JUDICIAL CENTRE OF CALGARY
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Court of Queen's Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABQB 2

Date:
Docket: 1801-10960
Registry: Calgary

Between:

PricewaterhouseCoopers Inc, LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp and not in its personal capacity

Respondent/Plaintiff

- and -

Perpetual Energy Inc, Perpetual Operating Trust, Perpetual Operating Corp and Susan Riddell Rose

Applicants/Defendants

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

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I. Introduction

[1] The action (the "**Action**") underling this application engages the *Bankruptcy and Insolvency Act* ("***BIA***"). This particular application was filed by the Defendants on February 25, 2020 (the "**Perpetual February 2020 Application**").

[2] The Action was initiated by PricewaterhouseCoopers Inc, LIT, ("**PWC**") in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp (the "**Trustee**"). Sequoia Resources Corp ("**SRC**") formerly operated under the name Perpetual Energy Operating Corp ("**PEOC**").

[3] The Defendants in this Action are Perpetual Energy Inc ("**Perpetual Energy**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp (collectively, the "**Perpetual Defendants**"), and Ms. Susan Riddell Rose ("**Ms. Rose**").

[4] The Trustee is challenging the transfer of a number of shallow gas wells and related assets (collectively, the "**Goodyear Assets**") from POT to PEOC. While a number of questions are under appeal, the only remaining issue within the trial court at this juncture concerns a claim by the Plaintiff under section 96 of the *BIA* (the "**Section 96 *BIA* Claim**").

[5] The Trustee commenced the Action by way of a Statement of Claim (the "**Trustee SOC**"). In that commencement document, the Trustee seeks an order declaring the sale of the Goodyear Assets (the "**Asset Transaction**") void as against the Trustee. Alternatively, the Trustee seeks judgment for an amount not less than $217,570,800 based on the application of section 96(1) of the *BIA*: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2020 ABQB 6 at para 3 ["***PWC QB Reasons***"]

[6] In the Perpetual February 2020 Application, the Applicants seek to strike or summarily dismiss the Section 96 *BIA* Claim. They raise two threshold issues regarding the elements of the Section 96 *BIA* Claim. Those two issues are whether: (i) PEOC was insolvent at the time of the Asset Transaction or rendered insolvent by it within the meaning of the *BIA*; or (ii) there was a transfer at undervalue within the meaning of the *BIA*.

II. Issues

[7] Framed in the context of questions, the issues that I address in the Perpetual February 2020 Application are as follows:

a. Is the Perpetual February 2020 Application an abuse of process?

b. Is there an aspect of the Section 96 *BIA* Claim that should be considered under this application?

c. Was PEOC insolvent at the time of the Asset Transaction or rendered insolvent by it?

d. Should the Trustee SOC be struck under Rule 3.68 of the *Alberta Rules of Court,* Alta Reg 124/2010 (the "**Rule**" or "**Rules**")?

e. Should the Trustee SOC be dismissed summarily under Rule 7.3?

III. Overview

[8] POT transferred its beneficial interest in the Goodyear Assets to PEOC in the Asset Transaction. This step was effected through an asset purchase agreement dated October 1, 2016. The effect of that agreement was to combine the legal and beneficial interest in the Goodyear Assets in PEOC.

[9] Shortly after the Asset Transaction was effected, Perpetual Energy sold all of the shares in PEOC to 1986114 Alberta Inc (the "**Share Transaction**"). The Share Transaction was effected through a share purchase and sale agreement dated September 26, 2016.

[10] PEOC was renamed SRC by its new shareholder

[11] On or about March 2, 2018, SRC filed a Notice of Intention to Make a Proposal pursuant to the *BIA*. On or about March 23, 2018, SRC assigned itself into bankruptcy.

[12] The Trustee reviewed matters, including the Asset Transaction. Subsequent to that review, the Trustee filed the Trustee SOC on August 2, 2018.

[13] The Trustee also filed an application on August 2, 2018. In that application, the Trustee listed Rule 7.3 as the basis for the requested summary judgment remedy that it was seeking against the Perpetual Defendants (the "**Trustee August 2018 Summary Judgment Application**").

[14] The Trustee August 2018 Summary Judgment Application focused on the Asset Transaction.

[15] The Trustee August 2018 Summary Judgment Application included a section entitled "Transfer at Undervalue". Within that section of the Trustee August 2018 Summary Judgment Application, the assertions were that the Asset Transaction: (i) was a transfer at undervalue; and (ii) was entered into by PEOC while it was insolvent or that it rendered PEOC insolvent.

[16] In terms of remedies sought, the Trustee August 2018 Summary Judgment Application asked the Court: (i) to set aside the Asset Transaction; and (ii) to declare that transaction void as against the Trustee.

[17] On August 27, 2018, the Perpetual Defendants filed a Statement of Defence (the "**Perpetual SOD**").

[18] On October 19, 2018, the Perpetual Defendants filed an Application for Summary Dismissal and to Strike (the "**Perpetual October 2018 Application**").

[19] Concerning the Perpetual October 2018 Application, one of the arguments advanced by the Perpetual Defendants was that the parties were dealing at arm's-length with each other within the meaning of the *BIA*. For reasons detailed in the ***PWC QB Reasons***, I declined to answer the question: ***PWC QB Reasons*** at paras 60 and 90. I was of the view that the arm's length issue required *viva voce* evidence before it could be properly determined.

IV. Interpretive Issues

A. General Comments

[20] A key issue in the analysis below concerns the definition of the term "obligations" and the phrase "obligations, due and accruing due" for purposes of the *BIA*. Neither are defined in the *BIA*.

[21] Absent a statutory definition of the term "obligations" and the phrase "obligations, due and accruing due" for purposes of the *BIA*, it is appropriate to consider the guidance offered by: (i) the jurisprudence; (ii) established business principles; (iii) established accounting principles; (iv) legal think-tanks, such as the Uniform Law Conference of Canada ("**ULCC**") and Alberta Law Reform Institute ("**ALRI**"); and (v) academics.

[22] Notwithstanding they should be considered, business and accounting principles are not rules of law: ***Canderel Ltd v Canada***, 1998 CanLII 846 (SCC) at para 35 [***Canderel***]. Importantly, business and accounting principles must take a subordinate position relative to the legal rules that govern: ***Canderel*** at para 35. As a result, a given business or accounting principle must be viewed critically. A couple of additional comments are warranted.

[23] My first comment focuses on accounting matters. For purposes of the Perpetual February 2020 Application, I do not dispute that the abandonment and reclamation obligations ("**ARO**") recorded in the audited financial statements for SRC were recorded in accordance with the appropriate accounting principles at the time. However, what is recorded as a "liability" for accounting purposes may not be considered an absolute liability at law if a creditor with a legally enforceable claim cannot be identified. Similarly, what is recorded as "obligations" for accounting purposes may not be considered "obligations, due and accruing due" at law if a creditor with a legally enforceable claim cannot be identified: see ***General Motors of Canada Ltd v Canada***, 2004 FCA 370 at para 24 [***General Motors***], leave to appeal to SCC refused, [2005] SCCA No 3.

[24] My second comment touches on legal think-tanks and academics. I acknowledge that the guidance provided by legal think-tanks is neither a rule of law nor equated to judicial precedent. That said, given the focus of such legal institutes, their commentary should be given appropriate

consideration. I apply the same comments to academics who are knowledgeable in the insolvency area.

B. Construction – Strict or Remedial

[25] The Trustee suggested that the relevant provisions in the *BIA* should be construed in a remedial fashion, and that they should be given a fair, large and liberal construction and interpretation so as to best ensure the attainment of their objects: *Interpretation Act*, RSC 1985 c I-21 at ss 12 and 13. In advancing this interpretative position, the Trustee referenced the following as a guideline:

> The well-established twin fundamental purposes of the BIA are to ensure the equitable distribution of a bankrupt's assets among the estate's creditors and to provide for the financial rehabilitation of insolvent persons. Professor Roderick J. Wood suggests a third objective: "the prevention of fraud and abuse of the bankruptcy system, the promotion of commercial morality, and the protection of the credit system": ***Re Pocklington***, 2017 ABQB 621 at para 52 (footnotes omitted).

[26] When construing any statute, it is important to consider the underlying objects. That said, the nature of the statute needs to be considered during the interpretative process. In that context, the following guideline is instructive:

> The legislative direction to interpret *all* legislation as remedial is also unfortunate in so far as it suggests that courts should no longer rely on the values underlying strict construction – the enjoyment of individual liberty, privacy, property rights and the like. While these are not the only values worth protecting, they remain an important part of the Canadian legal culture. Legislation that invades privacy or takes away rights *should* be interpreted strictly – unless other more compelling considerations suggest otherwise: Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed (Toronto: LexisNexis 2014) at 490 [***Sullivan on the Construction***].

[27] This guideline is also relevant to penal legislation. Penal legislation is legislation that creates offences punishable by fine, imprisonment or forfeiture of a right or privilege: *Sullivan on the Construction* at 490. The nature of some bankruptcy initiatives are analogous to quasi-criminal or penal proceedings: Frank Bennett, *Bennett on Bankruptcy* 22th ed (Toronto: LexisNexis 2020) at 178 ["**2020 Bennett on Bankruptcy**"]; ***Bombardier Credit Ltd v Find***, 1998 CanLII 3000 (ON CA) at para 20 [***Bombardier Credit***]; and ***Re Little*** (1924), 5 CBR 244 (Ont CA) [***Re Little***]. As a further comment, the *BIA* is generally not viewed as remedial, except in the context of proposals to creditors where the remedial aspect is achieved through a rules-based framework: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 (SCC) at para 15 [***Century Services***].

V. Analysis

[28] The Trustee SOC was drafted in a manner that focused on the alleged liabilities within PEOC. This "liability" focus is evidenced by the use of that term or derivatives thereof in ten instances within the Trustee SOC.

[29] The Trustee SOC mentioned the term "obligations", but only once. That sole reference to the concept of "obligations" in the Trustee SOC was in clause 16 of that commencement document, and that particular clause concerned an allegation Ms. Rose had breached her duties to PEOC.

[30] In its quest to respond to the Perpetual February 2020 Application, the Trustee shifted its focus to the concept of "obligations". Given the manner in which the relevant provisions of the *BIA* are drafted, that shift in the litigation focus by the Trustee is appropriate.

[31] In analyzing the issues inherent in the Perpetual February 2020 Application, some of the underlying history concerning the *BIA* is important. To assist in understanding some of the context underlying this case, the following is instructive.

> Until 1919, there was no federal, comprehensive legislation governing bankruptcy and insolvency. Then, in 1919, Parliament enacted the **Bankruptcy Act**, which overlapped fraudulent conveyance and insolvency legislation enacted by the provinces. The **Bankruptcy Act** was modeled after the English Act. The **Bankruptcy Act** has been amended from time to time with major amendments in 1949, 1967, 1992, 1997, 2005, and 2007. Parliament proclaimed most of the amendments of 2005 and 2007 in 2009.
>
> In 1970, the federal government released a study report that recommended entirely new bankruptcy legislation. Between 1975 and 1984, Parliament introduced six comprehensive Bills in the House of Commons and in the Senate, which would have completely revised the Act. Instead, Parliament introduced amendments to the then **Bankruptcy Act**, renamed the **Bankruptcy and Insolvency Act** (**BIA**) in 1992, and further amendments in 1997 and has continued to make amendments.
>
> While piecemeal amendments tend to cover issues and problems of the time, there is a clear need to revise and overhaul the **BIA** and either incorporate or co-ordinate the **Companies' Creditors Arrangement Act** (**CCAA**). Both statutes contain obsolete concepts and terminology that no longer appear to apply to 21st century commerce: 2020 Bennett on Bankruptcy at 1.

[32] My review of the *BIA* and its predecessors indicates that the wording of the phrase "obligations, due and accruing due" in the context of the definition of an "insolvent person" in section 2 of the *BIA* (and the predecessor statutes) has not been amended since Parliament enacted the *Bankruptcy Act* (as it then was) in 1919.

C. Is the Perpetual February 2020 Application an abuse of process?

1. Incremental Facts

[33] In the "Overview" component of the Perpetual SOD, it states that "[t]here was no transfer at undervalue. The parties were dealing at arm's-length. The [Aggregate] Transaction occurred more than one year before [SRC's] bankruptcy. [SRC] was not insolvent at the time of the

[Aggregate] Transaction nor rendered insolvent by the Transaction": see clause 5 of the Perpetual SOD.[1]

[34] The Vice-President, Finance, and Chief Financial Officer of Perpetual Energy is Mr. Schweitzer. In addition to being a graduate of Queen's University with a Bachelor of Commerce degree, Mr. Schweitzer is a Chartered Professional Accountant.

[35] Mr. Schweitzer swore two affidavits on the same day in respect of this litigation. The details associated with those two affidavits are as follows.

a. In a seven-page affidavit sworn and filed on May 5, 2020, Mr. Schweitzer focused on matters associated with PEOC at the time the Asset Transaction was effected (the "**First May 2020 Schweitzer Affidavit**"). The Asset Transaction was effected on October 1, 2016.

b. In a thirteen-page affidavit sworn and filed on May 5, 2020, Mr. Schweitzer focused on matters associated with PEOC at the time it was seeking security for costs in this litigation (the "**Second May 2020 Schweitzer Affidavit**"). The security for cost issue is forward looking, and is concerned with the ability of the Perpetual Defendants to recover Costs if they are ultimately successful in defending their position in the context of this litigation.

2. Further Analysis

[36] The Trustee asserts that the Perpetual February 2020 Application is an abuse of process. It advances two arguments to support this proposition.

[37] First, the Trustee asserts that it is an abuse of process for Mr. Schweitzer to have sworn two affidavits on the same day which take different positions in circumstances where they are based on the same corporate records (the "**Affidavit Argument**").

[38] Second, the Trustee asserts that the Perpetual February 2020 Application is an abuse of process because the Perpetual Defendants already applied under the Perpetual October 2018 Application to strike or summarily dismiss the Section 96 *BIA* Claim. The particular arguments advanced by the Trustee are: (i) that the Section 96 *BIA* Claim has been argued and determined; and (ii) that certain of its arguments are inconsistent with the pleadings filed by the Perpetual Defendants (*i.e.*, that there was no transfer) (collectively, the "**Pleading Argument**").

[39] I will deal with each of these assertions by the Trustee in sequence.

a. Affidavit Argument

[40] I reviewed the two affidavits on which the Trustee grounds its abuse of process assertion concerning the Affidavit Argument. I disagree with the Trustee.

