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Justice D.B Nixon

COURT FILE NUMBER 1801-10960

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

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

DOCUMENT **BRIEF OF THE RESPONDENT**
PRICEWATERHOUSECOOPERS INC., LIT
(SECURITY FOR COSTS)

For the hearing on July 28, 2020 at 10:00 a.m.
before Mr. Justice D.B. Nixon

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TABLE OF CONTENTS

INTRODUCTION..... 1

PART I - STATEMENT OF FACTS 1

PART II – ISSUES..... 1

PART III - ARGUMENT..... 2

 1. The Perpetual Defendants seek to rely on alternative evidence..... 2

 2. Section 254 of the *BCA* does not apply to Trustees in Bankruptcy..... 5

 3. The test for security for costs under Rule 4.22..... 6

 4. Conclusion on Rule 4.22 factors..... 19

 5. Amount sought..... 20

PART V - RELIEF SOUGHT..... 20

TABLE OF AUTHORITIES..... 21

INTRODUCTION

1. The Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp. (the “**Perpetual Defendants**”) have brought three applications: an application for security for costs, an application to strike and/or dismiss the Trustee’s claim under s. 96 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and an application for costs arising from their first application to strike and/or dismiss the Trustee’s claims.
2. With the exception of their application for costs, the Perpetual Defendants’ applications are an abuse of this Court’s process. The Perpetual Defendants attempt to rely on two inconsistent versions of the same key facts in two affidavits sworn by same witness on the same day.
3. In any event, the Perpetual Defendants are not entitled to security for costs. They are seeking costs against the Trustee personally, they have not shown that the Estate is unlikely to be able to pay a costs award and the other factors to be considered, including the fact that the estate “appears to have been impoverished by the very wrong sued for”¹, weigh heavily against the exercise of the Court’s discretion in their favour.

PART I – STATEMENT OF FACTS

4. The relevant facts are discussed below in relation to each issue.

PART II – ISSUES

5. The Perpetual Defendants’ application for security for costs raises three issues:
 - 5.1. Whether the application for security for costs should be dismissed as an abuse of process, regardless of its merits;
 - 5.2. If not,
 - 5.2.1. whether the Perpetual Defendants are entitled to security for costs; and
 - 5.2.2. the proper quantum of security for costs.

¹ *Alberta Civil Procedure Handbook*, 2018, Stevenson & Côté, pp. 4-21 and 4-22 [**Trustee’s Authorities, Tab 31**]

PART III – ARGUMENT

1. The Perpetual Defendants seek to rely on alternative evidence

6. The Perpetual Defendants’ case for security for costs is inconsistent with their case for striking and summary dismissal of the s. 96 claim.
 - 6.1. In seeking security for costs, the Perpetual Defendants argue that the Estate cannot pay a costs award in their favour because the ARO associated with Goodyear Assets make these assets essentially worthless. This version of the facts was also relied on by Defendants in the Court of Appeal and was the basis for Justice Veldhuis’ decision requiring the Trustee to pay security for costs.
 - 6.2. However, in seeking to strike and/or dismiss the Trustee’s s. 96 claim, the Perpetual Defendants argue that the ARO associated with Goodyear Assets are “not a liability” and that the Goodyear Assets actually have a positive value of \$4,109,391.
7. If the Perpetual Defendants had advanced *alternative arguments* on the *same evidence*, that would still arguably be an abuse of process.² However, because the Perpetual Defendants in fact rely on *alternative evidence* in the two inconsistent affidavits sworn by the same witness on the same day, the abuse of process argument is obvious.
8. Mr. Schweitzer swore two affidavits on May 5, 2020: one in support of the Perpetual Defendants’ application for security for costs and another in support of the Perpetual Defendants’ application for summary dismissal.
9. In support of the Perpetual Defendants’ application for security for costs, Mr. Schweitzer’s evidence is that the Perpetual Defendants are concerned that they will be unable to enforce an order for costs against the Trustee “because the estate has no exigible assets”.³ He says that:

² *Mystar Holdings Ltd. v 247037 Alberta Ltd.*, 2009 ABQB 480, at para. 62 [Trustee’s Authorities, Tab X]

³ Security for Costs Affidavit at para. 9.

According to the above information, and based on my understanding of the Supreme Court of Canada's decision in *Redwater* – namely that the obligation of an insolvent company to perform asset retirement obligations is binding on a trustee in bankruptcy and must be performed prior to payment of either secured or unsecured creditors – *it appears that the unsecured creditors of Sequoia stand to recover little or nothing.*⁴ [Emphasis added]

10. He confirms that his understanding is consistent with *Mr. Darby's evidence* in cross-examination that the assets in the Estate are of “marginal value”.⁵ This version of the facts concludes that the ARO and secured claims associated with the assets in the Estate exceed the positive value of those assets, including the Goodyear Assets.
11. This is inconsistent with the position in Mr. Schweitzer's other May 5 affidavit, sworn in support of the Perpetual Defendants' summary dismissal application. In that affidavit, Mr. Schweitzer swears that the “positive value” of the Goodyear Assets, a subset of the assets in the Estate, was \$4,109,391⁶ and that the Trustee's “opinion of the value mischaracterizes ARO as a liability”⁷
12. In *Mystar*, Justice Brooker reviewed the case law and confirmed that it was an abuse of process for a party, with full knowledge of the facts, even to advance diametrically opposed factual *allegations* in pleadings in two separate proceedings.⁸ The Perpetual Defendants' abuse of process in advancing two diametrically opposed versions of the key *evidence*, is obviously far more egregious.
13. As noted by our Court of Appeal, the abuse of doctrine is concerned with preserving the “integrity of the administration of justice” including by preventing conduct that would lead to “inconsistent results”.⁹
14. Two inconsistent decisions have already resulted from the Perpetual Defendants' reliance on alternative versions of the same facts.

