Lord, for purposes of a solvency test that
2 refers to obligations instead of liabilities. So I disagree with the first part of that sentence,
3 not with the OWA but with the submissions by Perpetual energy that's referred to there.
4 A provision and a liability -- provision is also a liability so there's a false dichotomy
5 there. But I do agree, My Lord, that the relevant question for the purposes of the solvency
6 inquiry is whether ARO is an obligation.
7
8 THE COURT: Part of the reason I'm asking, I just -- in your
9 statement of claim there's the use of obligation I think once and that is in the context in
10 paragraph 16, I'm just going by memory, in respect of a director issue that's associated
11 with Ms. Rose. But there's many, many references to liability and I'll comment as distinct
12 from the use of the word obligation so hence the reason I'm asking the question. We've
13 already dealt with the accounting. Any comments on that? Any further comments?
14
15 MR. DE WAAL: Yes, My Lord. In paragraph 13 for example in
16 the statement of claim, the allegation is that the Goodyear assets had no positive fair
17 market value at the time of the asset transaction but represented a significant net liability.
18 So the assets -- the focus is on the assets, not on ARO as a liability. But I do concede, My
19 Lord, that in paragraph 14.1, for example, we said the Sequoia acquired assets with
20 associated ARO and other liabilities. So they use that, My Lord. But in support of the --
21 of this particular application, which is now -- I shouldn't say in support of this
22 application, the original Darby affidavit specifically said in paragraph 47, he used the
23 word "obligations" instead of liabilities. It says, "As a result of the asset transaction,
24 (INDISCERNIBLE) had no property which at fair valuation was sufficient to enable
25 payment of all its obligations."
26
27 So if the issue is solvency, then -- if the issue is solvency, the solvency of -- at the time of
28 the transaction, whether -- I would submit, My Lord, whether the statement of claim
29 referred to liabilities does not change the test and for the purposes of this application the
30 question still is whether ARO are obligations as opposed to liabilities.
31
32 THE COURT: Well, I don't dispute that it doesn’t change the
33 test but while you did refer to section 2 and section 96, your context was almost always in
34 the context of liability as opposed to obligation but you're taking the position -- this is a
35 question. You're taking the position that ARO -- and I know I'm being repetitive, ARO is
36 a liability or ARO owes an obligation?
37
38 MR. DE WAAL: My Lord, again, I -- and I think I said that
39 earlier so I think I'm consistent in saying that an obligation can be a liability. It's not one
40 or the other. So ARO we say is an obligation but it certainly reflected for accounting
41 purposes as a liability, which it is. It's a liability of uncertain time and

1 (INDISCERNIBLE). And what I should say just to be correct, My Lord, is that provision
2 is a liability. ARO is a provision for (INDISCERNIBLE) and that provision is reflected
3 on the statements as a liability.
4
5 THE COURT: Well, it's labelled a liability but does that make
6 it a liability?
7
8 MR. DE WAAL: Yes, I submit it does, My Lord.
9
10 THE COURT: So again --
11
12 MR. DE WAAL: It's not --
13
14 THE COURT: Sorry, go ahead.
15
16 MR. DE WAAL: -- it's -- I apologize, My Lord. As I said earlier,
17 I think when we started yesterday -- it seems like a week ago but it's the fact that
18 something is reflected as a liability doesn't make it a liability. I concede that in principle
19 that's true. But once the liability exists it's accounted for in a particular way and that
20 confirms the facts, it's not the other way around -- it confirms the fact of existence of a
21 liability.
22
23 THE COURT: So if I understand that statement you still
24 maintain that deferred tax is a liability?
25
26 MR. DE WAAL: Well, we're going to address that in the written
27 submissions --
28
29 THE COURT: That's a fair --
30
31 MR. DE WAAL: -- as we discussed that --
32
33 THE COURT: -- that's a fair comment, Mr. de Waal. I just -- I
34 leave that with you. One point I want to clarify is the trust indenture in evidence or not,
35 and this goes back to a discussion that the parties had yesterday? And just a review to that
36 I think the Court asked for the document back in December 2018 as part of its questions.
37
38 MR. DE WAAL: My Lord, it was certainly provided to the Court
39 but not as evidence and I think it's not part of the record. That's certainly our
40 understanding, which is why we didn't really respond to that at all. It was provided to the
41 Court but it's not an authority and it's not something like the case or a statute. It should