[41] The First May 2020 Schweitzer Affidavit is in support of the Perpetual February 2020 Application to summarily dismiss the Section 96 *BIA* Claim against the Perpetual Defendants. The focal point of that particular affidavit was looking backward in time from the date the affidavit was filed. In particular, the First May 2020 Schweitzer Affidavit is looking back at the

[1] The Perpetual SOD uses the term "Transaction", which I equate to the phrase "Aggregate Transactions" as defined in the ***PWC QB Reasons***.

status of PEOC as at October 1, 2016. In particular, the focus of that affidavit is on PEOC as at the date of the Asset Transaction.

[42] The Second May 2020 Schweitzer Affidavit is in support of the application for security for costs, which the Perpetual Defendants filed. The focal point of that particular affidavit is the status of PEOC looking forward in time from the date the said affidavit was filed. I infer that the temporal focus of the Second May 2020 Schweitzer Affidavit is on or after October 2, 2020, being the date on which the Perpetual February 2020 Application was last argued.

b. Pleading Argument

[43] I reviewed the various arguments advanced by the Trustee. In summary, the Trustee asserts that the Perpetual February 2020 Application is an abuse of process because the striking and the summary dismissal of the Section 96 *BIA* Claim has been argued and determined. The Trustee then asserts that it would be an abuse to allow the Perpetual Defendants to argue the strike or summary dismissal because of that prior determination.

[44] While there is merit to some aspects of the Pleading Argument advanced by the Trustee, I do not agree that the Perpetual February 2020 Application should be dismissed. But for the Perpetual February 2020 Application, this litigation concerning the Perpetual Defendants and the Trustee SOC is far from over. Depending on the conclusion of this application, the Action could go on for years. If the matter can be determined earlier in a fair and just manner, it should be considered: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Jones***].

[45] My views on this point are supported by the foundational Rules. Those Rules direct that we should always strive to get to the merits of a case as fast, efficiently, inexpensively, and fairly as possible: William A Stevenson and Jean E Côté, *Alberta Civil Procedure Handbook*, 2021 ed (Edmonton: Juriliber, 2020) vol 1 at 1-5 [**Stevenson and Côté 2021**]. In this regard, the Supreme Court of Canada has also directed that the Courts require a shift in culture: ***Hryniak v. Mauldin***, 2014 SCC 7 at paras 2 and 28 [***Hryniak***]. Provided the process is fair and just, the best forum for resolving a dispute is not always the one with the most painstaking procedure: ***Hryniak*** at para 32.

[46] In framing the Perpetual October 2018 Application in an effort to strike and/or dismiss the claim of the Trustee under section 96 of the *BIA*, the Perpetual Defendants focused only on the "arm's length" issue: ***PWC QB Reasons*** at paras 60 and 90. In contrast, in the Perpetual February 2020 Application, the Perpetual Defendants focus on other elements that the Trustee most prove in order to establish its case.

3. Concluding Comments

[47] Given that the First May 2020 Schweitzer Affidavit and the Second May 2020 Schweitzer Affidavit are addressing two different scenarios and are focused on two different timeframes, I find that there is no abuse of process in respect of those documents.

[48] Given that the Perpetual October 2018 Application and the Perpetual February 2020 Application focus on different elements of the Section 96 *BIA* Claim, I find that there is no abuse of process. Provided this Court only addresses matters that have not been decided, it is appropriate for me to consider the Perpetual February 2020 Application.

[49] If the Perpetual Defendants can show that the claim does not have merit, it should not have to suffer a trial. Such a determination would be in keeping with the thrust of the foundational Rules. On the other hand, if the Trustee puts its best foot forward and demonstrates from the record that there is a genuine issue requiring a trial, then neither a striking of the Action nor a summary disposition is available.

[50] As a closing comment on this abuse of process matter, my views on the ability of the Court to consider the Perpetual February 2020 Application is consist with earlier assertions advanced by the Plaintiff in the context of the Trustee August 2018 Summary Judgment Application. In particular, the Trustee has asserted that "[t]he law on the relevant issues is also not complex. In any event, there is no reason why complex legal issues require a trial and cannot be determined on an application": see paragraph 29 of the Brief of the Respondent PricewaterhouseCoopers Inc, LIT, dated November 1, 2018 (the "**November 2018 Trustee Brief**"). This comment from the Trustee is consistent with the foundational Rules that I touched on above.

D. Is there an aspect of the Section 96 *BIA* Claim that should be considered under this application?

[51] Having determined that the Perpetual February 2020 Application is not an abuse of process, I now turn to the next question. The question as to whether there is an aspect in the Section 96 *BIA* Claim that should be considered engages the elements of that statutory provision. The relevant components of section 96 of the *BIA* read as follows:

> [96(1) *Transfer at undervalue*] On application by the trustee, a court may declare that a transfer at undervalue is void as against [...] the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> (a) the party was dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
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> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
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> (iii) the debtor intended to defraud, defeat or delay a creditor; or
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

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

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

[52] For purposes of this hearing, there are five distinct elements embedded in the framework of section 96 of the *BIA*. Those elements are as follows:

a. the relationship between the parties (*i.e.*, arm's length or non-arm's length) (the "**Relationship Element**");

b. a transaction that constitutes a "transfer at undervalue" (the "**Transfer at Undervalue Element**");

c. the time of occurrence of the transfer, as measured from the date of the initial bankruptcy event (*i.e.*, within one year or between one year and five years) (the "**Temporal Element**");

d. the insolvency of the debtor (the "**Insolvency Element**")[2]; and/or

e. the intention on the part of the debtor to defeat creditors (the "**Intention to Defeat Creditors Element**").

(Collectively, the "**Section 96 *BIA* Elements**.)

[53] Depending on the particulars of the transaction which the licensed insolvency trustee is examining, these elements apply and interact in different fashions. As a case in point, there is an important distinction within the Relationship Element as between an arm's length transaction and a non-arm's length transaction.

[54] In respect of an arm's length transaction, it is more difficult for a trustee to challenge the subject transfer, and the time frame is shorter. To contest an alleged transfer at undervalue between arm's length parties, the challenge must occur within one year of the date of the initial bankruptcy event. Further, the licensed insolvency trustee must prove at the time of the transfer, on a balance of probabilities, both: (i) the insolvency of the debtor at the time of the transfer; and (ii) the intention of the debtor to defeat creditors. To emphasize the point, the insolvency aspect and the intention to defeat creditors is a conjunctive test when an arm's length transaction is being challenged.

[55] In respect of a non-arm's length transaction that is challenged within one year, the tests are not that rigorous. To contest an alleged transfer at undervalue between non-arm's length parties, a licensed insolvency trustee need not prove any additional element if the transfer occurs within the one-year window. In particular, assuming the subject transfer is at undervalue, the conveyance can be impeached even if the debtor: (i) was not insolvent; and (ii) did not intend to defeat creditors.

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[2] The relevant component of the actual provision reads "the debtor was insolvent at the time of the transfer or was rendered insolvent by it".

[56] If the alleged transfer at undervalue in respect of a non-arm's length transaction occurred outside of this one-year period but within a five-year window immediately prior to the date of the initial bankruptcy event, the requirements are quite different. Under this scenario, the licensed insolvency trustee must prove at the time of the transfer, on a balance of probabilities, either: (i) the Insolvency Element; or (ii) the Intention to Defeat Creditors Element. To emphasize the point, the insolvency aspect and the intention to defeat creditors is a disjunctive test when a non-arm's length transaction is being challenged.

[57] The above framework provides a context within which to examine the Asset Transaction for purposes of the Perpetual February 2020 Application. Focusing on the particulars of the Asset Transaction, the Trustee must prove, on a balance of probabilities, each of the Section 96 *BIA Elements*. If the Perpetual Defendants displace one of those elements, then the Section 96 *BIA* Claim fails.

1. The Relationship Element

[58] The Relationship Element involves the question as to whether there was a non-arm's length relationship between the PEOC and POT at the time of the Asset Transfer. This question was before me in an earlier application: ***PWC QB Reasons*** at para 87 and 107.

[59] Concerning the question as to whether the relevant relationship was non-arm's length at the relevant time, I declined to answer the question because I determined that it needed to be tested in a *viva voce* context: ***PWC QB Reasons*** at para 100. Unless the Relationship Element comes back before me in the context of a *viva voce* hearing, I am functus on this issue. As a result, I make no further comment.

2. The Transfer at Undervalue Element

[60] The Transfer at Undervalue Element is a focal point of the Trustee SOC. In the section of the Trustee SOC entitled the "Transfer at Undervalue", the Trustee asserted that "[t]he Asset Transaction constituted a transfer at undervalue within the meaning of the *BIA*, including sections 2 and 96": see clause 21 of the Trustee SOC.

[61] The Transfer at Undervalue Element is one of two threshold issues listed in the Perpetual February 2020 Application. It is also an issue that the Perpetual Defendants raised in the Perpetual SOD.

[62] Given the facts and analysis, I find the Transfer at Undervalue Element is a live issue in my consideration of the Perpetual February 2020 Application. That said, I will not consider this issue further for purposes of this hearing. My reasons for this are twofold, albeit in the alternative.

[63] First, if I determine below that the Insolvency Element was not violated for purposes of the Perpetual February 2020 Application such that PEOC was not insolvent at the relevant time, then I will have to decide if either Rule 3.68 or Rule 7.3 applies to strike or summarily dismiss, respectively, the Section 96 *BIA* Claim against the Perpetual Defendants. That determination would be made independent of the Transfer at Undervalue Element.

[64] Second, if I determine below that the Insolvency Element was potentially violated for purposes of the Perpetual February 2020 Application, then the Section 96 *BIA* Claim against the Perpetual Defendants will have to go to trial. I make that determination because the Transfer at Undervalue Element engages a number of issues that should be explored in a trial proper. That

determination would be made because, in my view, neither Rule 3.68 nor Rule 7.3 should be used in this case to conclude the Transfer at Undervalue Element.

3. The Temporal Element

[65] The path the Court needs to address in the context of the Temporal Element will be determined by the Relationship Element.

[66] If the Asset Transaction is found to be arm's length, then the Trustee is out of time. This would be the case because the alleged transfer at undervalue between parties must have occurred within one year of the date of the initial bankruptcy event. Given that the Asset Transaction was effected in October 2016 and that the bankruptcy of SRC (formerly PEOC) occurred in March 2018, it is outside the one-year timeframe.

[67] If the Asset Transaction is found to be non-arm's length, then the Trustee is within the timeframe to challenge the conveyance. This would be the case because the alleged transfer at undervalue between parties must have occurred within five years of the date of the initial bankruptcy event.

[68] For purposes of the analysis under the Perpetual February 2020 Application only, I will assume that I am examining a non-arm's length transaction. In making this assumption, I emphasize that I make no finding on the arm's length/non-arm's length issue in this decision.

[69] Given the facts, analysis and assumption above, I presume for purposes of this analysis that the five year envelop in section 96(1)(b)(ii) of the *BIA* applies for purposes of the Perpetual February 2020 Application. As a result, the non-arm's length Temporal Element asserted by the Trustee is assumed to have been met for purposes of exploring the arguments inherent in the Perpetual February 2020 Application.

4. The Insolvency Element

[70] In a number of clauses in the Trustee SOC, the Trustee stated that SRC (formerly PEOC) was either insolvent at the time of the Asset Transaction or rendered insolvent by that transaction: see clauses 14.3, 16.3.3, 20.1 and 22.4 of the Trustee SOC. In responding to the Perpetual February 2020 Application, the Trustee grounds its argument on the fact that the *BIA* expressly refers to "obligations, due and accruing due", as opposed to "liabilities".

[71] The Insolvency Element was not dealt with in ***PWC QB Reasons*** because the Perpetual October 2018 Application did not raise the issue. As stated above, the issue the Perpetual Defendants advanced in the Perpetual October 2018 Application in the context of the Section 96 *BIA* Claim was directed to the issue of whether the Asset Transaction was at arm's length for purposes of section 96(1) of the *BIA*.[3]

[72] Based on my review of the documents, I find that both the Perpetual SOD and the Perpetual February 2020 Application touch on, and challenge, the insolvency assertion advanced in the Trustee SOC. In particular, the Perpetual SOD stipulates that SRC was not insolvent at the time of the relevant transaction nor rendered insolvent by that transaction: see clause 5 of the

[3] Since the focus of the Perpetual October 2018 Application concerning the *BIA* was on the non-arm's length issue, I was careful to not get into the "value" issue. The reason for my caution was that I did not want to become engaged with the Transfer at Undervalue Element issue when the Perpetual Defendants had not raised it in the Perpetual October 2018 Application.

Perpetual SOD. Similarly, the Perpetual February 2020 Application challenges the insolvency assertion advanced in the Trustee SOC.

[73] The Insolvency Element is a fundamental aspect of the Trustee SOC. If the evidence before me establishes that SRC (formerly PEOC) was neither insolvent at the time of the Asset Transaction nor rendered insolvent by that transaction, then the next step is to consider whether the Trustee SOC should be: (i) struck under Rule 3.68; or (ii) dismissed summarily under Rule 7.3. My preliminary review of the question in the context of the Perpetual February 2020 Application confirms that the Insolvency Element is worthy of examination.

[74] Given the facts and analysis, I find the Insolvency Element is a live issue in my consideration of the Perpetual February 2020 Application.

5. The Intention to Defeat Creditors Element

[75] The Trustee SOC makes no reference to the Intention to Defeat Creditors Element. As a result, I infer that this element is not relevant to the claim made by the Trustee. This inference is supported by the fact that the Perpetual SOD does not address the Intention to Defeat Creditors Element.

[76] Since pleadings shape the issues, I am not entitled to address this element, absent an amendment: ***Geophysical Service Incorporated v Murphy Oil Company Ltd***, 2018 ABCA 380 [***Geophysical Service***], leave to appeal to SCC refused, 2019 CarswellAlta 1009. Even "[a] motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future": ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 19 [***Lameman***]; see also ***Geophysical Service*** at para 33.

[77] Given the facts and analysis, I find the Intention to Defeat Creditors Element to be irrelevant to my consideration of the Perpetual February 2020 Application.

6. Concluding Comments

[78] Based on the facts and analysis, I have determined there is an aspect of the Section 96 *BIA* Claim that should be considered under the Perpetual February 2020 Application. Given the manner in which the Perpetual SOD and the Perpetual February 2020 Application are framed, the sole focus below will be on the Insolvency Element.

E. Was PEOC insolvent at the time of the Asset Transaction or rendered insolvent by it?

[79] This question engages the Insolvency Element. Based on the evidence before me in the context of the Perpetual February 2020 Application, the answer to this question pivots on whether the ARO associated with the Goodyear Assets at the time of the Asset Transaction is to be taken into account in the determination of the Insolvency Element.

1. Incremental Facts

[80] The evidence of the Trustee during the hearing concerning the Perpetual October 2018 Application focused on three financial variables. Those financial variables were: (i) the value of the consideration received by SRC (the "**Value Variable**"); (ii) the ARO (the "**ARO Variable**"); and (iii) property taxes (the "**Property Tax Variable**") (collectively, the "**Financial Variables**").