⁴ Security for Costs Affidavit, at para. 27.

⁵ Security for Costs Affidavit, at para. 27.

⁶ Summary Dismissal Affidavit, at para. 17.

⁷ Summary Dismissal Affidavit, at footnote 3.

⁸ *Mystar Holdings Ltd. v 24037 Alberta Ltd.*, 2009 ABQB 480 (*Mystar*), at para. 62 [Trustee's Authorities, Tab 1]

⁹ *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, at para. 28, citing *Amalgamated Transit Union, Local 583 v Calgary (City)*, 2007 ABCA 121, at paras. 69, 78 [Trustee's Authorities, Tab 2]

15. In his security for costs affidavit, Mr. Schweitzer cites Justice Veldhuis' Reasons for Decision.¹⁰ In granting security for costs, Justice Veldhuis noted that:

In oral argument, the respondent suggested 2500 wells will remain in the estate, subject to the appeal, that may be used to satisfy an adverse costs award. The respondent has given no indication as to their value *or any liabilities associated with these assets*. This does not allow this Court to make any meaningful assessment about whether they can be used to pay costs. *In Alberta's current economic climate "2500 wells", with nothing more, may well be equivalent to a \$3 bill.*¹¹ [Emphasis added.]

16. Justice Veldhuis' finding regarding the "liabilities associated with" the Goodyear Assets was not made *sua sponte*. In seeking security for costs in the Court of Appeal, Ms. Rose had argued that:

[T]he Sequoia estate stands to gain nothing from the Trustee's action; any gains from this litigation will be offset by Sequoia's *ostensibly mounting asset retirement obligations*. Even in the unlikely event that a Court simply voids the impugned transactions, the result will be to remove *assets (and their associated liabilities)* from the Sequoia estate; the likely benefit to Sequoia's preferred and unsecured creditors is nothing.¹²

17. The Perpetual Defendants relied on Ms. Rose's Memorandum of Argument and argued that the estate likely had insufficient assets to pay any costs award.¹³

18. At the same time as they are seeking security for costs on the basis of Justice Veldhuis' finding that the Goodyear Assets may be equivalent in value to a "\$3 bill" because of the "associated liabilities",¹⁴ they also seek to strike and/or dismiss the Trustee's claims on the basis of this Court's finding that the same assets had "a positive value to PEOC of \$4,109,391".¹⁵

¹⁰ Security for Costs Affidavit, at para. 21.

¹¹ *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36, at para. 33,

¹² September 23, 2019 Memorandum of Argument of S. Rose, at para. 3 [Trustee's Authorities, Tab 26]

¹³ September 24, 2019 Memorandum of Argument of the Perpetual Defendants, at paras. 2 and 10 [Trustee's Authorities, Tab 27]

¹⁴ Security for Costs Affidavit, at para. 21 and Exhibit I.

¹⁵ Summary Dismissal Affidavit, at para 17.

19. Giving effect to this strategy will undermine the integrity of the administration of justice¹⁶ and is precisely what the abuse of process doctrine seeks to prevent. The Court should not have to choose the particular version of the evidence which supports the particular objective of each application. The Court should also not permit the Perpetual Defendants to do so. There is no basis for the Court or for the Perpetual Defendants to accept one version over the other. In the result, both should be disregarded.
20. The Perpetual Defendants' applications should be dismissed as an abuse of this Court's process, regardless of the merits of the applications otherwise.

2. Section 254 of the *BCA* does not apply to Trustees in Bankruptcy

21. Section 254 of the *BCA* only applies in an action or proceeding in which the "plaintiff is a body corporate".¹⁷ The definition of "body corporate" includes "a company or other body corporate wherever or however incorporated".¹⁸
22. When the *BCA* refers to a trustee in bankruptcy, it uses the words "trustee in bankruptcy" instead of "body corporate", as in sections 50(1), 161(2)(b)(iii), 206.1(c).¹⁹
23. The Plaintiff is not a "body corporate". It is PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity.²⁰
24. The Perpetual Defendants cite *Future Health* in relation to s. 254, for the proposition that "an applicant is *prima facie* entitled to security for costs against a bankrupt litigant where the bankrupt cannot pay costs."²¹ *Future Health* did not concern s. 254 or the *OBCA*

¹⁶ *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, at para. 28, citing *Amalgamated Transit Union, Local 583 v Calgary (City)*, 2007 ABCA 121, at paras. 69, 78 [Trustee's Authorities, Tab 2]

¹⁷ Business Corporations Act, RSA 2000, c B-9, s. 254 [Perpetual Defendants' Authorities, Tab 3]