1 have been in evidence and we say it's not.
2
3 MR. MCDONALD: And, My Lord, I think we're all clear on the
4 facts. It was not attached as an exhibit to an affidavit, which is the normal way that
5 evidence is put before the Court. It was provided to the Court and to my friends as part of
6 the record of these proceedings and I submit we've all had it in our possession for almost
7 2 years and are aware of it and there's been no suggestion of any prejudice as a result of it
8 appearing in a document entitled Defendant's Joint Answers, dated December 17, 2018,
9 rather than affidavit attaching a trust indenture. So if there was some prejudice, I think it
10 would be important to consider it but there is no prejudice and it would be technical and
11 artificial in my view to ignore it.
12
13 MR. LENZ: My Lord, I know I'm just an intervener but I
14 only saw that document at 9:45 today and it's up to you and I'm just an intervener. But I
15 would have thought it's very important to know the relationship that was collapsed or
16 changed as a result of the transaction that's being impugned and if there's a trust
17 agreement, there's one document, are there any other documents. I would think that's very
18 important for the Court to know --
19
20 THE COURT: Yes. I'm going to ask --
21
22 MR. LENZ: -- how it's dealt with at this stage.
23
24 THE COURT: Thank you, Mr. Lenz. I'm going to ask the
25 parties in the form of Perpetual Energy and Pricewaterhouse Inc. to consider how -- I'm
26 just sensitive about referring to anything that's not in evidence. And the reason -- Mr.
27 Lenz I think has touched on a couple of important points. The reason I was reflecting on
28 it last night is when I read the briefs and I see constant references to the relationships; I
29 think it's instructive for the Court to know what's in the documents. I've certainly had it in
30 my possession since I requested it as part of the questions raised. The reason I'm focused
31 on it right now, I'm looking at paragraph 30, Mr. McDonald, of the brief that was filed by
32 yourself in reply of the defendant's document dated September 30th, 2020, and the
33 sentence there -- the last sentence of paragraph 30, "The asset transaction did not dispose
34 of any ARO [semicolon, slash] Sequoia did not 'assume' an ARO."
35
36 I know we've touched on this but I wanted to explore the question who has the
37 obligations? Legal owner or beneficial owner? I may have put the question in the wrong
38 place but this is part of the narrative. And I'm wondering to answer that question do we
39 need the trust indenture in evidence? And I've certainly heard all the arguments about,
40 you know, transfer/no transfer and the comments by all parties and I've read with great
41 interest the submissions and listened with even greater interest the oral positions. But is it

1 possible to answer that question without having the indenture in evidence?
2
3 MR. MCDONALD: Yes, I submit it is possible. If the question is
4 who has the obligations, the legal or the beneficial owner, in my submissions that is
5 determined by the licensing regime and the issuance of the license and the license is
6 issued to PEOC and it has the obligations. And I suspect that the licensing regime does
7 not allow a licensee to contract out of those obligations through a trust deed or any other
8 document. So I submit to you that you don't need the Trustee for that purpose. But I'd like
9 to make a suggest, My Lord. It would be unfortunate if the decision in this case was
10 driven in any way by the fact that a document that was in your possession, tendered to
11 you in an open courtroom and given to my friends, was somehow not taken into
12 consideration by the Court because it was not filed as part of an affidavit. We tendered as
13 part of those submissions other documents that you'll be familiar with; they were all
14 bound together. If -- and so I haven't looked of course for the purposes of today to when
15 one can call a witness late or tender evidence late but perhaps while we're all here I
16 should make an application for leave to file an affidavit to attach to that affidavit the trust
17 indenture that was attached to the joint answers of the defendants submitted to the Court
18 on December 17th. And so I'd like to make that application now and hopefully we can
19 solve this point.
20
21 THE COURT: Mr. de Waal, comments, sir?
22
23 MR. DE WAAL: My Lord, (INDISCERNIBLE) shows that Mr.
24 McDonald in his submissions to Your Lordship yesterday indicated that it's not in
25 evidence, that technically it -- well, technically it wasn't in evidence and that Your
26 Lordship should have to refer to that. It would also -- it would be unfortunate if it comes
27 down to this, that but for the fact that we specifically mentioned the fact that this was
28 never produced, and we did this back in September, and we did it that it was not -- not
29 that it was not produced, it was not in evidence and we did that in September and to my
30 recollection did it on more than one occasion. In July was the other time.
31
32 And so we pointed this out and yet here we are today at the end of a 2-day hearing with
33 the record incomplete and referring specifically to a trust indenture which is trust related
34 as we know is at the heart of this matter. So we say this is all the applicant's own doing
35 and if they now want to make an application, we would certainly oppose that.
36
37 MR. MCDONALD: My Lord, my only reply to my friend's
38 opposition is that there has not been suggested nor is there any prejudice, which is what I
39 submit is the test you ought to apply.
40
41 THE COURT: I'm going to allow the application. I ask that