[81] Concerning the Value Variable, the value of the Goodyear Assets received by PEOC on the Asset Transaction was alleged in the Trustee SOC to be no more than $5,670,200: see clause 13.2 of the Trustee SOC. This amount does not include any value attributed to the Gas Marketing Contract, which the evidence indicates was $12.9 million: ***PWC QB Reasons*** at para 332; see also ***PWC QB Reasons*** at para 114(e).

[82] The Trustee SOC includes the following.

a. The Goodyear Assets had significant associated ARO when PEOC acquired that property in the context of the Asset Transaction: para 5 of the Trustee SOC; see also ***PWC QB Reasons*** at para 114(a).

b. The amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified: para 6.1 of the Trustee SOC; see also ***PWC QB Reasons*** at para 114(b).

[83] Concerning the ARO Variable, the evidence provided by the Trustee in the context of the Perpetual October 2018 Application alleged the "liabilities" assumed by PEOC in the Asset Transaction included the following estimated amounts: (i) ARO abandonment costs of $98,855,218; (ii) ARO reclamation costs of $93,272,056; and (iii) ARO facility costs of $26,831,000. These alleged ARO liabilities aggregate to a total of $218,958,274: ***PWC QB Reasons*** at para 333.

[84] Concerning the Property Tax Variable, the evidence provided by the Trustee in the context of the Perpetual October 2018 Application alleged municipal property taxes in the amount of $10,047,744. Based on my review of the evidence in that earlier hearing, I noted that those municipal property taxes were from a 2015 listing. Since the Asset Transaction was effected in 2016, I focused on the evidence concerning the municipal property taxes associated with that calendar year. Based on my review of the evidence in that earlier hearing, I found the relevant outstanding municipal property tax to be in the amount of $1,560,890: ***PWC QB Reasons*** at para 334.

[85] SRC carried on business operations under its new management from October 1, 2016 until early March, 2018 (the "**SRC Operations Period**"). The SRC Operations Period equates to just over 17 months of ongoing business activity.

[86] The financial statements for Perpetual Energy report that the expected time period for settling its ARO is a range of up to 25 years. Those financial statements also report that Perpetual Energy used a rate of 2.3% for discounting purposes.

[87] The financial statements for Canadian Natural Resources Limited ("**Canadian Natural**") report that the expected time period for settling its ARO is a range of up to 60 years. Those financial statements also report that Canadian Natural used a rate of 3.8% for discounting purposes.

2. The Statutory Framework

a. The *BIA*

[88] The relevant aspects of section 96(1) of the *BIA* are outlined above. As stated in that analysis, there are five elements embedded in the framework of section 96 of the *BIA*. For purposes of the Perpetual February 2020 Application, I only focus on the Insolvency Element.

[89] The Insolvency Element engages the definition of "insolvent person" which is defined in section 2 of the *BIA* (the "**Insolvent Person Definition**"). That definition reads as follows:

> In this Act
>
> [...]
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;....

b. The *CCAA*

[90] Certain aspects of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ["***CCAA***"] will be touched on as part of this analysis because of comments within the jurisprudence. That said, there are important differences between the *CCAA* and the *BIA*, and some of those differences need to be highlighted for purposes of this application.

[91] As a preliminary comment in respect of the *CCAA*, that statute does not contain a definition for the phrase "insolvent person". Section 2 is the "Definitions" component of that statute, and it is silent on the phrase "insolvent person".

[92] However, the *CCAA* does include the phrase "insolvent person" in section 36.1 of that statute. That provision (and its headings, included here for reference purposes only) reads as follows:

> **Preferences and Transfers at Undervalue**
>
> 36.1(1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> **Interpretation**
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> > (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
> >
> > (b) to "trustee" is to be read as a reference to "monitor"; and
> >
> > (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

3. The Trustee Position

[93] The Trustee argues that all line items listed in the "liabilities" section of the balance sheet (the "**Right-Hand Side of the Balance Sheet**") are to be included in assessing the Insolvency Element for purposes of the Asset Transaction.[4] In advancing this assertion , the Trustee states that "[e]very obligation" is to be included in applying the balance sheet test: ***Re Stelco Inc***, 2004 CanLII 24933 (ON SC) at para 59 [***Stelco***]. In response to a question that I asked for context, the Trustee also asserted that any deferred taxes would be included in the application of the balance sheet test because that obligation would crystallize on the "date of the test": see also ***Stelco*** at para 59.

[94] In advancing the above position, the Trustee relies primarily on the sweeping comments of Justice Farley who wrote the ***Stelco*** decision. In that case, Justice Farley made the comment that "[s]urely, there cannot be 'orphan' obligations which are left hanging unsatisfied. It seems to me that the intention of 'due and accruing due' was to cover off all obligations of whatever nature or kind and leave nothing in limbo": ***Stelco*** at 50; see also ***Stelco*** at paras 22, 52 and 59. The Trustee also relies on a number of other cases: see ***Re Anderson***, 2012 BCSC 956 at para 10 [***Anderson***]; and ***Re 4519922 Canada Inc***, 2015 ONSC 124 at paras 27 and 31 [***4519922Co***].

[95] In the course of advancing his position, Justice Farley disagreed with the comments of Justice Ground in ***Enterprise Capital Management Inc v Semi-Tech Corp***, 1999 CanLII 15003 (ON SC). Insofar as Justice Ground and Justice Farley are both of the Ontario Superior Court, the judicial comments of one do not bind the other.

[96] While I have the highest regard for the leadership that Justice Farley showed in the commercial area over the years that he was on the bench, I do not agree that his sweeping comments apply to the Insolvency Element as it is framed in the *BIA*. While the construction of the phrase "obligations, due and accruing due" that Justice Farley suggested above embraces a laudable objective for *CCAA* purposes, a prerequisite to that result under the *BIA* would require, in my view, a legislative amendment to that statute.[5] I touch on that needed legislative amendment below, but emphasize for purposes of this application that Parliament has not yet been acted upon needed amendments to the *BIA* notwithstanding that other forums have identified the need for such legislative modifications.

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[4] I use the defined phrase the "Right-Hand Side of the Balance Sheet" rather than the usual reference to the "liability" side of the balance sheet. I define it as such to avoid the assumption that a line item within that section of the balance sheet is automatically a "genuine liability". As a matter of law, line items within the Right-Hand Side of the Balance Sheet may not be "genuine liabilities".

[5] Justice Farley (as he then was) made a number of commendable suggestions in the insolvency area. As Justice Newbould stated in one case involving a discussion concerning a suggestion by the Honourable Jim Farley that there be a bifurcation of the role of the monitor, "[t]hat may be a laudable objective, but would require legislation": ***Re Nelson Education Limited***, 2015 ONSC 3580 at para 34. Others have also recognized the significance of the issues that Justice Farley touched on. As two practitioners noted in an academic paper acknowledging the contribution of Justice Farley during his tenure on the Bench, "[n]ot everyone agrees on all of the issues, but issues are being identified in the formal resolution actively pursue": see John McLean and Larry Prentice, "The Western View of an Eastern Judge" in Janis P Sarra, ed, *Annual Review of Insolvency Law* 2006 (Toronto: Thomson Carswell, 2007) at 56. As I will note below, the definition of "insolvent person" is one of the areas which, in my view, requires amendment, but Parliament has not yet taken the appropriate steps to amend the *BIA*.

[97] My further comments concerning Justice Farley and his interpretation of the phrase "obligations, due and accruing due" are fivefold.

[98] First, the comments of Justice Farley in ***Stelco*** were made in the context of an application under the *CCAA*. As has been mentioned by the Supreme Court of Canada, the *CCAA* has a remedial objective and it is focused on *all* stakeholders: ***Century Services*** at paras 59 and 60; see also Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" in Jill Corraini and the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law* 2019 (Toronto: Carswell Thomson Reuters, 2020) at page 624. Consistent with this theme, an academic has commented that Justice Farley gave the term "insolvent" "...an expanded meaning under the *CCAA* in order to give effect to the rehabilitative goal of that statute": see Dr Janis P Sarra, *Rescue! The Companies' Creditor Arrangement Act*, 2nd ed (Toronto: Carswell 2013) at 101 and 102 [***Rescue!***]. Similarly, Justice Paperny (as she then was) notably characterized the *CCAA* endorsement exercise as one that "widens the lens" to balance a broader range of interests, which includes creditors, shareholders, the company, employees and the public: ***Re Canadian Airlines Corp***, 2000 ABQB 442 at paras 95 and 174, leave to appeal to ABCA refused, 2000 ABCA 238; 2001 ABCA 9, leave to appeal to SCC refused, 2001 Carswell Alta 888.

[99] It is noteworthy that when Justice Farley was considering the solvency issue, he stated explicitly that he was going "...to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of <u>'debtor company' in the context and within the purpose of that legislation</u>": ***Stelco*** at para 26 (underlining added). In my view, his focus on "that legislation" and the broad perspective of the *CCAA* justifies a consideration of all obligations when considering a restructuring under that statutory framework because one needs to look forward into the future.

[100] This broad perspective involving applications under the *CCAA* has been commented on by Janis Sarra. She has observed that certain entities have been found to be insolvent "...using the <u>expanded definition of insolvency</u> set out in *Re Stelco Inc*": ***Rescue!*** at 106 (underlining added). She has gone on to state that the expanded "...definition reflects the "rescue" emphasis of the *CCAA*, modifying the definition of insolvent person to include a financially troubled corporation that is reasonably expected to run out of liquidity within reasonable proximity of the time as compared with the time reasonably required to implement a restructuring": ***Rescue!*** at 106.

[101] In contrast, I view the Insolvency Element under section 96 of the *BIA* as being measured as at a point in time. That is, one must determine what obligations are due and accruing due as at a particular date. As an aside, my view that one must determine what obligations are due and accruing due as at a particular date is not inconsistent with the Trustee's view that an obligation would crystallize on the "date of the test". When I consider matters within the context of the Insolvency Element, the relevant question is what obligations crystalize (*i.e.*, are completely constituted) as at the "date of the test".

[102] In this regard, I construe "obligations, due" as one where there is an existing relationship in circumstances where the subject obligation is completely constituted and presently exigible: ***The Hydro-Electric Commission of Ontario v Albright***, 1922 CanLII 8 (SCC), 64 SCR 306 at

312 [***Hydro-Electric***]. Examples of the relevant relationships include debtor/creditor (including trade debtor/trade creditor) and borrower/lender.

[103] I do not view an obligation based on an estimate as falling within the scope of the "obligations, due", unless there is an existing creditor: see ***General Motors*** at para 24. I take this interpretative position because absent an existing creditor there has not been the crystallization of the necessary relationship to establish an "obligation[...], due" in a legal sense for purposes of the *BIA*. That is, I do not view an obligation based on an estimate as being completely constituted. Absent an existing creditor, no one can enforce a debt obligation at that time because no completely constituted obligation exists in a legal sense.

[104] To emphasize the point concerning "obligations, due", the enactment by a body politic of a statutory framework that creates future obligations to society, which causes an entity like Perpetual Energy to book an accounting estimate does not equate to the establishment of "obligations, due". Using ARO as an example, the accounting exercise to quantify the amount that may be due in the future is only an estimate of an obligation the time of calculation. It does not establish an obligation that is "due" to an identifiable person at that time.

[105] Similarly, I construe "obligations, ...accruing due" as one where there is an existing debtor/creditor or borrower/lender relationship in circumstances where the underlying obligation is completely constituted, albeit with an additional amount accumulating day to day, but which is only enforceable in the future: see ***Hydro-Electric*** at page 312 and 313.

[106] My interpretation of the phrase "obligations, ...accruing due" is supported by the consideration the Supreme Court gave to the meaning of "accrued" in ***Sun Indalex Finance, LLC v United Steelworkers***, 2013 SCC 6 [***Sun Indalex***]. In that case, the term "accrued" was considered in the context of certain statutory wind-up deemed trust provisions covering "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations": *Pension Benefits Act*, RSO 1990, c P.8, s 57(4).

[107] In ***Sun Indalex***, Justice Deschamps (for the majority on this point) held that "a contribution has 'accrued' when the liabilities are completely constituted, even if the payment itself will not fall due until a later date": ***Sun Indalex*** at para 36 (underlining added). In support of his conclusion on this matter, Justice Deschamps cited Justice Duff's interpretation of the meaning of the word "accrued" in ***Hydro-Electric***. In interpreting the scope of a covenant, Justice Duff found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted – and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* – a debt for example which is *debitum in praesenti solvendum in futuro*: ***Hydro-Electric*** at 312 and 313.
>
> [Emphasis in the original.]

[108] Second, Justice Farley and his sweeping comments in ***Stelco*** are reflective of the fact that he tended to push the legislative boundaries under the *CCAA*. He did so through the exercise of his inherent jurisdiction. In the course of expressing his views on the meaning of "obligations", he commented that "[t]he word "liability" is a very broad one. It includes all obligations to which

the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2) (underlining added)": ***Stelco*** at para 52.

[109] I acknowledge that Justice Farley then went on to state that "contingent and unliquidated claims would be encompassed by the term 'obligations'": ***Stelco*** at para 52. He also framed "...the BIA (c) test...roughly ... as an assets compared with obligations test": ***Stelco*** at para 41.

[110] While I might be inclined to accept Justice Farley's last comment if the relevant terminology within clause (c) of the Insolvent Person Definition only referred to the term "obligations", the relevant terminology is not the term "obligations" *simplicter*. The relevant phrase within that definition is "obligations, due and accruing due". In my view, those additional words constrain the meaning of "obligations".

[111] Third, judicial activities under the *CCAA* is judge-made law crafted on an *ad hoc* basis, without statutory guidelines: see 2020 Bennett on Bankruptcy at 5. This is a contrast to dealing with the matters under the under the *BIA*, which proceed under a detailed legislated framework. In my view, I am obligated to construe the *BIA* as it currently reads, not based on how it should read. As a result, I am obligated to construe the phrase "obligations, due and accruing due".[6]

[112] Fourth, Justice Farley further observes "...that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account": ***Stelco*** at para 55. He further comments that "[a]ll liabilities, contingent or unliquidated would have to be taken into account": ***Stelco*** at para 56. In making that comment, Justice Farley relied on a number of cases, including ***Re King Petroleum Ltd*** (1978), 29 CBR (NS) 76 (Ont. SC).