¹⁸ Business Corporations Act, RSA 2000, c B-9, s. 1(i) [Trustee's Authorities, Tab 28]

¹⁹ Business Corporations Act, RSA 2000, c B-9, ss. 50(1), 161(2)(b)(iii) and 206.1 [Trustee's Authorities, Tab 28]

²⁰ Statement of Claim, p. 1 [Trustee's Authorities, Tab 23]

²¹ Security for Costs Brief, at para. 18, citing *Future Health Inc. (Trustee of) v State Farm Mutual Automobile Insurance Co. of Canada*, 35 C.P.C. (6th) 168 at para. 8 (Ont SCJ) [Perpetual Defendants' Authorities, Tab 7]

equivalent. It was decided based on Ontario's equivalent to Rule 4.22 and is no authority for the proposition that s. 254 applies to trustees in bankruptcy.

25. Section 254 does not apply to the Trustee.

3. The test for security for costs under Rule 4.22

(a) Whether it is likely the applicant will be able to enforce a judgment against assets in Alberta

26. There are four main problems with the Perpetual Defendants' argument on this issue.
27. Firstly, they incorrectly state the law regarding their evidentiary burden. They are required to establish on a balance of probabilities that it is unlikely the Estate has any exigible assets.
28. Secondly, the evidence they cite from the "May 2020 Schweitzer Affidavit"²² regarding the marginal value of the Goodyear Assets is inconsistent with the other "May 2020 Schweitzer Affidavit"²³ in which Mr. Schweitzer's says the Goodyear Assets have "a positive value of \$4,109,391."²⁴
29. Thirdly, the Perpetual Defendants argue that the secured *claims* in the estate, \$7,054,630 as of April 2018, exceed the value of the assets in the estate.²⁵ The proper question is whether the secured claims *that will be allowed* will exceed the value of the assets in the Estate, including the available cash.
30. Fourthly, the Perpetual Defendants argue that "the Trustee is not selling the Goodyear Assets or the assets Sequoia purchased from AlphaBow Energy Ltd." as if that somehow suggests that these assets will not be available for enforcement of a judgment. Although the statement is accurate, the implication obviously is not. The Trustee is not selling these assets *pending the outcome of the litigation*. If the Trustee's claim against the Perpetual

²² Security for Costs Brief, at para. 27(b).

²³ Summary Dismissal Brief, at footnote 11.

²⁴ Summary Dismissal Affidavit, at para. 17.

²⁵ Security for Costs Brief, at para. 19, citing Security for Costs Affidavit, at para. 24(a).

Defendant fails, *such that they will be entitled to costs*, the assets or the proceeds from a sale of the assets will in fact be available for the enforcement of a cost award.

(i) The Perpetual Defendants have to make their case on a balance of probabilities

31. The Perpetual Defendants submit, citing *Trimove* and *ConocoPhillips*, that they bear the “initial onus” to show that the Trustee will unlikely to be able to pay a costs award, “then the burden shifts to the Trustee to establish why it should not be required to post security.”²⁶ Significantly, however, this paraphrasing does not include important aspects of the decision regarding the onus on the applicants.

32. In *ConocoPhillips*, Master Robertson cited *Trimove*, which specifically states that:

[The applicant] bears the initial onus *to establish, on a balance of probabilities, that the respondent will be unable to pay its costs if the defence is successful. If the applicant satisfies the onus, the evidentiary burden shifts to the respondent to show why the Court should not exercise its discretion to make such an order against it.*²⁷ [Emphasis added.]

33. Accordingly, the Perpetual Defendants have to establish, on a balance of probabilities, that it is unlikely the estate will be able to pay a costs award *if the defence is successful*. The burden only shifts to the Trustee if they satisfy that onus.

(ii) The value of the assets in the estate

34. The Perpetual Defendants’ cite Mr. Schweitzer’s affidavit in support of the application for security for costs in arguing that “the secured claims against the Sequoia estate exceed its available resources.”²⁸

35. Mr. Schweitzer says that as a result of the “asset retirement obligations” the unsecured creditors “stand to recover little or nothing.”²⁹ He also says that his “understanding” is

²⁶ Security for Costs Brief, at para. 26(b).

²⁷ *ConocoPhillips*, at para. 77 [Perpetual Defendants’ Authorities, Tab 6]

²⁸ Security for Costs Brief, at para. 21, citing Security for Costs Affidavit, at para. 27.

²⁹ Security for Costs Affidavit, at para. 27.

consistent with Mr. Darby's evidence, on behalf of the Trustee, that the assets in the estate are of "marginal value".³⁰

36. Mr. Schweitzer also says under oath on the same day, however, that the Goodyear Assets, which represent only a portion of the assets in the estate,³¹ have a "positive value" of \$4,109,391.³² The Perpetual Defendants are not permitted to decide which version of Mr. Schweitzer evidence is correct, or should be considered in support of a particular application.