1 that document be provided to the Court in appropriate affidavit format. I'm making that
2 decision because I think it's important for the Court to consider in circumstances where
3 we have spent the last 2 days in the context of a transaction involving POT and that is an
4 important document. I will also ask for the benefit of both parties if you're going to give
5 me written submissions on what we've already talked about in terms of the *Bennett on*
6 *Bankruptcy,* the notation that I had identified in the 2020 edition -- 22nd edition that just
7 came out and the deferred taxes, I would like the parties to address this point, and I
8 certainly have my notes and it's on the record what Mr. McDonald has stated in terms of
9 obligations, that the Court would benefit from a bit of written submission on the issue of
10 the asset transaction in respect of PEOC/Sequoia did not assume any ARO.
11
12 MR. LENZ: My Lord, may I say one thing or were you just
13 mid-sentence?
14
15 THE COURT: No, I'm just paging through here. Go ahead, sir.
16
17 MR. LENZ: So the trust indenture that I got this morning,
18 which I assume is the one that was circulated among the parties 2 years ago --
19
20 THE COURT: Yes.
21
22 MR. LENZ: -- is signed by CIBC World Markets Inc. and
23 then the other party is Paramount Energy Operating Corp. and it's not signed by them.
24 And I'm not making an issue on that necessarily but I do think -- like it's important that
25 we have the totality of the relationship between PEOC and POT. In other words, if there
26 is some other document whereby these companies are supporting each other, financially
27 or otherwise, that would be an important fact for the Court to know. And I guess I would
28 ask Your Lordship to direct that that be produced in the affidavit along with the trust
29 indenture because, you know, releases were given and so on as part of this transaction. In
30 other words, My Lord, the trust indenture as far as we know, assuming that the argument
31 is true that the responsibility for abandonment and reclamation didn't change hands as a
32 result of this transaction, did any recourse for those obligations disappear as a result of
33 this transaction? That's my only question and I think Mr. McDonald can probably address
34 that in the affidavit but since we haven't had production of documents or anything like
35 that I don't think we know that right now and it would make a difference if something
36 else disappeared as a part of this transaction. That's my submission, My Lord.
37
38 THE COURT: Thank you, Mr. Lenz. Any other comments on
39 that comment from Mr. Lenz?
40
41 MR. DE WAAL: My Lord, (INDISCERNIBLE).