[113] I note that in ***King***, Justice Steele observed that "[i]n this case, I find no difficulty in accepting the obligations shown as liabilities because they are known" (underlining added): ***King*** at 81, as quoted in ***Stelco*** at para 49. A few comments are warranted. First, unlike the circumstances in ***King***, the alleged ARO is not known. It is simply an estimate of an obligation, which will be impacted by unknown legislative changes over the decades to come. The vagaries of ARO are evidenced by the fact that the Perpetual Energy financial statements report that its ARO will be settled in a range of up to 25 years. That timeline by itself creates uncertainty. The vagaries of the ARO are further emphasized by the evidence of Canadian Natural (which is one of the Intervenors), whose financial statements report that its ARO will be settled in a range of up to 60 years. In my view, that extended timeline further evidences the uncertainty of the ARO. The radical differences in the discount rates applied by Perpetual Energy and Canadian Natural further illustrate the vagaries, being 2.3% and 3.8%, respectively. Second, the reference to "obligations" in ***King*** is not qualified by the phrase "due and accruing due". Insofar as words mean something, that additional terminology is important.

[114] Fifth, to the extent jurisprudence in Canada makes comments concerning the meaning of phrases in the *BIA* in the context of a *CCAA* restructuring, those comments are *obiter dicta*. While such comments are instructive, they are not binding on me. Importantly, the Trustee has not provided me with any authority that is binding on me in respect of its construction of the phrase "obligations, due and accruing due" in the context of the *BIA*.

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[6] Mr. Frank Bennett states that "[b]oth statutes [BIA and CCAA] contain obsolete concepts and terminology that no longer appear to apply to 21st century commerce": 2020 Bennett on Bankruptcy at 1.

[115] In summary, if this case was dealing with a dispute under the *CCAA*, I would give the comments of Justice Farley further consideration because that statute is remedial in nature (a "rescue" focus) and the court should consider the interests of all stakeholders in an effort to continue the troubled business: ***Century Services*** at paras 15 to 18. I make this comment because the underlying thrust of the *CCAA* is to provide a framework that will avoid the negative consequences of liquidation: ***Century Services*** at para 18. In contrast, the *BIA* does not have a "rescue" focus. The statute is, in part, penal in nature: ***Re Little***; and ***Bombardier Credit***. Given that different context, a court should be cautious about giving an "expanded definition" to the concept of insolvency for purposes of the *BIA*, notwithstanding that it may be appropriate for the *CCAA*: ***Rescue!*** at 106.

4. The Perpetual Energy Position

[116] As stated above, the Perpetual Defendants assert that PEOC (subsequently SRC) was not insolvent at the time of the Asset Transaction nor rendered insolvent by that transaction. This assertion is evident in the Perpetual SOD and the Perpetual February 2020 Application because both of those documents touch on, and challenge, the insolvency assertion advanced in the Trustee SOC.

5. Further Analysis

[117] As with many issues in law, the answer is not as clear as a layperson might assume. On the Insolvency Element issue, there are two different camps within the Canadian judicial community.

[118] What is particularly interesting about the arguments advanced by the Trustee concerning the alleged scope of the Insolvent Person Definition is that notwithstanding they were asserted by a celebrated jurist in 2004 (and occasionally followed – see ***4519922Co*** at para 31, where Justice Newbould cited Justice Farley with approval, albeit in a *CCAA* context, again), they have not been universally followed throughout Canada, even in Ontario: see, for example, ***Re Industries Cover inc (Syndic des)***, 2015 QCCS 136 at paras 412-26 [***Industries Cover***]; and ***RBC v Oxford Medial Imaging Inc***, 2019 ONSC 1020 at para 39.

[119] I acknowledge that statements have been made by courts to the effect that contingent liabilities on guarantees are to be included as debts accruing due: ***Anderson*** at para 10. An examination of the ***Anderson*** case is warranted since the Trustee raised it as an example.

[120] Mr. Carl Glenn Anderson ("**Mr. C. G. Anderson**") had personally agreed to guarantee certain amounts in 2002 concerning 439288 BC Ltd ("**439Co**") and Area Finance Inc ("**AFI**") (collectively, the "**CGA Guarantees**"). When Mr. C. G. Anderson granted that guarantee in 2002 it was because 439Co was insolvent, and the guarantee was a term of the amended proposal: ***Anderson*** at para 3(4).

[121] Mr. C. G. Anderson subsequently effected a non-arm's length transfer of property, which occurred on August 15, 2005: ***Anderson*** at para 3(12). The transferee was his son, Mr. Jarrett Anderson. The issue was whether Mr. C. G. Anderson was insolvent at the time of that transfer in August, 2005.

[122] Both 439Co and AFI made assignments in bankruptcy on November 2, 2009. That 2009 assignment is not relevant, but it does provide context. The critical evidence is that 439Co and

AFI had deficiencies in their financial capacities in August 2005 that subjected Mr. Anderson to a call on the guarantees in the amount of $15,500,000 (and he also owed approximately $2,600,000 directly to 439Co): ***Anderson*** at para 3(10).

[123] I concur that it was appropriate for Justice Meiklem in the ***Anderson*** case to include the CGA Guarantees in the calculation as to whether Mr. C. G. Anderson was insolvent as at the August 15, 2005 transfer date: ***Anderson*** at para 10. The reason for my concurrence is because the obligation that Mr. C. G. Anderson had under the CGA Guarantees was *completely constituted* on August 15, 2005, which is the "date of the test". That is, the underlying contractual relationship could be enforced as at that date. The only reason it is called contingent on the August 15, 2005 date is because no steps had been taken on or before that date to enforce the CGA Guarantees, notwithstanding that the contractual framework existed.

[124] I also note with particular interest that in ***Industries Cover***, Pinsonnault, JCS cites Justice Fournier in ***Bonneau (Faillite de)***, 1997 CanLII 8560 (QC CS) at paras 36 to 29 that it would be non-sensical to adopt an expansive interpretation of "obligations, accruing due" for the purposes of determining insolvency because including all future payments as due on the spot in the balance sheet test would result in a good part of the population being insolvent: ***Industries Cover*** at para 425; see also ***Villeneuve c Villeneuve***, 2007 QCCS 4468 at paras 31 and 32. Given the economic climate in Canada that is currently impacting the oil and gas industry, I infer that the same concern exists for the participants in that economic sector. That is, applying the Trustee's interpretation would likely render many of the oil and gas entities operating in Canada insolvent as at the date of this decision.

[125] I addition to the above noted debate, I think it important that four key players have not accepted the interpretive approach that Justice Farley suggested in ***Stelco*** concerning the phrase "obligations, due and accruing due" within clause (c) of the Insolvent Person Definition. I turn to consider the nature and context of these four key players.

a. Preliminary Comments

[126] One of the inherent questions asked in the Perpetual February 2020 Application is whether PEOC was rendered insolvent by the Asset Transaction, if it was not already insolvent. As noted above, this engages the Insolvency Element. In the context of this case, the focal point is clause (c) of the Insolvent Person Definition.

[127] The underlying question concerns the scope of the phrase "obligations, due and accruing due" within clause (c) of the Insolvent Person Definition. Clause (c) of the Insolvent Person Definition is often referred to as the "balance sheet test" (the "**Balance Sheet Solvency Test**").

[128] There is authoritative commentary and one legislative enactment that touches on the "insolvency" issue. That commentary and the one legislative enactment is worthy of consideration, and, as alluded to above, it stems from four key players.

[129] The authoritative commentary and the one legislative enactment on which I will touch is: (i) a paper issued by the ULCC in 2012, which was entitled *Uniform Reviewable Transaction Act* ["**2012 *URTA* Proposal**"]: see 2012 ULCC 0035; (ii) Final Report 108 issued by the ALRI, March 2016, Updated April 2016, which was entitled Reviewable Transactions ["**2016 ALRI *Reviewable Transactions Act***"]: see 2016 CanLIIDocs 390; (iii) the enactment by New Brunswick of the *Debtor Transactions Act* (the "**2015 NB *DTA***"): see SNB 2015, c 23; and (iv) Frank Bennett. In considering the Insolvency Element in the context of commentary from Frank

Bennett, I reviewed Frank Bennett, *Bennett on Bankruptcy* 18th ed (Toronto: LexisNexis 2016) ["**2016 Bennett on Bankruptcy**"], Frank Bennett, *Bennett on Bankruptcy* 21st ed (Toronto: LexisNexis 2019) ["**2019 Bennett on Bankruptcy**"] and 2020 Bennett on Bankruptcy.

[130] I also reviewed the commentary from a few other sources which captures the views of the federal Crown concerning "genuine liabilities". While those other sources touch on the matter in a different context, that perspective is instructive concerning the Insolvency Element issue.

b. The Uniform Law of Conference of Canada – The 2012 Proposal

[131] The ULCC undertook a comprehensive project to consider calls for reform of the law of fraudulent conveyances and fraudulent preferences in Canada. Now, as in 1919 when the federal *Bankruptcy Act* was initially enacted, there is overlap between: (i) the *BIA*, on one hand; and (ii) fraudulent conveyance and insolvency legislation enacted by the provinces, on the other hand. In 2012, the ULCC recommended the adoption of the 2012 *URTA* Proposal across Canada.

[132] In considering the issues, the ULCC drew on the *BIA* in a manner that is relevant to the Insolvency Element. One of the items addressed in the 2012 *URTA* Proposal was the definition of "insolvent". The definition in the 2012 *URTA* Proposal is as follows:

> "insolvent", with respect to a person, means that
>
> > (a) the person is for any reason unable to meet his or her obligations as they generally become payable,
> >
> > (b) the person has ceased paying his or her obligations in the ordinary course of business as they generally become payable, or
> >
> > (c) the aggregate of the person's property, other than exempt property, is not, at a fair valuation, sufficient to enable payment of all his or her obligations, whether or not those obligations are currently payable;

[133] For purposes of my analysis, I note that the term "obligations" in clause (c) of the definition of "insolvent" in the 2012 *URTA* Proposal is not qualified by any words. In my view, that revised legislative drafting approach opens the Balance Sheet Solvency Test under the definition of "insolvent" in the 2012 *URTA* Proposal to potentially include anything that would fall within the scope of the term "obligations". While I need not make a finding on the matter at this time, the use of the term "obligations" in the 2012 *URTA* Proposal may include ARO within the scope of clause (c) of the definition of "insolvent" in that draft statute. The inference that I draw on that matter is supported by the narrative that accompanied the 2012 *URTA* Proposal. The relevant narrative is as follows:

> Clauses (a) and (b) of the definition exactly parallel the corresponding clauses of the *Bankruptcy and Insolvency Act* (*BIA*) definition of the term. Clause (c) provides a balance sheet test of insolvency, which is designed to determine whether the cumulative value of a person's property is sufficient to satisfy all of his or her financial obligations. The test reflects the equivalent clause of the *BIA* definition but differs in two points of detail. First, only property of a debtor that can be reached by creditors under judgment enforcement law is included in calculating the cumulative value of his or her assets for purposes of determining creditors' rights; exempt property is explicitly excluded. Secondly, the [2012

> *URTA* Proposal] resolves a debate about the application of the *BIA* balance sheet test. The issue is whether the calculation of obligations is to take into account only obligations that are currently payable, or all obligations to which a person is currently subject regardless of whether they are payable presently or in the future. The second view is adopted here (the "**2012 *URTA* Commentary**").
>
> [Emphasis added.]

[134] It is noteworthy that the 2012 *URTA* Proposal was promulgated approximately eight years after the comments of Justice Farley in ***Stelco***. If the ULCC thought that ***Stelco*** was correct concerning the scope of clause (c) of the Insolvent Person Definition, I infer that it would not have been necessary for this national think-tank to recommend the amendment to the *BIA* framework wording in clause (c) of the definition of "insolvent" in the 2012 *URTA* Proposal. Further, there would have been no need to state in 2012 *URTA* Commentary concerning clause (c) of the definition of "insolvent" that the revised wording "resolves a debate about the application of the *BIA* balance sheet test".

c. The Alberta Law Reform Institute – The 2016 Proposal

[135] In 2016, the ALRI recommended the 2012 *URTA* Proposal be adopted in Alberta: see 2016 CanLIIDocs 390. The actual document recommended for approval was the 2016 ALRI *Reviewable Transactions Act*, which adopted the 2012 *URTA* Proposal with minor amendments.

[136] In considering the issues, the ALRI drew on the 2012 *URTA* Proposal in a manner that is relevant to the Insolvency Element because it effectively incorporated the *BIA* insolvency framework by reference. One of the items included in the 2016 ALRI *Reviewable Transactions Act* was the definition of "insolvent", which reads as follows:

> "insolvent", with respect to a person, means that
>
> > (a) the person is for any reason unable to meet his or her obligations as they generally become payable,
> >
> > (b) the person has ceased paying his or her obligations in the ordinary course of business as they generally become payable, or
> >
> > (c) the aggregate of the person's property, other than exempt property, is not, at a fair valuation, sufficient to enable payment of all his or her obligations, whether or not those obligations are currently payable;

[137] The definition of the term "insolvent" in the 2016 ALRI *Reviewable Transactions Act* is identical to the definition of that term in the 2012 *URTA* Proposal.

[138] A review of the history concerning the 2016 ALRI *Reviewable Transactions Act* provides context. After considering the 2012 *URTA* Proposal, the ALRI made the following statement:

> The Uniform Reviewable Transactions Act should be enacted in Alberta, with such minor revision as may be required to conform to local drafting protocols, to incorporate the few changes suggested below and to appropriately cross-reference Alberta legislation. The [2012 *URTA* Proposal] represents good policy, would strengthen the judgment enforcement system and would greatly clarify the rights of creditors and the corresponding liability of those who deal with a person who has creditors. It is comprehensive in scope and includes rules addressing questions

that are either not addressed by current legislation or for which there are no clear answers: 2016 ALRI *Reviewable Transactions Act* at para 102.

[139] For purposes of this analysis, I note that the term "obligations" in clause (c) of the definition of "insolvent" in the 2016 ALRI *Reviewable Transactions Act* is not qualified by any words. In my view, the drafting of clause (c) of the definition of "insolvent" in the 2016 ALRI *Reviewable Transactions Act* opens the Balance Sheet Solvency Test under the definition of "insolvent" in to potentially include anything that would fall within the scope of the term "obligations", including possibly ARO.[7] My views on this are supported by the narrative that accompanied the 2012 *URTA* Proposal, which was incorporated into the 2016 ALRI *Reviewable Transactions Act* by way of an attachment in the form of Appendix A.

[140] It is noteworthy that the 2016 ALRI *Reviewable Transactions Act* was promulgated approximately 12 years after the comments of Justice Farley in ***Stelco***. Again, if the ALRI thought that ***Stelco*** was correct concerning the scope of clause (c) of the Insolvent Person Definition, I infer that it would not have been necessary for it to accept the amendment suggested by ULCC to the *BIA* framework concerning the wording in clause (c) of the definition of "insolvent" which was included in the 2012 *URTA* Proposal. Further, there would have been no need to incorporate by reference the 2012 *URTA* Commentary concerning clause (c) of the definition of "insolvent" that the revised wording "resolves a debate about the application of the *BIA* balance sheet test": see Appendix A to the 2016 ALRI *Reviewable Transactions Act*.

d. New Brunswick – The 2015 *Debtor Transactions Act*

[141] The enactment of the 2015 NB *DTA* is significant because it gives legislative strength to the wording in clause (c) of the definition of "insolvent" in the 2012 *URTA* Proposal. In my view, it also gives legislative acceptance to the 2012 *URTA* Commentary. I make these comments because the definition of "insolvent" in the 2015 NB *DTA* adopted the same wording as outlined above in respect of the 2012 *URTA* Proposal and the 2016 ALRI *Reviewable Transactions Act*.