37. With respect to the available cash in the estate, the Perpetual Defendants submit that:

In November 2019, Mr. Darby testified he was only "guessing" the estate had approximately \$2.3 million in cash [...].³³

38. Mr. Darby's evidence in cross-examination was that his "estimate or approximation" was that the estate's bank balance was \$2.5 million on that date.³⁴ His statement about "guessing on numbers" was in response to a question about the portion of that amount in trust, which he described as "somewhere" between \$100,000 and \$200,000.³⁵

39. If the \$2.3 million approximate cash number provided by Mr. Darby is combined with the \$4,109,319 "positive value" number for the Goodyear Assets sworn to by Mr. Schweitzer,³⁶ exigible assets to the value of at least \$6,409,319 are available – without even taking into account any other assets, such as the assets received from AlphaBow Energy Ltd.

(iii) The secured claims

40. The Perpetual Defendants rely on the Trustee's Preliminary Report, issued in April 2018, which stated that the secured claims were \$7,054,630.³⁷ They also submit that Mr. Darby,

³⁰ Security for Costs Affidavit, at para. 27.

³¹ Security for Costs Affidavit, at para. 24(d).

³² Summary Dismissal Affidavit, at para. 18.

³³ Security for Costs Brief, at para. 19.

³⁴ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 19, lines 14-18.

³⁵ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 23, lines 5-17.

³⁶ Summary Dismissal Affidavit, at para. 17.

³⁷ Security for Costs Brief, at para. 19.

on behalf of the Trustee, testified that the secured creditors' claims "are" in the "millions" and "greater than the cash on hand."³⁸

41. Mr. Darby confirmed in cross-examination that merely filing a secured claim did not make a party a secured creditor.³⁹ More importantly, he confirmed that no secured claims were actively being advanced.⁴⁰
42. There is therefore no evidence on the real question – whether the assets in the estate will exceed the secured claims which will be allowed.

(iv) Costs are only payable "if the defence is successful"⁴¹

43. The Perpetual Defendants argue that "the Trustee is not selling the Goodyear Assets or the assets Sequoia purchased from AlphaBow Energy Ltd."⁴²
44. Mr. Darby, on behalf of the Trustee, confirmed in cross-examination in that the Trustee was not selling the Goodyear Assets, in order to maintain the ability to return them to the Perpetual Defendants if it succeeds on its s. 96 claim.⁴³ However, but for the ongoing litigation, the Trustee would be looking to sell those assets.⁴⁴
45. Justice Nielsen in *Trimove* confirmed that an applicant for security for costs is required to show that the plaintiff is unlikely to pay its costs "if the defence is successful."⁴⁵ This recognizes that a defendant will only receive costs *if it is successful*.
46. In the present case, the Trustee is not selling the Goodyear Assets so that they can be returned to the Perpetual Defendants if the Trustee's s. 96 claim is successful. However, the Perpetual Defendants would only be entitled to claim costs if the Trustee's s. 96 claim

³⁸ Security for Costs Brief, at para. 19.

³⁹ November 6, 2019 Transcript of Cross-Examination of P. Darby, at p. p. 59, lines 12-27, p. 60-64.

⁴⁰ November 6, 2019 Transcript of Cross-Examination of P. Darby, at p. 59, lines 10-18, lines 10-18, p. 23, lines 5-17.

⁴¹ *ConocoPhillips*, *supra*, at para. 77, citing *Trimove*, at para. 108 [**Perpetual Defendants' Authorities, Tabs 6 and 8**]

⁴² Security for Costs Brief, at para. 27(d), citing Security for Costs Affidavit, at para. 24(d).

⁴³ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 74, lines 9-27.

⁴⁴ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 74, lines 9-27.

⁴⁵ *ConocoPhillips*, at para. 77 [**Perpetual Defendants' Authorities, Tab 6**]

is unsuccessful. In that event, the Goodyear Assets would be available to generate funds for payment of the costs.⁴⁶

(v) The Perpetual Defendants have not shown (on a balance of probabilities) that the estate is unlikely to be able to pay a costs award

47. Based on Mr. Darby's testimony and (one of) Mr. Schweitzer's versions of the facts, the total value of the assets in the estate is at least \$6,409,319, excluding the AlphaBow and other non-Goodyear Assets: the \$4,109,319 "positive value" of the Goodyear Assets⁴⁷ and approximately \$2.3 million in cash.⁴⁸

48. Mr. Darby also confirmed that no secured claims are actively being advanced.⁴⁹

49. Accordingly, the Perpetual Defendants cannot establish, on a balance of probabilities, that the estate is unlikely to be able to pay a costs award *if they are successful.*

50. The Perpetual Defendants have inspected and obtained copies of the Trustee's records of the administration of the estate. They chose not to present any of that evidence to the Court.

50.1. They submit that they are entitled to an "adverse inference" against the Trustee because a confidentiality condition the Trustee imposed "prevented the Perpetual Energy Defendants from showing the Court the Trustee's own records or cross-examining the Trustee on them."⁵⁰

50.2. They also accuse the Trustee and its representative Mr. Darby of using a "double-standard" because Mr. Darby attached records relating to the administration of

⁴⁶ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 74, lines 9-27.

⁴⁷ Summary Dismissal Affidavit, at para. 17.

⁴⁸ Transcript of Cross-Examination of P. Darby on November 6, 2019, at p. 19, lines 14-18, p. 23, lines 5-17.

⁴⁹ November 6, 2019 Transcript of Cross-Examination of P. Darby, at p. 59, lines 10-18, lines 10-18, p. 23, lines 5-17.