1
2 THE COURT: Go ahead, Mr. de Waal.
3
4 MR. DE WAAL: My Lord, I echo that. It's somewhat difficult for
5 us to anticipate what there may be and what part of that we will get to see if we simply
6 get the trust indenture. So it raises all kinds of new issues potentially. None of this has
7 been addressed for the very reason that Your Lordship has identified, which is that this is
8 not in evidence, and at this point to add new evidence obviously opens up a few other
9 things -- other questions about trust examination and additional documents. And, again,
10 as I say, if we only get to see the trust indenture that does not solve the problem with
11 respect to -- I accept the ruling but, as I say, it just raises other questions, My Lord.
12
13 THE COURT: Mr. McDonald.
14
15 MR. MCDONALD: My Lord, my application and your order was to
16 address the technical issue of it having been filed with the Court but not attached to an
17 affidavit and I hear my friends saying, well, no, now we want you to go and find out if
18 there's more evidence and if there is more evidence put that evidence in. That wasn't what
19 I understand my friend de Waal's concern was before or if you had a concern, your
20 concern wasn't my application and it wasn't your order. Talking without knowing
21 anything about this other than we had a technical problem and we've addressed it with an
22 order and that's what I -- it is my intention to do, is attach to an affidavit documents that
23 are already before the Court, not re-open the evidence or expand the evidence of this
24 case.
25
26 MR. WATSON: Sir, it's Scott Watson.
27
28 THE COURT: Yes, sir.
29
30 MR. WATSON: I represent mere intervenors but from listening
31 to this conversation it's apparent to me that this particular document, and maybe others,
32 are key to the asset transaction which my clients are limited to discussing and I would
33 want to make sure that all parties and the Court are aware this request that I didn't get a
34 copy of whatever is being circulated.
35
36 MR. MCDONALD: Well, My Lord, we're running the risk of
37 running down a rabbit hole here. We brought an application to strike and for summary
38 dismissal. A technical point was raised about one document referred to in our brief that
39 hadn't been attached to an affidavit. You have granted an order that overcomes that
40 technical issue and we will comply with that order. My friends had an obligation -- my
41 friend the respondent, not the interveners who had never had any right of cross-

1 examination to explore any of these issues at all -- my friend on behalf of the Trustee had
2 a right to cross-examine on the evidence that we're relying on and had a right to file
3 response evidence and had an obligation to put his best foot forward. If he wanted to do
4 any of those things that was up to him. But you have a record, you've issued an order to
5 overcome a technical deficiency, and we should -- or my respondents should win or lose
6 based on the record.
7
8 THE COURT: The order stands as stated, full stop. I certainly
9 appreciate the submissions of all counsel on matters. My remaining questions actually
10 just tie into the location of the ARO liability vis-à-vis this trust issue, which is why this
11 has come up. I think we've covered most everything directly or indirectly. Any other
12 business that we should attend to before we adjourn? I -- one procedural question that I
13 would like to raise, it just ties into the additional submission that I requested. It started
14 out just to be one item because of what I touched on in *Bennett on Bankruptcy,* it's
15 expanded a little bit. Should we adjourn or should I adjourn with the prospect of having
16 the opportunity to speak to matters again? Or should we adjourn and I'll simply reserve
17 and issue a decision based on the submissions to date, written and oral, subject to what
18 will come back before me in writing? I'm going to ask Mr. de Waal for his position on
19 that first and then Mr. McDonald and then the interveners.
20
21 MR. DE WAAL: My Lord, it will depend obviously on what the
22 written submissions say but I expect that we may want to respond and I expect that Mr.
23 McDonald may want to respond to whatever we submit. So if that can be accommodated
24 in writing that's one option, otherwise, it seems to me, My Lord, that we would need a
25 date to come back on, which may be more difficult to find. So I would propose -- subject
26 to Your Lordship's discretion obviously, but I would propose an opportunity to make the
27 written submissions and then an opportunity to reply. And then if Your Lordship
28 obviously needs oral -- opportunity to question us orally then we're obviously in Your
29 Lordship's hands, but that's what I would propose.
30
31 THE COURT: Mr. McDonald.
32
33 MR. MCDONALD: Well, I'll close by saying something I never
34 thought I'd say. I agree with Mr. de Waal. Written submissions are fine for us and if Your
35 Lordship, having read them, thinks it's important to have another session orally with us
36 then we're in Your Lordship's hands. We're quite content without a further opportunity
37 for the oral submissions but I really think it's your call, it's not ours.
38
39 THE COURT: Okay.
40
41 MR. MCDONALD: And we'd like to set a schedule for those