[142] Given its enactment of the 2015 NB *DTA*, I infer that the lawmakers in New Brunswick adopted that definition of "insolvent" for the reasons stated in the 2012 *URTA* Commentary.

e. Bennett on Bankruptcy

[143] Mr. Frank Bennett does not have the weight of the ULCC or the ALRI. That said, he needs no introduction to the insolvency community in Canada. He is a past Chair of both the provincial and national Bankruptcy and Insolvency sections of the Canadian Bar Association. He has made a significant academic contribution to the insolvency area over the decades, as evidenced by the many books he authored in this area. Insofar as he has addressed the Balance

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[7] I state in this sentence that the use of the term "obligations" could possibly include ARO because there is still some uncertainty concerning the scope of that word. I make that comment because there is commentary that an "obligation" is a legally binding tie that established a bond between an obliger and an obligee: see Daniel Greenberg, ed, *Stroud's Judicial Dictionary of Words and Phrases* (London, UK: Sweet & Maxwell, 2012), sub verbo "obligation". Further, there is additional commentary that suggests that an "obligation" equates to an agreement, enforceable by law, whereby a person or persons become bound to the payment of a sum of money or other performance: see JA Simpson and ESC Weiner, eds, *The Oxford English Dictionary* (Oxford, UK: Clarendon Press, 1989) *sub verbo* "obligation". That is just an issue the legislative drafters would need to address.

Sheet Solvency Test and its connection with the Insolvency Element, Mr. Bennett's views are worthy of consideration.

[144] With that background in mind, I reviewed the 2016 Bennett on Bankruptcy, the 2020 Bennett on Bankruptcy, and, during an earlier segment of this ongoing litigation between the parties to this action, I reviewed 2019 Bennett on Bankruptcy (collectively, the "**Frank Bennett Commentary**"). I do not address the 2019 Bennett on Bankruptcy edition below in any detail, although I note that the analysis in that edition expands on what is in 2016 Bennett on Bankruptcy, and tracks with what the Balance Sheet Solvency Test commentary in 2020 Bennett on Bankruptcy.

i. The 2016 Bennett Position

[145] The Balance Sheet Solvency Test is addressed in 2016 Bennett on Bankruptcy. That edition of Bennett on Bankruptcy is relevant because 2016 is the year during which the Asset Transaction was effected.

[146] The relevant commentary the 2016 Bennett on Bankruptcy text concerning the Balance Sheet Solvency Test is as follows:

> ...And factor (c), property if sold at a fair valuation would not be sufficient to pay his or her debts, refers to a net worth statement where the creditor needs to establish that the debtor does not have sufficient assets, if liquidated at fair market sale, to satisfy the debts. This is often referred to as the balance sheet or liquidation test. In calculating the debtor's net worth, one has to include obligations currently payable and one does not have to include claims accruing due: "Interpretation" Chapter of 2016 Bennett on Bankruptcy at 47 and 48.

[147] The corresponding footnote to the above commentary is as follows, and it contained no commentary except for the reference to the following Ontario Superior Court case:

> **Enterprise Capital Management Inc. v. Semi-Tech Corp.**, 1999 CanLII 15003 (Ont. S.C.J.): Footnote 24 in the "Interpretation" Chapter of 2016 Bennett on Bankruptcy at 48.

ii. The 2020 Bennett Position

[148] The Balance Sheet Solvency Test is also addressed in 2020 Bennett on Bankruptcy. Since the Perpetual February 2020 Application was heard in calendar 2020, I reviewed that edition of the annotated textbook to see if there had been any shift in the views of Mr. Bennett concerning the Balance Sheet Solvency Test. I found that there had been a shift insofar as the 2020 Bennett on Bankruptcy text addressed ***Stelco*** directly in the context of its discussion concerning the Balance Sheet Solvency Test.

[149] The relevant commentary the 2020 Bennett on Bankruptcy text concerning the Balance Sheet Solvency Test is as follows:

> And factor (c), "property if sold at a fair valuation would not be sufficient to pay his or her debts", refers to a net worth statement where the creditor needs to establish that the debtor does not have sufficient assets, if liquidated at fair market sale, to satisfy the debts. This is often referred to as the "balance sheet or liquidation" test. In calculating the debtor's net worth, one has to include

> obligations currently payable and one does not have to include claims accruing due: "Interpretation" Chapter of 2020 Bennett on Bankruptcy at 48 and 49.

[150] The corresponding footnote to the above commentary is as follows:

> [Footnote 31] **Enterprise Capital Management Inc. v. Semi-Tech Corp.**, [1999] O.J. No. 5865 (Ont. S.C.J.); **Royal Bank of Canada v. Oxford Medical Imaging Inc.**, [2019] O.J. No. 1295, 2019 ONSC 1020, 68 C.B.R. (6th) 19 (Ont. S.C.J.), where the court in following the **Enterprise Capital Management** case, stated at para. 39 that ". . .it is inappropriate to include every debt payable at some future date for the purposes of determining insolvency. This would render numerous corporation's insolvent. Rather, debt obligations ought to be measured against the fair valuation of the company's property and limited to obligations currently payable or properly chargeable."
>
> On the other hand, if the debtor is facing a liquidity crisis, the court will take that factor into consideration where debts are payable at some future date. See, for example, **Re Stelco Inc.**, [2004] O.J. No. 1257, 48 C.B.R. (4th) 299 (Ont. S.C.J.), leave to appeal to the Court of Appeal refused, for a comprehensive review of the factors and law regarding whether a debtor company is insolvent. The Court reviewed variations of the insolvency test to determine whether a debtor will be insolvent if it cannot meet its future obligations, or would be facing a liquidity crisis if it could not meet its obligations as they become due within a short period of time: Footnote 31 in the "Interpretation" Chapter of 2020 Bennett on Bankruptcy at 49.

iii. Concluding Comments on Bennett

[151] The Frank Bennett Commentary stipulates that the Balance Sheet Solvency Test needs to take into account obligations currently payable. I agree with that aspect of the Frank Bennett Commentary because it is consistent with the phrase "obligations, due" in the Insolvent Person Definition. By definition, obligations currently payable are completely constituted liabilities, which are presently exigible.

[152] The Frank Bennett Commentary in the 2020 Bennett on Bankruptcy also stipulates that the Balance Sheet Solvency Test needs to take into account "...obligations...properly chargeable".[8] I agree with that position to the extent that the subject obligation is completely constituted as at the "date of the test".

[153] The Frank Bennett Commentary further states that "...one does not have to include claims accruing due". I do not agree with the entire thrust of that statement. I take that position because the interpretive view in the Frank Bennett Commentary goes too far concerning this particular matter. It is not in-keeping with the full context of the phrase "obligations, due and accruing due", which is included in clause (c) of the Insolvent Person Definition.

[154] As I read the Insolvent Person Definition, the concept of "obligations, ...accruing due" is explicit in the legislative framework. As a result, "obligations, ...accruing due" must be taken

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[8] I construe this phrase to be a reference to obligations, albeit still subject to the qualifying words "due and accruing due". If the term "chargeable" is intended to be a reference to, for example, the expensing of ARO, then I note that no ARO can be deducted (*i.e.*, expensed) for income tax purposes until it is incurred (*i.e.*, actually paid for). That could be decades in the future.

into account. In my view, the only proviso is that the "accruing" obligation must be completely constituted as at the "date of the test", albeit with an additional amount accumulating day to day, but which is only enforceable in the future: see ***Hydro-Electric*** at page 312 and 313. If the accruing obligation is completely constituted as at that relevant date, it must be taken into account for purposes of the Insolvency Element: see ***Sun Indalex*** at para 36.

[155] This interpretive view, however, draws a line at a different point than what is suggested by the Frank Bennett Commentary. In particular, I construe "obligations, ...accruing due" to exclude any alleged accruing obligation that is not completely constituted as at the relevant date. As such, in considering the Insolvency Element, alleged obligations that are mere estimates are not to be included in the determination of the solvency of an entity.

[156] In making the above comment, I acknowledge the assertions of the Industry Intervenors (defined below) to the effect that the ARO is a legislated liability that cannot be avoided. While there is merit to that argument insofar as there may be an obligation owed to society, there no amount "due" to a person until the obligation is completely constituted in respect of an identifiable person (*i.e.*, a trade creditor). Mere accounting estimates do not effect that result under clause (c) of the Insolvent Person Definition, as presently worded.

[157] I think it significant for purposes of the Perpetual February 2020 Application that the Frank Bennett Commentary does not give the weight to the comments of Justice Farley in ***Stelco*** concerning the meaning of the phrase "obligations, due and accruing due". I infer that the Frank Bennett Commentary does not give Justice Farley weight on that matter because Mr. Bennett believes that the ***Stelco*** commentary goes too far in suggesting what is to be included in the scope of the phrase "obligations, due and accruing due". This inference is supported by the fact that the Frank Bennett Commentary explicitly addresses ***Stelco*** in the 2020 Bennett on Bankruptcy.

[158] In connection with this comment, I note that Mr. Bennett has remarked as follows in terms of the need for legislative amendments:

> It's time for major amendments to the **Bankruptcy and Insolvency Act (BIA)** and to the **Companies' Creditors Arrangement Act (CCAA)**... As previously written, Parliament should revisit the whole area of bankruptcy and insolvency, making laws certain, coordinating and harmonizing the insolvency statutes so that creditors and debtors can readily predict with some certainty their rights and remedies in an insolvency situation. Certainty of laws and predictability are the hallmarks of an efficient working system: 2020 Bennett on Bankruptcy at v of the Preface.

[159] The comments of the ULCC also make it evident that there is a need for *BIA* amendments in respect of clause (c) of the Insolvent Person Definition. If the federal Crown wants to include items such as the ARO in the determination of the Insolvency Element, then legislative amendments to the *BIA* are required. In addition to the 2012 *URTA* Commentary, this view is implicitly supported by: (i) the 2016 ALRI *Reviewable Transactions Act* (see Appendix A); and (ii) the definition of "insolvent" in the 2015 NB *DTA*, which adopted the same wording as provided for in the 2012 *URTA* Proposal.

f. Additional Context

i. The Federal View – No Tax Deduction

[160] The issue as to whether ARO associated with the Goodyear Assets should be considered in respect of the Insolvency Element at the time of the Asset Transaction can be informed by reviewing other areas of the law. One area of the law that has dealt with the issue of contingent liabilities over the decades is income tax. While the wording in the *Income Tax Act* is different, there is an overlap in the context, which is informative.

[161] Under the *Income Tax Act*, ARO costs are generally only deductible in the period in which they are incurred (*i.e.*, paid). The prohibition against an earlier deduction occurs because the *Income Tax Act* stipulates that "[i]n computing the income of a taxpayer from a business or property no deduction shall be made in respect of ...an amount as, or on account of, a reserve, a contingent liability or amount or a sinking fund except as expressly permitted by this Part..." (underlining added): see section 18(1)(e) of the *Income Tax Act*.

[162] Given the different wording between the *BIA* and the *Income Tax Act*, I will only point out a couple of concepts that are informative. Historically, the Crown would only permit a deduction in respect of an alleged obligation if there was a "genuine liability": see Edwin C Harris QC, "Words in Context: 'Contingent' and 'Dividend'", in *Report of Proceedings of the Fifty-Fourth Tax Conference*, 2002 Conference Report (Toronto: Canadian Tax Foundation, 2003), 38:1 – 19 at 38:6.

[163] One comment from the Federal Court of Appeal is particularly instructive because it: (i) highlights the difference between accounting and law; and (ii) focuses on the need for an "absolute liability". This judicial comment also emphasises the need for an identifiable creditor. The judicial comment reads as follows:

> It is not disputed that in an accounting context, the Closing Balance in the Contingency Fund was properly treated as an expense in GM's 1995 audited financial statements and was recorded among "other current liabilities" in those statements. However, it must be remembered that what is recorded as an obligation for accounting purposes may not be considered an absolute liability at law if a creditor with a legally enforceable claim cannot be identified: ***General Motors*** at para 24.
>
> [Emphasis added.]

ii. Deferred Taxes – An Accounting Provision

[164] Perpetual Energy had no deferred taxes reported on the financial statements that were in evidence. However, Canadian Natural had deferred taxes reported on its financial statements that were in evidence.

[165] Since deferred taxes were included in evidence, I asked questions on the issue for context. I did so because I wanted to ensure that I fully understood the scope of the Trustee's assertions. As I reviewed above, the Trustee asserts that any deferred taxes would be included in the application of the Balance Sheet Solvency Test for purposes of the Insolvency Element because it is of the view that the related obligation would crystallize on the "date of the test".

[166] Notwithstanding that Perpetual Energy has no deferred taxes, it is worth reviewing aspects of that line item on the Right-Hand Side of the Balance Sheet to determine if it should be

taken into consideration in the context of Insolvency Element. A simple example will illustrate the point. Subject to the analysis below, a discussion concerning deferred taxes also illustrates the need to draw a line between what is relevant for purposes of the Insolvency Element and what is not relevant.

[167] Deferred taxes arise in a number of circumstances in the course of preparing financial statements. One circumstance where deferred taxes arise is when the depreciation rate used for financial reporting purposes (the "**Book Depreciation**") differs from the allowable capital cost allowance rate that is permitted under the provisions of the *Income Tax Act* (the "**CCA Deduction**"). For purposes of this discussion, I will assume that a particular operating company ("**ACo**") has this fact pattern, and that a licensed insolvency trustee is considering the application of the Balance Sheet Solvency Test in the context of considering the Insolvency Element.

[168] If the Book Depreciation rate is lower than the CCA Deduction rate in the ACo scenario, a deferred tax will be recorded on the financial statements of the company. That deferred tax will be recorded on the "liability" side of the balance sheet, which I defined above as being the Right-Hand Side of the Balance Sheet.

[169] To reiterate, the deferred tax of ACo arises in those circumstances because of a timing difference between the Book Depreciation rate and the CCA Deduction rate (the "**Illustrative Timing Difference**"). If the underlying business of ACo ceased today, the Illustrative Timing Difference reported on its financial statements for the end of business on this date would never be due by that taxpayer to the Crown. In those circumstances, the Illustrative Timing Difference in respect of the deferred tax would become a permanent timing difference. To emphasize the point, no obligation would crystallize on the "date of the test".