⁵⁰ Security for Costs Brief, at para. 28.

the estate to a confidential affidavit and this “contradicts the Trustee’s rationale for its position”.⁵¹

51. As the Trustee pointed out in the Court of Appeal security for costs proceedings, the issue for the Trustee is the *public* disclosure of the estate records.⁵² The allegation of a “double standard” is premised on an incorrect statement of the Trustee’s position: that it “forbids” the Perpetual Defendants from relying on the estate records “as evidence”.⁵³
52. The Trustee is concerned only with public disclosure contrary to the *BIA* and has no objection to the records being put before the Court on a confidential basis. The Perpetual Defendants were never “prevented” from “showing the Court” the Trustee’s records:⁵⁴ in reality, they prefer to seek an adverse inference⁵⁵ while relying on Mr. Schweitzer’s implications regarding what the estate records show.⁵⁶
53. For example, the Trustee’s representative offered to take the Perpetual Defendants through the secured claim files, to illustrate that the \$7,054,630⁵⁷ was not indicative of the secured claims that will be allowed.⁵⁸ The Perpetual Defendants instead asked that the claim files be put on the public record, knowing the Trustee would refuse.⁵⁹
54. It is submitted that the Court should draw its own conclusions from the fact that, even after this was discussed extensively in the proceedings in the Court of Appeal, the Perpetual Defendants have chosen not to put any of the records of the administration of the estate which it obtained, into evidence.

⁵¹ Security for costs Brief, at para. 28.

⁵² Trustee’s February 10, 2020 Memorandum of Argument, at para. 10.4 [**Trustee’s Authorities, Tab X**]

⁵³ Security for Costs Brief, at para. 28(c).

⁵⁴ Security for Costs Brief, at para. 28.

⁵⁵ Security for Costs Brief, at para. 28.

⁵⁶ Security for Costs Affidavit, at para. 25.

⁵⁷ Security for Costs Brief, at para. 19.

⁵⁸ November 6, 2019 Transcript of Cross-Examination of P. Darby, p. 62, lines 7-27, p. 63-64, lines 1-25.

⁵⁹ November 6, 2019 Transcript of Cross-Examination of P. Darby, p. 65, lines 2-8 and Exhibit 3.

(b) The merits of the Action

55. The Perpetual Defendants' submit that there is "little to no merit" to the Trustee's s. 96 claim.⁶⁰ They make three arguments.
56. Firstly, on whether the transfer was at arm's length, they say that this Court found "there is some supporting evidence" that the Purchaser Team exercised "*de facto* control over PEOC."⁶¹
- 56.1. The Court acknowledged that "the rebuttable presumption in section 4(5) of the *BIA* must be considered":⁶² PEOC was the Trustee of POT at the time of the Asset Transaction and PEI was the sole shareholder of PEOC and beneficiary of POT.
- 56.2. "De facto" control is only one factor the Court can consider in determining if the Perpetual Defendants are able to rebut the s. 4(5) presumption that a transaction between related parties is a non-arm's length transaction.⁶³
- 56.3. In a position inconsistent with their Statement of Defence, their previous arguments for seeking summary dismissal before this Court and their pending appeal, the Perpetual Defendants now say that PEOC was the only party to the Asset Transaction, because it was the Trustee of POT.⁶⁴ PEOC obviously could not have dealt with itself at arm's length.
57. Secondly, on whether the transfer was a transfer at undervalue, the Perpetual Defendants submit that the Trustee's allegation that the value provided by PEOC in the Asset Transaction included its assumption of ARO "is premised on the flawed assumption that ARO associated with the Goodyear Assets constitutes a liability and is bound to fail."

⁶⁰ Security for Costs Brief, at para. 29.

⁶¹ Security for Costs Brief, at para. 30.

⁶² Reasons, at para. 95.

⁶³ Reasons, at para. 78.

⁶⁴ Summary Dismissal Brief, at para. 39.

- 57.1. The flawed assumption is that ARO must be a separate “liability” in order to affect the value of the Goodyear Assets transferred to PEOC in the Asset Transaction.
- 57.2. Regardless of whether ARO constitute a liability, there cannot be any dispute that the end-of-life obligations associated with the Goodyear Assets were “built into” the value of those assets at the time of the Asset Transaction,⁶⁵ for the purposes of considering whether the transfer was at undervalue.
58. Thirdly, on the insolvency issue, the Perpetual Defendants submit that the Trustee’s allegation that the Asset Transaction rendered PEOC insolvent is “based on the assumption that the ARO associated with the Goodyear Assets is a liability.”⁶⁶
- 58.1. Again, it is the Perpetual Defendants who are making an assumption. They assume that ARO must be “a liability” in order for the Asset Transaction to have rendered PEOC insolvent.
- 58.2. That is directly inconsistent with the balance sheet insolvency test under the *BIA*, which is concerned with “obligations due and accruing due”, not with “liabilities”.⁶⁷
59. The Perpetual Defendants still have not provided *any* evidence to challenge the Trustee’s opinion as to value of the Goodyear Assets. This Court previously noted their “focus away from the value issue” in scoping their application to dismiss the Trustee’s s. 96 claim narrowly.⁶⁸ They now seek to avoid the value issue again, by bringing a second very narrowly scoped application to try to dismiss the s. 96 claim without having to deal with the very obvious “value issue”.