1 submissions so that we get them in to you quickly so you have our thoughts on those
2 points as soon as --
3
4 THE COURT: Thank you. I agree with the schedule. Let me
5 just ask for input from Mr. Lenz and Mr. Watson first. Any comments, gentlemen?
6
7 MR. WATSON: Well, Sir, as I indicated earlier, I've heard
8 submissions that this trust indenture may address a key and/or fundamental issue about
9 whether there was a transfer of AOR liabilities under the PSA under the trust indenture.
10 And we're not parties but that is one of the central issues that we submitted our briefs on
11 and we're allowed to participate in. So I -- I will abide -- I'll do this. I will abide by
12 whatever Mr. McDonald and Mr. de Waal agree.
13
14 THE COURT: Okay. Mr. Lenz.
15
16 MR. LENZ: And, My Lord, I'm like minded.
17
18 THE COURT: Okay. I'm going to adjourn and reserve subject
19 to the further submissions that we discussed. Timeline and length, Mr. McDonald first,
20 Mr. de Waal second, and I view important that we have input from the interveners on this
21 also.
22
23 MR. MCDONALD: I don't know if you were thinking of sequential
24 submissions where we go first and then my friends respond and then we have a right of
25 response, but if that's the order you're thinking, we can certainly have our submission in
26 next week. So perhaps if we say a week from today for ours then my friends have a week
27 after that and then we have 3 days or so for any reply, that would work for me but we can
28 speed it up if you prefer. In terms -- sorry.
29
30 THE COURT: Let me -- if I can --
31
32 MR. MCDONALD: I'm sorry, I spoke when you did, My Lord. I
33 didn't hear you.
34
35 THE COURT: Yes, my apologies. I just wanted to give you a
36 timeframe. I'm flexible. I am really jammed for the next 6 weeks, probably 7 weeks, but
37 -- and I just mention that so that no one feels pressed for time. I'd like to deal with this
38 promptly but I do want the benefit of that. I would like sequential so subject to what Mr.
39 de Waal says your proposal, Mr. McDonald, does make sense to me. And I apologize, go
40 ahead.
41

1 MR. MCDONALD: Well, maybe I should ask when you're leaving
2 town because --
3
4 THE COURT: I'm not --
5
6 MR. MCDONALD: -- we should get these into your hands before
7 you leave if we can.
8
9 THE COURT: Sir, I'm not leaving town. I'm just going to be
10 tied up in another long trial.
11
12 MR. MCDONALD: Oh, I'm sorry. I didn't hear you. Okay.
13
14 THE COURT: I just wanted to give you that time reference
15 that, you know, I am flexible and in disagreement for what you propose, subject to Mr. de
16 Waal's input which is important. Mr. de Waal.
17
18 MR. DE WAAL: My Lord, I'm content to go with the 9th, the
19 16th, and I guess 3 days being the 19th, which is the following Monday. But it's -- the
20 only question or the only additional comment I would have is that we should get the
21 affidavit of course as soon as possible.
22
23 THE COURT: Any comments on that matter, Mr. McDonald.
24 And then I'd like Mr. Lenz and Mr. Watson to comment if they wish.
25
26 MR. MCDONALD: No, we'll get the affidavit as soon as possible. It
27 will be quick.
28
29 THE COURT: Okay. In terms of -- okay, so I think we've
30 agreed on the dates. What length do you require in terms -- I'd just like -- just in fairness
31 to all parties what page limit would you need? Could you do this within five pages for the
32 first and second and then maybe three pages in the reply?
33
34 MR. MCDONALD: Yes.
35
36 THE COURT: Okay. Mr. de Waal, is that okay?
37
38 MR. DE WAAL: The question -- it should be okay. The question
39 I have is whether that includes any submissions we may want to make on the trust
40 indenture or whether the trust indenture just goes in? Because nobody has dealt with that
41 except in our brief, we've pointed out in a number of paragraphs that we didn't have this