[170] That permanent timing difference would arise because as at the date that the business of ACo ceased to operate, no incremental income tax amount associated with that deferred tax would be due or accruing due. That is, as at the date that the business ceased operations there would no legal obligation owed to the Crown in respect of the Illustrative Timing Difference. Further, no legal obligation associated with that Illustrative Timing Difference arising in the ACo context would ever crystallize into a tax debt owed to the Crown. As a result, for purposes of the Insolvency Element in this example, the deferred taxes are not captured by the phrase "obligations, due and accruing due".

[171] Given the illustrative facts and analysis, I find (for demonstrative purposes only) that the deferred taxes arising from the Illustrative Timing Difference would not be taken into account for purposes of the Insolvency Element. This demonstrates that a line must be drawn on the Right-Hand Side of the Balance Sheet. The only question is where that line is to be drawn in a particular case when considering the application of the Insolvency Element.

g. Determining Insolvency

[172] The Insolvent Person Definition has two branches. Both branches must be established before a person can be considered insolvent. I will review each of those branches.

i. "Insolvent Person Definition"- First Branch

[173] First, the person must have liabilities to creditors provable as claims under the *BIA* that amount to one thousand dollars. The defined term "debtor" in section 2 of the *BIA* includes an "insolvent person".

[174] The Trustee has provided no proof that PEOC had any provable claims before the Asset Transaction. However, for purposes of this analysis, I find PEOC had liabilities to municipalities in the form of property taxes that would be provable as claims for in excess of one thousand dollars immediately after the Asset Transaction.

[175] Given the facts and analyses, I find this first branch has been proved, on a balance of probabilities, because there are provable claims of more than $1,000 owed to municipalities in the form of property taxes.

ii. "Insolvent Person Definition"- Second Branch

[176] Second, to be considered an "insolvent person", the entity must fall into one of three categories. Those categories are that the person: (i) is, for any reason, unable to meet their obligations as they generally become due (the "**Liquidity Test**"); (ii) has ceased paying their current obligations in the ordinary course of business as they generally become due (the "**Cease Payment Test**"); or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due (which I defined above as the Balance Sheet Solvency Test).

[177] Concerning this second branch, there is no evidence that PEOC was unable to meet either the Liquidity Test or the Cease Payment Test on October 1, 2016. The Liquidity Test looks forward in time. The Cease Payment Test looks backward in time. For completeness, I touch on both of those two tests.

[178] Concerning the Liquidity Test, the evidence is that SRC (formerly PEOC) operated for over 17 months after the Asset Transaction. Indeed, in a public letter to its stakeholders issued in March 2018, SRC (formerly PEOC) reported that during the first 11 months of the SRC Operations Period, the corporation steadily increased its production and reduced its overall environmental liabilities. In that same letter, SRC also reported that it ranked fifth in the Province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017: ***PWC QB Reasons*** at para 19.

[179] Concerning the Cease Payment Test, there is no evidence that PEOC ceased making payments in the period on or before October 1, 2016. While it was negotiating with certain municipalities concerning property tax matters, PEOC did not stop making payments. It was simply negotiating terms.

[180] Given the facts and analysis, I find that the Perpetual Defendants proved, on a balance of probabilities, that PEOC (subsequently SRC) met both the Liquidity Test or the Cease Payment Test as at the date of the Asset Transaction.

[181] The sole remaining question is whether the Balance Sheet Solvency Test was violated by PEOC (subsequently SRC) on the date of the Asset Transaction. This question engages Insolvency Element, which touches on the Insolvent Person Definition, and the meaning in law of the phrase "obligations, due and accruing due".

[182] Before I address the detail in this case, I will address the submissions of the intervenors. There were two intervenors in this hearing, and they were: (i) the Orphan Well Association ("**OWA Intervenor**"); and (ii) three industry intervenors, being Canadian Natural, Cenovus Energy Inc and Torxen Energy Ltd (collectively, the "**Industry Intervenors**").

[183] In its submissions to the Court, the OWA Intervenor argued that in considering the second branch of the Insolvent Person Definition, the inquiry should be broad so as to consider obligations. In advancing this argument, the OWA Intervenor asserted that one must look at the plain words of the provision in question. The plain words must then be evaluated in light of the object of the legislation, the scheme of the legislation, and the intent of Parliament. In particular, in its original submissions to the Court, the OWA Intervenor argued that the term "obligation" should be given its ordinary meaning, which is broader than "claim".

[184] The OWA Intervenor then submitted that the ARO is one such obligation. In oral argument, the OWA Intervenor further asserted that these obligations only arise because of a regulatory framework. In its reply Brief, the OWA Intervenor further argued "...that the relevant question is whether ARO is an 'obligation', not whether it is a liability."

[185] In its submissions to the Court, the Industry Intervenors took a different approach to this interpretive debate. While the Industry Intervenors touched on the assertion that ARO as an obligation and a liability in its oral argument, its written submissions advanced down a different path. In its written submissions, the Industry Intervenors argued that the relevant consideration of ARO in the Balance Sheet Solvency Test was not focused on the whether it was an obligation or a debt. Rather, the Industry Intervenors argued that the ARO was a critical and fundamental component of the determination of the fair market value of the person's aggregate property.

[186] Concerning the arguments provided by the OWA Intervenor, a few brief remarks are warranted. First, while I am general agreement with what much of the OWA Intervenors argued, I am obligated to read the legislation as drafted. The relevant phrase is "obligations, due and accruing due" as opposed to the term "obligation" *simplicter*. Second, the Supreme Court of Canada has construed the qualifying words such that only obligations that are completely constituted and presently exigible fall within the scope of that phrase: ***Hydro-Electric*** at 312; and ***Sun Indalex*** at para 36. As a result, if the alleged obligation is not completely constituted, it does not fall within the scope of "obligations, due and accruing due". Third, the phrase "obligations, due and accruing due" has been in the *BIA* (and its predecessors) for over 100 years. Based on the 2012 *URTA* Commentary issued by the ULCC, the need for a legislative change has been recognized for years, but no steps have been taken to amend the *BIA*. Insofar as I am an adjudicator (as opposed to a legislator), I reiterate that I must take the *BIA* as it reads. Fourth, insofar as bankruptcy proceedings are in the nature of penal measures, the Trustee must establish each of the Section 96 *BIA* Elements with proper evidence, including the Insolvency Element: ***Re Little***. In the context of the Perpetual February 2020 Application, that requires the Trustee to put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. In its capacity as the Respondent, the Trustee cannot resist summary disposition simply by raising a "doubt", although it is not required at that stage to prove its case on a balance of probabilities: ***Stefanyk v Sobeys Capital Incorporated***, 2018 ABCA 125 at para 16 [***Stefanyk***]; and ***McDonald v Brookfield Asset Management Inc***, 2016 ABCA 375 at para 13, leave to appeal to SCC refused, 2017 Carswell Alta 947.

[187] Concerning the arguments provided by the Industry Intervenors, its substantive focus was on the impact that ARO has on the determination of the fair market value of the person's property. That point goes to the issue of whether there was a transfer at undervalue, as opposed to whether the ARO falls within the ambit of the phrase "obligations, due and accruing due". That raises a number of issues, which is why I stated above that if it was the Transfer at

Undervalue Element that was in issue, it should not be decided by way of summary judgment under Rule 7.3.

[188] I now turn to my summary comments concerning the second branch of the Insolvent Person Definition. For purposes of the Perpetual February 2020 Application, I focus on each of the Financial Variables. Those variables are: (i) the Value Variable; (ii) the ARO Variable; and (iii) the Property Tax Variable. I address these three variables to determine whether the Perpetual Defendants established, on a balance of probabilities, that PEOC did not violate Balance Sheet Insolvency Test as at the date of the Asset Transaction.

(I) Value Variable

[189] The Trustee alleged the value of the consideration received by SRC was at most $5,670,200. That amount was in evidence, and it does not include any value attributed to the Gas Marketing Contract. The evidence indicates that the Gas Marketing Contract had a value in the range of $12.9 million. The Perpetual Defendants put other particulars in evidence that would add to the value, but there is no need to address those increments for purposes of this application.

[190] The evidence was that the $5,670,200 value amount also included an estimate of some abandonment costs and salvage value, but the Trustee went on to state that it did not consider these items to be material. While there are other issues noted in the affidavit, I accept the factual assertions in the Trustee SOC because the underlying affidavit stated that "[f]or the purposes of evaluating the Asset Transaction, the Trustee has used the reserve report received as part of the Perpetual Disclosure that attributes the highest value to the Goodyear Assets": see paragraph 38 of the Trustee's Affidavit sworn on August 2, 2018.[9] To be clear, that "highest value" was the $5,670,200 amount.

[191] I further note that if the Trustee wanted to revisit this value of $5,670,200 in the context of the Perpetual February 2020 Application, it could have done so. Indeed, the Trustee had an obligation to put its "best foot forward" concerning this value issue. For whatever reason, the Trustee took no such steps to update the evidence before me concerning the Value Variable. That being the case, I am obligated to deal with the evidence as it stands. In particular, in an application for summary judgment I am obligated to make a decision on the basis of the pleadings and evidence actually before me, and not on suppositions about what might be pleaded or proved in the future: ***Lameman*** at para 19; see also ***Weir-Jones*** at paras 37 and 39; ***Fort McKay Métis Community Association v Morin***, 2020 ABCA 311 at para 16 [***Fort McKay Métis Community***]; ***H2S Solutions Ltd v Tourmaline Oil Corp***, 2019 ABCA 373 at para 19 [***H2S Solutions***], additional reasons, 2020 ABCA 201; and ***Holmes v Jastek Master Builder 2004 Inc***, 2019 SKCA 132 at para 193 [***Holmes***].

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[9] Since the Trustee swore to the fact that it "used the reserve report with the highest value", the Court is entitled to rely on that evidence. That evidence from the Trustee equates to proof, on the balance of probabilities, of the Value Variable. While the Trustee asserted in argument that the value of $5,670,200 only related to 650 of the wells (approximately 26% of the total wells) and that the value may be different if all the wells were taken into account, it did not provide any new evidence that would have displaced its initial $5,670,200 value amount or updated the particulars in respect of that value. Given those circumstances in the context of the Insolvency Element, there was no need for me to consider the challenges or issues connected with any other valuation.

[192] Based on the facts in evidence and my analysis, I find that the evidence proves, on the balance of probabilities, that the value of the consideration received by SCR (formerly PEOC) was $5,670,200 for purposes of the Perpetual February 2020 Application.

(II)ARO Variable

[193] The aggregate ARO alleged by the Trustee is $218,958,274. The aggregate ARO can be broken down as follows: (i) ARO abandonment costs in the amount of $98,855,218; (ii) ARO reclamation costs in the amount of $93,272,056; and (iii) ARO facility costs in the amount of $26,831,000.

[194] Based on the facts and analysis, in order for any component of the ARO to fall within the phrase “obligations, due and accruing due” in clause (c) of the Insolvent Person Definition, it must be completely constituted and presently exigible: ***Hydro-Electric*** at 312. Since the Trustee did not provide any evidence to established that the ARO, or any component thereof, is completely constituted and presently exigible, I find that the amount of ARO to be included in the determination of the Insolvency Element is “Nil”. By way of summary, this interpretative approach is supported by: (i) the ULCC and 2012 *URTA* Proposal; (ii) the ALRI and its recommendations in respect of the 2016 ALRI *Reviewable Transactions Act*; (iii) the Frank Bennett Commentary; and (iv) by implication, the enactment of 2015 NB *DTA.*

[195] In making this ARO finding, I acknowledge the contribution of the OWA Intervenor and Industry Intervenors (collectively, the "**Intervenors**"). The Intervenors provided a number of affidavits in support of their positions (collectively, the "**Intervenors Affidavits**"). While I found the Intervenors Affidavits to be informative concerning the factual aspects related to the underlying operating corporations of the Affiants, I find the Intervenors Affidavits do not assist in advancing the position of the Trustee concerning the ARO Variable. My reasons are fourfold.

[196] First, the evidence of an Intervenor is not evidence in respect of SRC. While I accept it for the information it provides, it is not evidence on which I need to rely to make findings. The Intervenors Affidavits indicate that that the underlying corporations take steps to estimate and track their ARO that is expected to be incurred at the end of the life cycle of the asset. However, that is an exercise in estimating a future liability. That estimating process does not equate to the creation of an obligation that is completely constituted under the law.

[197] Second, the Intervenors Affidavits express a number of opinions rather than confining their comments to facts which I should consider. For reasons mentioned below, the inclusion of opinions on matters of law should not be included in an affidavit.

[198] Third, the Intervenors Affidavits refer to deemed liabilities. To the extent there are "deemed liabilities", I infer that there is no actual liability, which supports the view that the ARO does not equate to "obligations, due and accruing due". In any event, "deemed liabilities" are typically a statutory fiction: ***R v Verrette***, 1978 CanLII 208 (SCC), [1978] 2 SCR 838 at 845.

[199] Fourth, the Intervenors Affidavits opine that if the Asset Transaction is "tolerated", it would undermine the "polluter pays" accountability concept and would be in conflict with the expectations of the oil and gas industry concerning the application of the underlying provincial regulatory regime. There is merit to this point, but it needs to be addressed by amending the *BIA*. That is a legislative function. My task is to carry out an adjudicative function, and I must do so based on how the *BIA* currently reads.

[200] Concerning my above comments regarding opinions in affidavits, I find the Intervenors Affidavits to be inadmissible to the extent that the content of their affidavits opines on, or makes conclusions concerning, the characterization of the ARO in the context of the ongoing litigation regarding this Action. I make this finding because opinions on matters of law, or any conclusion based on the evidence, are for the court to decide. Those matters are not properly addressed in an affidavit: ***Rau v Edmonton (City)***, 2015 ABCA 5 at para 19; ***Hovsepian v Westfair Foods Ltd***, 2003 ABQB 641 at para 49. In particular, the affiants for the Intervenors purport to opine on issues of law, and make conclusions that are based on legal principles.

[201] To emphasize the legal foundation for this finding, evidence similar to that in the Intervenors Affidavits has been rejected in other cases. In particular, when determining issues that required a consideration of the conduct and process of directors, Justice Farley rejected such expert evidence, and he was upheld by the Ontario Court of Appeal. The comments of the appellate court on this matter were as follows.

> It seems to me that the conduct of directors is to be weighed against existing statutes, policies and legal precedent. I think it is inappropriate for these two witnesses to draw legal conclusions as to pure law or mixed questions of fact and law. As well I find it inappropriate and equally unhelpful for them to draw factual determinations. This is not a technical area (in the same way that laws of physics or the science of medicine are) where a trier of fact would need assistance in understanding the principles and how to apply the facts: ***Pente Investment Management Ltd v Schneider Corp***, 1998 CarswellOnt 5943 (Ct J) at paras 4-5; affirmed 1998 CarswellOnt 4035 (CA).