⁶⁵ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*), at para. 157, citing *Daishowa-Marubeni International Ltd. v Canada*, 2013 SCC 29 (*Daishowa*), at para. 29 [Trustee’s Authorities, Tabs 19 and 20]; Summary Dismissal Brief, at para. 56(a).

⁶⁶ Security for Costs Brief, at para. 30(c).

⁶⁷ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 2 [Trustee’s Authorities, Tab 17]

⁶⁸ *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, 2020 ABQB 6 (Reasons), at para. 90.

60. The Perpetual Defendants' do not have a "reasonably meritorious defence" to the Trustee's s. 96 claim.⁶⁹ Their willingness to go to great lengths to avoid the value issue strongly suggest the opposite.

(c) Any other matter the Court considers appropriate

61. In determining whether to require a party to provide security for costs, the Court is entitled to consider "any other matter" it considers appropriate under s. 4.22(e), which is form of "catch-all" provision.⁷⁰ One such additional factor the Court is entitled to consider is the defendants' role in impoverishing the plaintiff.

i. The Perpetual Defendants' role in reducing the value of the estate

62. In their *Civil Procedure Handbook*, Stevenson & Côté note that:

Security is discretionary. The Court can look at all the circumstances and refuse to order security if it would be unjust. For example, the plaintiff may have a strong case, have no way of raising security, and *appear to have been impoverished by the very wrong sued for*.⁷¹ [Emphasis added.]

63. In *Sirron Systems Inc. v. Insyght Systems Inc.*, the Court cited a number of authorities for the proposition that it would be unjust to require the plaintiff to post security for costs where its impecuniosity was the result of the defendants' alleged conduct.⁷²

64. Alberta authorities confirm that the defendants' role in impoverishing the plaintiff is a "significant circumstance" the Court should consider in determining whether it would be "just and reasonable" to require a plaintiff to provide security for their costs.⁷³

65. In *Filipenko*, Master Laycock reviewed the authorities confirming that the defendants' alleged contribution to the plaintiff's impecuniosity should be considered in reducing the

⁶⁹ *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*, 2011 ABQB 175, at para. 17 [**Perpetual Defendants' Authorities, Tab 14**]

⁷⁰ *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*, 2017 ABCA 373 (*Access Mortgage*), at para. 11 [**Trustee's Authorities, Tab 30**]

⁷¹ Alberta Civil Procedure Handbook, 2018, Stevenson & Côté, pp. 4-21 and 4-22 [**Trustee's Authorities, Tab 31**]

⁷² *Sirron Systems Inc. v. Insyght Systems Inc.*, 2018 ONSC 2019 (*Sirron*) [**Trustee's Authorities, Tab 32**]

⁷³ *Spectrum Centre for Physical Therapy & Athletic Rehabilitation Ltd. v. Filipenko*, 2011 ABQB 340 (*Filipenko*), at paras. 27-31 [**Perpetual Defendants' Authorities, Tab 15**]; *1007374 Alberta Ltd. v. Ruggieri*, 2013 ABQB 420 (*Ruggieri*), at para. 64 [**Trustee's Authorities, Tab 33**]

quantum of security or denying an application for security for costs entirely.⁷⁴ He would not have ordered security for costs if the applicant had been the defendant “who was the direct cause of the plaintiff’s financial collapse.”⁷⁵

66. In *Ruggieri*, Justice Yamauchi cited *Filipenko* for the proposition that if the defendant’s conduct resulted in the plaintiff’s impecuniosity, this is a “significant circumstance to consider” in deciding an application for security for costs.⁷⁶
67. Accordingly, the defendants’ alleged role in causing the plaintiff’s financial circumstances is a factor the Court should consider in deciding whether to dismiss an application for security for costs or reduce the security ordered.
68. Although the Perpetual Defendants have applied twice to strike and/or dismiss the Trustee’s s. 96 claim on the basis of discrete issues, they have been careful to avoid any discussion of the values involved in the transaction.⁷⁷ The Trustee’s opinion regarding the negative effect of the Asset Transaction on the value of the estate still remains uncontradicted after almost two years.⁷⁸
69. The Perpetual Defendants also do not dispute that they benefited from the Asset Transaction. Although the negative consequences of the Asset Transaction for PEOC were never discussed by the Perpetual Defendants, they can be inferred from the Perpetual Defendants’ internal and external statements regarding the benefits accruing to PEI from the Asset Transaction.
70. According to Ms. Rose, in 2016, PEI determined that it was in the best interest of PEI to sell certain shallow natural gas assets (the “**Goodyear Assets**”).⁷⁹

⁷⁴ *Filipenko*, supra, at para. 31 [Perpetual Defendants’ Authorities, Tab 15]

⁷⁵ *Ibid*, at para. 36 [Perpetual Defendants’ Authorities, Tab 15]

⁷⁶ *Ruggieri*, supra, at para. 64 [Trustee’s Authorities, Tab 33]

⁷⁷ *Reasons*, at para. 89.

⁷⁸ August 2, 2018 Affidavit of P. Darby, at para. 44.