1 on the record and therefore didn't deal with it. So if we are to deal with the trust
2 indenture, again, we need to see that. But I don't believe that five pages will be sufficient
3 to deal with the three questions as well as the trust indenture.
4
5 THE COURT: Why don't we set five, five, and three for the
6 first two issues and five, five, and three for the trust indenture, the liability issue.
7
8 MR. WATSON: Sir, just for clarification. It's Scott Watson.
9
10 THE COURT: Yes, sir.
11
12 MR. WATSON: Five, five for the parties and three for the
13 interveners?
14
15 THE COURT: No, I was just dealing with the parties right
16 now. I was going to come to the interveners in a second, Mr. Watson.
17
18 MR. WATSON: Okay, pardon me.
19
20 THE COURT: No worries, thank you. Is that fair, Mr.
21 McDonald?
22
23 MR. MCDONALD: Well, I'm not looking to write more pages but it
24 sounds to me like we're going to file five and then we're going to get 15 in return and
25 we're going to have to deal with those 15 and three pages and that doesn't seem like a
26 sensible way in my submission. So my objective -- or and I take it yours when you
27 initially said five was to make sure we don't start filing big briefs and I'm content with the
28 five but I think if we're going to get 15 in return we need some latitude on our reply so
29 that we can properly address what my friend's -- my friend the respondent and the
30 interveners send to us. So is that ten so then they get a total of 15 and we get a total of 15.
31 That seems to have some sense to it.
32
33 THE COURT: So 15 on the reply from yourself.
34
35 MR. MCDONALD: Well, I was thinking ten because we got five on
36 the first one. So five on the first one, ten on the last one, and they get 15 in the middle.
37
38 THE COURT: I'm fine with that. Are the other parties fine
39 with that in terms of -- including the interveners?
40
41 MR. DE WAAL: Well, if I'm saying something -- I'm not sure

1 what (INDISCERNIBLE) have in mind but in essence we may be filing a submission of
2 five pages, and we'll have five pages from Mr. McDonald to respond to, and then we're
3 going to have ten pages to reply to our five pages. So it all -- it gets somewhat silly, I
4 admit, My Lord, but it's not a matter of 15 pages for Mr. McDonald to respond to our
5 five. That's also unworkable. So I don't know how to solve the problem, My Lord, but it
6 doesn't seem fair.
7
8 THE COURT: I'm just trying to put some boundaries around
9 this. I'm fine with the dates and I will so order those dates. I would like the parties to put
10 their heads together to figure out what is fair and appropriate and I will respond to that. If
11 I need to give an order, I will do so independent. But if the parties -- and I want to be fair
12 to those that are on the call right now that are making submissions. Can I leave that in
13 your capable hands?
14
15 MR. DE WAAL: Yes. Thank you, My Lord.
16
17 THE COURT: Mr. McDonald?
18
19 MR. MCDONALD: I'm sorry, I was talking to Mr. Chiswell. Is there
20 anything else? I don't have anything else.
21
22 THE COURT: No, I was just saying the dates work for the
23 Court and if you could put your heads together collectively and come up with what is
24 appropriate from a page perspective, the Court will work with whatever you have. I just
25 want to be fair to all parties in a circumstance where you might want to have a look at
26 matters before you finalize your thoughts.
27
28 MR. MCDONALD: You know, we might be creating too much out
29 of this. The reason I said that we need 15 pages is because it's inevitable in my
30 submission that the interveners are going to line up with the respondent and so we're
31 going to have to respond to that. And I think their role in these proceedings makes that
32 abundantly clear. They're not going to file briefs supporting us. Mr. de Waal is going to
33 want to counter.
34
35 I suggest we stick with the five and the fine and we'll read what -- when we receive the
36 15 pages we'll read it, we'll try to file a short brief to respond to it. I suspect it won't take
37 ten pages. If we think we need ten we'll tell them we need ten. If they disagree or if Mr.
38 de Waal thinks he needs something, then we'll -- if we can't reach agreement, we'll ask
39 you for your direction. Would that work?
40
41 THE COURT: That will certainly work for the Court. So that --

1 unless there's any other business that concludes what I was going to rise today. And
2 again, we will adjourn and I'll look forward to those submissions. Any other business?
3
4 MR. MCDONALD: Thank you very much for your time and
5 patience, My Lord.
6
7 THE COURT: Thank you. Madam clerk, if we could adjourn.
8
9 MR. DE WAAL: Thank you, Sir.
10
11
12 PROCEEDINGS ADJOURNED
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Certificate of Record

I, Katherine O'Brien, certify that this recording is the record made of the evidence of the proceedings in Court of Queen's Bench, held in courtroom 1203 at Calgary, Alberta, on the 2nd day of October, 2020, and that I was the court official in charge of the sound recording machine during these proceedings.

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I, Nicole Carpendale, certify that

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

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