(III) Property Tax Variable

[202] Based on my review of the evidence in the context of the ***PWC QB Reasons***, I found, on a balance of probabilities, the relevant outstanding municipal property tax payable to be in the amount of $1,560,890: at para 334. Since the Trustee took no steps to update the evidence before me concerning the outstanding property tax that was payable on the date of the Asset Transaction, I find that the Property Tax Variable remains unchanged at an amount due of $1,560,890 for purposes of the Perpetual February 2020 Application.

6. Concluding Comments

[203] Based on the facts and analysis, I find that the Value Variable has been proven, on a balance of probabilities, to be $5,670,200.

[204] Based on the facts and analysis, I find that the Trustee has not provided evidence that any portion of the ARO is completely constituted and presently exigible. At best, the evidence establishes that the ARO is an estimate of an obligation, as opposed to an accounting entry that evidences “obligations, due and accruing due” for purposes of the *BIA*. As a result, I also find that the ARO associated with the Goodyear Assets at the time of the Asset Transaction has been established, on a balance of probabilities, to be Nil for purposes of clause (c) of the Insolvent Person Definition.

[205] Based on the facts and analysis, I find that the Property Tax Variable has been proven, on a balance of probabilities, to be $1,560,890.

[206] Given these determinations, I find that under the second branch it has been established, on a balance of probabilities, that PEOC was not insolvent at the time of the Asset Transaction or

rendered insolvent by the Asset Transaction. I summarize the mathematical results of my findings concerning the Balance Sheet Solvency Test under the Second Branch of the Insolvent Person Definition as follows:

Description	Amount
Value Variable	$5,670,200
ARO Variable	NIL
Property Tax Variable	1,560,890
Net Asset	$4,109,310

(See also ***PWC QB Reasons*** at para 368.[10])

F. Should the Trustee SOC be struck under Rule 3.68?

1. Incremental Facts

[207] The Trustee SOC did not refer to the financial statements of PEOC.

[208] The Trustee SOC stated that SRC (formerly PEOC) "...acquired assets with associated ARO and other liabilities which exceeded the value of the assets": clause 14.1 of the Trustee SOC.

2. The Law

[209] The ***PWC QB Reasons*** outlined the parameters within which an action may be struck under Rule 3.68: see paras 31 to 36. I will only refer to the relevant aspects of those parameters.

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

> **Court Options to Deal With Significant Deficiencies**
>
> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following: …
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim; …

[10] The Net Asset number recorded in para 368 of the ***PWC QB Reasons*** was $4,109,391. The difference between that number and the above $4,109,310 is $81 ($4,109,391 minus $4,109,310). That difference arises because the property taxes were recorded in para 368 as being $1,560,809, notwithstanding that I had found the property taxes to be $1,560,890: see ***PWC QB Reasons*** at para 334. The difference between $1,560,890 and $1,560,809 is $81.

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

[211] The primary judicial guideline in the ***PWC QB Reasons*** that applies to this hearing concerning the striking of an action is para 33, and it reads as follows:

> When considering an application under Rule 3.68(2)(b), "the Court must accept the allegations of fact as true expect to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof": ***Grenon***[***v Canada Revenue Agency***, 2017 ABCA 96] at para 6 [***Grenon***]. In other words, the decision must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application; and (ii) the applicable statutory and common law: ***HOOPP Realty Inc v Guarantee Co of North America***, 2015 ABCA 336 [...] at para 25, Wakeling JA, concurring.

[212] In deciding whether to strike the allegation that the Asset Transaction rendered PEOC insolvent, the Trustee argues that the Court "...must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": ***Rudichuk v Genesis Land Development Corp***, 2020 ABCA 42 at para 5 [***Rudichuk CA***]. The Trustee further argues that allegations must be "read generously" in favour of the Trustee: ***Rudichuk v Genesis Land Development Corp***, 2017 ABQB 119 at para 39.

3. Further Analysis

[213] In considering the application of Rule 3.68 for purposes of striking the Trustee SOC, I reviewed the commencement document for particulars. The facts alleged in the Trust SOC stated that SRC (formerly PEOC) "...acquired assets with associated ARO and other liabilities which exceeded the value of the assets" (underlining added).

[214] Rule 3.68(3) directs me not to consider any other evidence. Since the financial statements of SRC are not referred to in the Trustee SOC, I have no ability to delve into the assertion that the liabilities exceed the value of the assets. For purposes of considering Rule 3.68, I am blind to what is in the relevant financial records.

[215] In the circumstances, I am required to accept the allegations of fact in the Trustee SOC as true: ***Grenon*** at para 6; and see also ***PWC QB Reasons*** at para 32. An exception to this general rule exists if the allegations in the Trustee SOC: (i) were based on assumptions or speculation; or (ii) were patently ridiculous or incapable of proof: ***Grenon*** at para 6; and see also ***Operation Dismantle v The Queen***, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at para 27 [***Operation Dismantle***].

4. Concluding Comments

[216] Given the facts and analysis, I will not apply Rule 3.68 to strike the Trustee SOC. In making this determination, I also considered whether the allegations in the commencement document: (i) were based on assumptions or speculations; or (ii) were patently ridiculous or incapable of proof: ***Grenon*** at para 6; and see also ***Operation Dismantle*** at para 27. I find that none of those exceptions apply. In making this determination, I give the Trustee SOC a generous interpretation and err on the side of not striking the claim: ***Rudichuk CA*** at para 5.

G. Should the Trustee SOC be dismissed summarily under Rule 7.3?

1. Standard of Proof and Procedural Points

[217] The standard of proof on a summary disposition application is the "balance of probabilities": ***Stefanyk*** at paras 14 and 16; ***Angus Partnership Inc v Salvation Army (Governing Council)***, 2018 ABCA 206 at para 42 [***Angus Partnership***]. The moving party must begin by proving the factual basis of the application on the balance of probabilities: ***PWC QB Reasons*** at para 48; and ***Weir-Jones*** at paras 30 and 33. Once that has occurred, the presiding judge must be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial: ***Weir-Jones*** at para 30. In short:

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

[218] Summary disposition is appropriate where the chambers judge can make any required fact findings from the summary dismissal record in a fair and just manner: ***Stefanyk*** at para 15; and ***Angus Partnership*** at paras 44 and 79.

[219] A Respondent cannot resist summary disposition simply by raising a "doubt". It must put its "best foot forward". In particular, in an application for summary judgment I am obligated to make a decision on the basis of the pleadings and materials actually before me, and not on suppositions about what might be pleaded or proved in the future: ***Lameman*** at para 19; see also ***Weir-Jones*** at paras 37 and 39; ***Fort McKay Métis Community*** at para 16; ***H2S Solutions*** at para 19; and ***Holmes*** at para 193. Gaps in the record will not necessarily prevent summary disposition: ***Stefanyk*** at para 12.

[220] While the persuasive burden is initially on the Applicant, once that burden is satisfied the persuasive burden shifts to the Respondent: ***PWC QB Reasons*** at para 41; and ***Wood Buffalo Housing & Development Corp v Flett***, 2014 ABQB 537 at para 33.

[221] The Ontario Court of Appeal recently held that the definition of an insolvent person “is reserved for ‘clear cut situations where the liabilities on which the petition is founded and the act of bankruptcy are clearly established by sound and convincing evidence’”: ***Kormos v Fast***, 2019 ONCA 430 at para 13.

2. Incremental Facts

[222] In the Trustee August 2018 Summary Judgment Application, the Trustee sought, amongst other remedies, summary judgment in this Action under Rule 7.3. The Trustee initially stated that: (i) the relevant facts are simple; (ii) the law on the relevant issues is not complex; and (iii) there is no reason why complex legal issues require a trial and cannot be determined on an application.

[223] I reiterate that the SRC Operations Period equates to just over 17 months. During the SRC Operations Period, SCR (previously PEOC) acquired approximately 800 additional wells from at least three other arm’s length third parties. Through the SRC Operations Period, SRC also: (i) abandoned 150 wells; and (ii) received reclamation certificates for 90 wells.

[224] Subsequent to the hearing that gave rise to the ***PWC QB Reasons***, the Trustee did not provide any new evidence to revise or update the value of the consideration received by SRC (formerly PEOC) in the context of the Asset Transaction.

[225] Subsequent to the hearing that gave rise to the ***PWC QB Reasons***, the Trustee did not provide any new evidence to established that the ARO, or any component thereof, was completely constituted and presently exigible as at October 1, 2016.

[226] Subsequent to the hearing that gave rise to the ***PWC QB Reasons***, the Trustee did not provide any new evidence to revise or update the property taxes assumed by SRC (formerly PEOC) in the context of the Asset Transaction.

3. The Law

[227] The ***PWC QB Reasons*** outlined the parameters within which an action may be subject to summary judgment under Rule 7.3: see paras 37 to 54. I will only refer to the relevant aspects of those parameters.

[228] Summary dismissal applications are permitted under Rule 7.3. The relevant components of that Rule read as follows:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:[...] b) there is no merit to a claim....

[229] A Court may summarily dismiss a case where there is no genuine issue requiring a trial. In particular, no trial is required where a judge is able to reach a fair and just determination on the merits of a motion for summary dismissal: ***Windsor v Canadian Pacific Railway***, 2014 ABCA 108 at para 13. This will be the case when the process:

> a. allows the judge to make the necessary findings of fact;
>
> b. allows the judge to apply the law to the facts; and
>
> c. is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> (See ***PWC QB Reasons*** at para 37; and ***Hryniak*** at para 49.)

[230] For the Perpetual Defendants to be successful under Rule 7.3, they need to establish that there is no merit to the particular claim or part of it.

[231] A determination under Rule 7.3(1)(b) is not a result of a summary trial. It is a matter of summary judgment. In that regard, a summary judgment process is not to be construed as being on the summary trial process continuum: ***Weir-Jones*** at para 19.

[232] To emphasize the point, a summary judgment "is a way of resolving disputes *without* a trial; a summary trial is a trial": ***Weir-Jones*** at para 18 (emphasis in original). The three-part test in ***Hyrniak*** set out above is the correct analytical approach for when summary judgment may be appropriate: ***Weir-Jones*** at para 21; and see ***Hryniak*** at para 49.

[233] A judge can make findings of fact if the record permits that to be done, when viewed from an overall perspective: ***Weir-Jones*** at para 38. Further, that Court indicated that a judge

may draw inferences as necessary, and need not restrict themselves only to cases where the facts are not in dispute: ***PWC QB Reasons*** at 45.

[234] Summary judgment also may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: ***PWC QB Reasons*** at para 50; and ***Weir-Jones*** at para 21. In general, the sufficiency of the record will depend on the nature of the issues, the source and continuity of the evidence, and other relevant considerations: ***Weir-Jones*** at para 36.

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

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

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

(See also ***PWC QB Reasons*** at para 52.)

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

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

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

(See also ***PWC QB Reasons*** at para 54.)

4. Further Analysis

[239] At this stage of the analysis, the dispute is focused on the Insolvency Element. The evidence related to that component of the Perpetual February 2020 Application is not in serious dispute. Indeed, the primary evidence on which I relied came from the Trustee.

[240] In this case there are three Financial Variables relevant to the Insolvency Element, which I touched on above. Those three variables are: (i) the Value Variable; (ii) the ARO Variable; and (iii) Property Tax Variable. I addressed these three Financial Variables to illustrate the point that if ARO is not included in the phrase "obligations, due and accruing due", then, in my view, the foundation on which the Trustee is advancing the Section 96 *BIA* Claim effectively evaporates.

[241] But for the Trustee's comment to the Court during argument to the effect that I was in error on the value of the consideration received by SRC (*i.e.*, the Value Variable), the Trustee did not provide any new evidence concerning that matter. I address that value issue in more detail below.

[242] The relevant facts are simple. As stated above, that determination is supported by a similar assertion advanced by the Trustee in the initial stages of this case. By way of review, this simplicity point was asserted by the Trustee, notwithstanding that was made in reference to the multitude of elements that the Plaintiff had to prove: see paragraph 11 of the November 2018 Trustee Brief. In contrast, the Perpetual Defendants only need to deal with the evidence in the context of one element, that being the Insolvency Element.

[243] In addition to asserting that the relevant facts are simple, the Trustee also asserted that the law on the relevant issues is not complex: see paragraph 29 of the November 2018 Trustee Brief. The Trustee further asserted there is no reason why complex legal issues require a trial and cannot be determined on an application: see paragraph 29 of the November 2018 Trustee Brief. I agree with the Trustee's assertion on this point.

[244] The Perpetual February 2020 Application advanced by the Perpetual Defendants is the flip side of the argument that the Trustee was advancing in 2018. Based on the Trustee August 2018 Summary Judgment Application, the Trustee had to prove four elements to be successful under Rule 7.3. Those four elements were: (i) the Relationship Element; (ii) the Transfer at Undervalue Element; (iii) Temporal Element; and (iv) the Insolvency Element.[11] In an earlier hearing on this matter, I was advised by Counsel that the Trustee August 2018 Summary Judgment Application had been parked for the time being.

[245] The focal point concerning the Perpetual February 2020 Application is the characterization of the ARO in the context of the Insolvency Element. From a substantive perspective, I view the characterization of the ARO as being the sole legal issue at this stage of the application.

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[11] I did not include a fifth element because it was not mentioned in the pleadings. That fifth element is defined above as the "Intention to Defeat Creditors Element". Since the Trustee has assumed the Asset Transaction was a non-arm's length transaction, it need only prove one of: (i) the Insolvency Element; or (ii) the Intention to Defeat Creditors Element. The structure of the pleadings indicate that the Trustee selected the Insolvency Element path. I followed that path.

[246] In making this comment, I am not ignoring the fact that the Perpetual February 2020 Application also raised a second threshold issue, which was whether there was a transfer at undervalue. I will not address that issue at this stage of the analysis, other than to reiterate that it engages the Transfer at Undervalue Element which should not be decided by way of summary judgment under Rule 7.3.

[247] Returning to the sole issue, the substantive question is how the law applies to the ARO: ***PWC QB Reasons*** at para 50; and ***Weir-Jones*** at para 21. If the ARO is properly characterized as falling within the scope of "obligations, due and accruing due" for purposes of the Insolvency Element, then this Action must proceed to a trial proper in order to deal with the Section 96 *BIA* Claim. On the other hand, if the ARO does not fall within the scope of "obligations, due and accruing due" for purposes of the Insolvency Element, then the Section 96 *BIA* Claim fails because the Insolvency Element would not be satisfied.