⁷⁹ Affidavit of S. Rose, at paras. 1 and 25.

71. An August 2016 internal presentation highlights the benefits to PEI of disposing of its shares in PEOC but only after POT had transferred to PEOC, in the Asset Transaction, the beneficial interest in the negative value Goodyear Assets.

71.1. Perpetual Operating Corp. would replace PEOC as the licensee for the Perpetual Respondents with the Alberta Energy Regulator and their Licensee Liability Rating (“LLR”) would rise from 2.05 to 5.12;⁸⁰

71.2. The Perpetual Respondents’ projected ARO for the year ending 2016, excluding salvage, would be reduced from \$123 million to \$35 million.⁸¹

71.3. The so-called “Goodyear Assets” to be disposed of through the Asset Transaction and the Share Transaction represented “approximately 71% of forecast year end 2016 corporate liabilities.”⁸²

72. The same presentation reveals the negative consequences of the Asset Transaction for PEOC:

72.1. PEOC’s LLR would drop from 2.05 to 1.02.⁸³

72.2. With the exception of the valuable assets put in the name of PEOC on an interim basis to “maintain” its LLR for a limited time,⁸⁴ PEOC would be left with the Goodyear Assets and the \$87 million in ARO associated with them.⁸⁵

72.3. The Perpetual Respondents would dispose of 71% of their “corporate liabilities” represented by the Goodyear Assets, solely by transferring them to PEOC.⁸⁶

73. In seeking security for costs, the Perpetual Defendants seek to emphasize the financial consequences of the Asset Transaction for PEOC. Mr. Schweitzer’s May 5 affidavit specifically in support of the application for security for costs says the unsecured creditors of PEOC (now Sequoia) stand to recover “little or nothing” because of the ARO

⁸⁰ Goodyear Presentation, at pp.5-9, Affidavit of P Darby, Exhibit C.

⁸¹ Goodyear Presentation, at pp. 9 and 22, Affidavit of P Darby, Exhibit C.

⁸² Goodyear Presentation, at p. 22, Affidavit of P Darby, Exhibit C.

⁸³ Goodyear Presentation, at pp. 5-9; Retained Interests Agreement, Affidavit of P Darby, Exhibits C and F

⁸⁴ Goodyear Presentation, at p. 8; Retained Interests Agreement, preamble para. 2 and s. 5.1(c)(vii) Affidavit of P Darby, Exhibit C and F.

⁸⁵ Goodyear Presentation, at p. 22, August 2, 2018 Affidavit of P Darby, at Exhibit C.

⁸⁶ Goodyear Presentation, at p. 22, August 2, 2018 Affidavit of P Darby, at Exhibit C.

associated with the assets in the estate.⁸⁷ He confirms that his understanding is consistent with Mr. Darby's evidence, on behalf of the Trustee, that the assets in the estate are of "marginal value".⁸⁸

74. Three factors make the Perpetual Defendants' alleged role in reducing the value of the estate a particularly important factor weighing against an order for security for costs in their favour:

74.1. The Trustee's evidence regarding the magnitude of the negative financial effect of the Asset Transaction remains uncontradicted.⁸⁹ The Perpetual Defendants have had ample opportunity to provide at least some evidence on value but have carefully avoid that issue.⁹⁰

74.2. The Perpetual Defendants cannot dispute that they benefited directly and significantly from the transfer of the Goodyear Assets to PEOC. Their own internal and external statements say that.⁹¹

74.3. Although they benefited from the Asset Transaction, the Perpetual Defendants now seek to rely on the negative, and enduring, aftermath in seeking security for costs.⁹²

75. As in *Sirron Systems* and the authorities cited therein, it would be unjust in the circumstances to require the Trustee to provide security for costs in favour of the Perpetual Defendants.⁹³

⁸⁷ Security for Costs Affidavit, at para. 27.

⁸⁸ Security for Costs Affidavit, at para. 27.

⁸⁹ August 2, 2018 Affidavit of P Darby, at para. 44.

⁹⁰ Reasons, at paras. 60, 89 and 90.

⁹¹ Goodyear Presentation, at pp. 5-9, August 2, 2018 Affidavit of P. Darby, Exhibit "C"; September 27, 2016 News Release and September 30, 2016 Interim Financial Statements, August 2, 2018 Affidavit of P. Darby, Exhibits "O" and "P"; Retained Interests Agreement, Affidavit of P Darby, Exhibit F

⁹² Security for Costs Affidavit, at para. 27.