[248] Based on the facts and analysis, I found above that the Value Variable and the Property Tax Variable are a positive amount of $5,670,200 and a negative amount of $1,560,890, respectively. Both of these amounts parallel what I found in the context of an earlier hearing: see ***PWC QB Reasons*** at paras **344 and 334**. I made this finding above because the Trustee had an opportunity to put its best foot forward. Since it did not update this evidence, I am obligated to make a decision on the basis of the pleadings and evidence actually before me, and not on suppositions about what might be pleaded or proved in the future: ***Lameman*** at para 19; see also ***Weir-Jones*** at paras 37 and 39; ***Fort McKay Métis Community*** at para 16; ***H2S Solutions*** at para 19; and ***Holmes*** at para 193.

[249] Based on the facts and analysis, I find that the Trustee has not provided evidence that any portion of the ARO is completely constituted and presently exigible. At best, the evidence establishes that the ARO is an estimate of an obligation, as opposed to an accounting entry that evidences "obligations, due and accruing due" for purposes of the *BIA*. As a result, I found above and reiterate here that the ARO Variable associated with the Goodyear Assets at the time of the Asset Transaction is to be set at "Nil" in the determination of the Insolvency Element.

[250] In considering the application of Rule 7.3 in this case, I also deliberated on the following: (a) that there is not a substantive dispute concerning the facts in evidence ("**Simple Facts – Trustee Evidence**"); (b) that the quality of the evidence will allow a just determination ("**Evidence Quality – Just Determination Foundation**"); and (c) that the evidence on which I am relying would meet the standards required at trial ("**Evidence Admissibility – Trial Standard**"). I address these three considerations below.

a. Simple Facts – Trustee Evidence

[251] In my view, there is not a substantive dispute concerning the material facts associated with the Insolvency Element debate: ***PWC QB Reasons*** at para 46; and ***Weir-Jones*** at paras 21 and 35-36. While there is a debate concerning the characterization of certain matters under the law, the facts are quite simple. What is disputed is what the law is, and how that law applies to the relevant facts.

i. Value Variable

[252] Concerning the Value Variable, I used the value amount that the Trustee put in evidence during the Perpetual October 2018 Application, and evidence concerning that amount was not updated by the Trustee during the Perpetual February 2020 Application. The particulars that the Trustee did refer to in argument included: (i) the fact that the McDaniel Report only referred to 652 wells out of an aggregate of 2,502 wells; and (ii) a variety of other valuation issues. Those particulars where already in evidence. Importantly, however, the Trustee did not amend or update its sworn testimony, which was to the effect that "[f]or the purposes of evaluating the Asset Transaction, the Trustee has used the reserve report received as part of the Perpetual Disclosure that attributes the highest value to the Goodyear Assets": see paragraph 38 of the Trustee's Affidavit sworn on August 2, 2018. Again, that highest value is the amount of $5,670,200, which is attributable to the Value Variable.

[253] Given the nature of the Trustee's evidence on this matter and my analysis, I find that the Court is entitle to rely on it for purposes of establishing, on the balance of probabilities, that the Value Variable is $5,670,200. As a result, I take the Trustee's sworn evidence as it stands.

ii. ARO Variable

[254] Concerning the ARO Variable, the evidence from the Trustee is that the cost model estimated the future obligations associated with the Goodyear Assets were: (i) $192,127,274 for the Goodyear Wells (abandonment costs of $98,855,218 and reclamation costs of $93,272,056); and (ii) $26,831,000 for the facilities associated with the Goodyear Wells calculated as the costs attributable to the Goodyear Assets, proportionate to the total ARO for all facilities. However, the Trustee provided no evidence that the estimated ARO is completely constituted and presently exigible. Further, there is no evidence of any existing creditors (trade creditors or otherwise) in respect of the ARO. The relevant legal question is whether the ARO in these circumstances falls within the ambit of the phrase "obligations, due and accruing due".

[255] In considering the ARO Variable issue, I acknowledge the argument that an obligation based on possibilities may not be sufficient to meet the *CCAA* "value test of debts due or accruing due", but an obligation based on probabilities should meet that test: see ***Re Les Oblats de Marie Immaculée du Manitoba***, 2004 MBQB 71 at para 44. My response to this argument is fourfold. First, the related judicial comment was made in the context of the *CCAA*. As I stated above, one may be justified in coming to that conclusion under the framework of the *CCAA*. However, I do not accept it for purposes of the *BIA*. Second, while it is probable that the ARO may represent a future obligation, there is no evidence that it has been completely constituted. Third, for purposes of the Insolvent Person Definition, there is too much uncertainty concerning a probable obligation that is potentially payable 25 years or 60 years in the future, especially when there is a very high likelihood that there will be technical and legislative changes which will impact on the "probable obligation". Fourth, I have not been provided with any authority that has accepted the "probable obligation" argument in context of the *BIA*, and I certainly do not accept for purposes of this application.

[256] Given the evidence and analysis, I find as a matter of law that the ARO Variable does not fall within the ambit of the phrase "obligations, due and accruing due". As a result of that finding,

the facts in evidence and my aggregate analysis, I further find that the ARO Variable has been established, on the balance of probabilities, to be an amount of "Nil".

iii. Property Tax Variable

[257] Concerning the Property Tax Variable, the evidence that the Trustee provided during the Perpetual October 2018 Application was not updated by the Trustee during the Perpetual February 2020 Application. In my review of the property taxes in the context of the Perpetual October 2018 Application, I examined the relevant evidence in some detail. I did not accept the 2015 municipal property tax documents as a proxy for the 2016 property tax liability: ***PWC QB Reasons*** at para 334. Instead, I focused my analysis in the context of that hearing on what was in evidence concerning unpaid municipal property taxes as at October 1, 2016. Based on my review of the evidence at that time, I found the relevant outstanding municipal property tax to be in the amount of $1,560,890: ***PWC QB Reasons*** at para 334.

[258] Given the evidence and analysis, I find that the Property Tax Variable has been established, on the balance of probabilities, as a payable in the amount $1,560,890: ***PWC QB Reasons*** at para 334.

b. Evidence Quality – Just Determination Foundation

[259] In my view, the quality of the evidence associated with the Insolvency Element is such that it is fair to conclusively adjudicate the Action summarily: ***PWC QB Reasons*** at para 46; and ***Weir-Jones*** at para 34. The substantive issue is how the ARO is dealt with in the context of the Insolvency Element.

[260] As mentioned above, the issue of how the ARO is dealt with is a question of law. The quality of the evidence associated with the ARO is not in dispute insofar as most of the critical evidence was provided by the Trustee.

[261] The issue pivots on whether an accounting estimate concerning a future cash outflow falls within the ambit of "obligations, due and accruing due" as at the date of the Asset Transaction in circumstances where there is no evidence the ARO associated with PEOC is completely constituted. As noted above, the Trustee provided no evidence that any component of the ARO was completely constituted.

[262] Given the facts and analysis, I find that an accounting estimate of ARO does not equate to, or establish, a completely constituted indebtedness that falls within the ambit of "obligations, due and accruing due". This finding is bolstered by the fact that the Trustee provided no evidence that any creditor was owed any amount in respect of even a component of the ARO such that it could enforce payment. This conclusion is further bolstered by the fact that the definition of "insolvent person" in the *BIA* should not be given the expanded definition that was used in ***Stelco***. The expanded definition may be justified for *CCAA* purposes because of the "rescue" emphasis of that statute: ***Rescue!*** at 106. In contrast, the *BIA* is analogous to a penal statute, and should be construed accordingly. The only aspect of the *BIA* that is remedial is in respect of proposals under that statute: see ***Century Services*** at para 15.

c. Evidence Admissibility – Trial Standard

[263] In making the above determinations, I am cognizant of the implications concerning a final disposition of the issues in this Action. That being the case, I need to ensure that I am relying on

evidence that would meet the standards required at trial: see ***Attila Dogan Construction v AMEC Americas Limited***, 2015 ABQB 120 at para 59. As has been noted by this Court, that is reasonable rule because litigants should not, for example, be vulnerable to having their rights finally determined by evidence that would not be admissible at trial: ***Murphy v Cahill***, 2012 ABQB 793 at para 25.

[264] I am comfortable with the affidavit evidence in this case because the critical evidence associated with each of the three Financial Variables came from affidavits that the Trustee put into evidence. Further, if the Trustee had tendered that same evidence in a trial, it would have been admissible. If there is a concern that the Trustee was relying on hearsay when it stated an admission in its affidavit concerning, for example, value amount, then I note that one can still be granted summary judgement without infringing the hearsay rules if one relies on an admission in the pleadings of the Respondent: Stevenson and Côté 2021 at 13-61 (8. Admissions). If that rule applies to admissions in a pleading, I infer that it applies with greater strength to "admissions" in a Respondent's affidavit.

5. Concluding Comments

[265] Having regard to the state of the record and the issues, I am of the view that it is possible to fairly resolve the dispute on a summary basis. Based on the evidence before me, the only substantive uncertainty concerns the proper treatment of the ARO in the context of the Insolvency Element. That is a question of law, and it does not require a trial.

[266] Based on the facts and analysis, the Perpetual Defendants have met the burden that there is "no merit" to the Section 96 *BIA* Claim. The reason for this conclusion is because the Insolvency Element has not been satisfied. I come to this conclusion because the ARO is considered Nil for purposes of clause (c) of the Insolvent Person Definition. That determination is a question of law. Having answered that question, there is no remaining genuine issue requiring a trial. In summary, at a threshold level, the facts of the case have been proven, on a balance of probabilities, all of which have been touched on above.

[267] Since the Perpetual Defendants met their burden, the Trustee was obligated to put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This could have occurred by: (i) challenging the case advanced by the Perpetual Defendants; (ii) showing that a fair and just summary disposition is not realistic; or (iii) otherwise demonstrating that there is a genuine issue requiring a trial. In my review, the Trustee achieved none of these, with the result that I am not convinced there is a genuine issue requiring a trial.

[268] In particular, since characterization of the ARO Variable involves a question of law, there is no genuine issue requiring a trial. The legal issue is very narrow, and there is sufficient evidence on the record to make a proper determination. As a result, summary disposition is available. Importantly, notwithstanding that the Trustee was obligated to put its best foot forward in the context of the Perpetual February 2020 Application, it did not take steps to bring any new evidence forward in respect any of the three Financial Variables.

[269] Based on my aggregate assessment of matters, I am sufficiently confident in the state of the record that I am prepared to exercise my judicial discretion to summarily resolve the dispute in respect of the Section 96 *BIA* Claim. I am comfortable in exercising my discretion in this

regard because the substantive issue concerns the characterization of the ARO. If the ARO is not captured by the phrase "obligations, due and accruing due", then the foundation for the Section 96 *BIA* Claim crumbles. Given the evidence and analysis, I find that PEOC (subsequently SRC) did not violate the Balance Sheet Solvency Test as at the date of the Asset Transaction. Given that determination, I further find that the Trustee SOC should be dismissed summarily under Rule 7.3 insofar as the Section 96 *BIA* Claim is the sole remaining issue within the trial division.

VI. Conclusions

A. Is the Perpetual February 2020 Application an abuse of process?

[270] Given that the First May 2020 Schweitzer Affidavit and the Second May 2020 Schweitzer Affidavit are addressing two different scenarios and are focused on two different timeframes, I find that there is no abuse of process in respect of those documents.

[271] Given that the Perpetual October 2018 Application and the Perpetual February 2020 Application focus on different elements of the Section 96 *BIA* Claim, I find that there is no abuse of process. Provided this Court only addresses matters which have not been decided, I find that it is appropriate for me to consider the Perpetual February 2020 Application.

B. Is there an aspect of the Section 96 *BIA* Claim that should be considered under this application?

[272] Based on the facts and analysis, I have determined there is an aspect of the Section 96 *BIA* Claim which should be considered under the Perpetual February 2020 Application. Given the manner in which the Perpetual SOD and the Perpetual February 2020 Application are framed, I find that it is appropriate to consider the Insolvency Element.

C. Was PEOC insolvent at the time of the Asset Transaction or rendered insolvent by the Asset Transaction?

[273] Based on the facts and analysis, I find that the Value Variable has been proven, on a balance of probabilities, to be $5,670,200.

[274] Based on the facts and analysis, I find that the Trustee has not provided evidence that any portion of the ARO is completely constituted and presently exigible. At best, the evidence establishes that the ARO is an estimate of an obligation, as opposed to an accounting entry that evidences "obligations, due and accruing due" for purposes of the *BIA*. As a result, I also find that the ARO associated with the Goodyear Assets at the time of the Asset Transaction has been established, on a balance of probabilities, to be Nil for purposes of clause (c) of the Insolvent Person Definition.

[275] Based on the facts and analysis, I find that the Property Tax Variable has been proven, on a balance of probabilities, to be $1,560,890.

[276] Given these determinations, I find that PEOC was not insolvent at the time of the Asset Transaction or rendered insolvent by the Asset Transaction.

D. Should the Trustee SOC be struck under Rule 3.68?

[277] Given the facts and analysis, I will not apply Rule 3.68 to strike the Trustee SOC. In making this determination, I considered whether the allegations in the commencement document:

(i) where based on assumptions or speculations; or (ii) where patently ridiculous or incapable of proof. I find that none of those exceptions apply. In making this determination, I gave the Trustee SOC a generous interpretation, and err on the side of not striking the claim.

E. Should the Trustee SOC be dismissed summarily under Rule 7.3?

[278] Based on my aggregate assessment of matters, I am sufficiently confident in the state of the record that I am prepared to exercise my judicial discretion to summarily resolve the dispute in respect of the Section 96 *BIA* Claim. I am comfortable in exercising my discretion in this regard because the substantive issue concerns the characterization of the ARO. If the ARO is not captured by the phrase "obligations, due and accruing due", then the foundation for the Section 96 *BIA* Claim crumbles. Given the evidence and analysis, I find that PEOC (subsequently SRC) did not violate the Balance Sheet Solvency Test as at the date of the Asset Transaction. Given that determination, I further find that the Trustee SOC should be dismissed summarily under Rule 7.3 insofar as the Section 96 *BIA* Claim is the sole remaining issue within the trial division.

VII. Costs

[279] If the parties cannot otherwise agree, they may speak to costs at their convenience.

Heard on the 1st and 2nd day of October, 2020.
Further written submissions filed on the 6th, 9th, 16th and 20th days of October, 2020.
Dated at the City of Calgary, Alberta this 14th day of January, 2021.

D.B. Nixon
J.C.Q.B.A.

Appearances:

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for Perpetual Energy Inc, Perpetual Operating Trust and Perpetual Operation Corp, Defendants/Applicants

Mr. Steven Leitl QC and Mr. Gunnar Benediktsson of Norton Rose Fulbright Canada LLP
for Susan Riddell Rose, Defendant

Mr. Kenneth T Lenz QC and Ms. Andrea Stempien of Bennett Jones LLP
for Orphan Well Association, Intervener

Mr. G Scott Watson and Mr. Charles W Ang of Parlee McLaws LLP
for Canadian Natural Resources Ltd, Cenovus Energy Inc and Torxen Energy Ltd, Industry Interveners