⁹³ *Sirron*, *supra*, at paras. 32-43 [Trustee's Authorities, Tab 32]

ii. The Perpetual Defendants seek costs against the Trustee personally

76. The Perpetual Defendants argue that they will be unable to recover costs from the estate if they are successful. In fact, they have made it clear that they will not be seeking costs against the estate, but against the Trustee personally.
77. There is no dispute that the Trustee personally can pay any costs awarded in favour of the Perpetual Defendants.
78. In seeking security for costs in the Court of Appeal, the Perpetual Defendants argued that the estate could not pay and it would “be unjust for the Trustee to immunize itself from the economic consequences of its litigation”.⁹⁴ Having obtained the Order, the Perpetual Defendants sought costs of the very same application *from the Trustee personally*. They have sought costs against the Trustee personally at every opportunity since, including before this Court.
79. The 18-month delay in applying for security for costs Order confirms that there is no real concern on the part of the Perpetual Defendants that they will not be able to recover their costs (against the Trustee personally, or against the estate).

iii. The importance of the issues raised

80. Another factor weighing strongly against the Perpetual Defendants’ application for security for costs is the importance to the greater community of the issues raised by the Trustee’s s. 96 claim.
81. In *Amex*, Justice Wakeling identified key factors weighing for and against granting an application for security for costs. An application for security for costs is more likely to be granted if:

⁹⁴ Perpetual Defendants’ September 24, 2019 Memorandum of Argument at para. 13 [Trustee’s Authorities, Tab 26]

The resolution of the issues presented by the respondent's action is not important to the greater community. The growth of the law will not be impaired by an order that may bring an action to a premature end.⁹⁵

82. Conversely, an application for security for costs is less likely to be granted if:

The resolution of the issue presented by the respondent's action is important to the community. The growth of the law will be impaired by an order that may bring the action to an end before a final adjudication.⁹⁶

83. The issues raised by the Trustee's s. 96 claim are of significant importance to the greater community. Evidence of the importance of the Trustee's s. 96 claim to the greater community is the number of parties that support or have filed applications to intervene in the Action on that basis.

84. As noted by Justice Wakeling, the Court should consider whether "the law will be impaired by an order that may bring the action to an end before a final adjudication."⁹⁷

4. Conclusion on Rule 4.22 factors

85. Mr. Schweitzer swore two inconsistent affidavits on the same day, May 5, 2020. The Perpetual Defendants rely on those two affidavits in advancing two inconsistent versions of the same facts, tailored to the objective of each of their applications.

86. This an abuse of the Court's process. Both applications should be dismissed to maintain "the integrity of the administration of justice".⁹⁸

87. Even if the merits of the Perpetual Defendants' application for security for costs are viewed in isolation, they are not entitled to rely on s. 254 and the Rule 4.22 factors do not support a security for costs Order:

87.1. The Perpetual Defendants have not shown, on a balance of probabilities, that the estate is unlikely to be able to pay a costs award in their favour.

⁹⁵ *Amex Electrical Ltd. v. 726934 Alberta Ltd.*, 2014 ABQB 66, at para. 74(h) [Trustee's Authorities, Tab 34]

⁹⁶ *Ibid*, at para. 75(h) [Trustee's Authorities, Tab 34]

⁹⁷ *Ibid* [Trustee's Authorities, Tab 34]

⁹⁸ *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, at para. 28, citing *Amalgamated Transit Union, Local 583 v Calgary (City)*, 2007 ABCA 121, at paras. 69, 78 [Trustee's Authorities, Tab 2]

- 87.2. The merits of the action do not favour the Perpetual Defendants, as indicated by their repeated attempts to avoid the real issue: the value of the consideration given and received by PEOC.
- 87.3. The Perpetual Defendants cannot dispute that the Asset Transaction benefited them significantly at the expense of PEOC. In fact, they seek *to rely* on those negative consequences in seeking security for costs.
- 87.4. The Perpetual Defendants seek costs against the Trustee personally, not against the estate.
- 87.5. The issues raised by the Trustee's s. 96 claim are of significant importance to the greater community, as evidenced by the number of parties seeking to intervene.
88. The Court should not exercise its discretion in favour of the Perpetual Defendants in these circumstances.

5. The Amount Sought

89. No decision on costs, or the scale of costs, has been made yet. There is no basis for the assumption in the application that the Perpetual Defendants will not only be successful and entitled to costs, but that they will be awarded costs on a "full-indemnity" basis.
90. The submissions on costs on behalf of the Trustee refer to *Manson Insulation Products Ltd v. Crossroads C & I Distributors*,⁹⁹ in which Justice Thomas reviewed the law in Alberta regarding elevated costs and found that solicitor and own client full indemnity costs are not usually available in civil litigation, that this form of costs award "... is virtually unheard of except where provided for by contract" and that costs awards on this level will only be available if one of the successful litigation parties identifies a contractual basis for full indemnification.

⁹⁹ 2019 ABQB 684

91. If the Trustee is directed to post security for costs, the amount should be based on taxable Schedule C costs and should only cover the current applications, with leave to renew the application for further security, if necessary.

PART IV - RELIEF SOUGHT

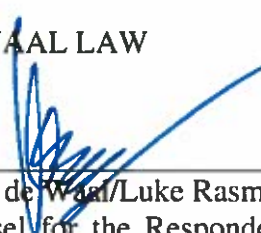
92. The Trustee respectfully requests that the application for security for costs be dismissed, with costs.

Calgary, Alberta
July 17, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per:



Rinus de Waal/Luke Rasmussen
Counsel for the Respondent, PricewaterhouseCoopers
Inc., LIT, in its capacity as the Trustee in Bankruptcy
of Sequoia Resources Corp.

TABLE OF AUTHORITIES

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1. *Mystar Holdings Ltd v 24037 Alberta Ltd.*, 2009 ABQB 480
2. *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65
3. *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1995 ABCA 111
4. *Schwartz Estate v Kwinter*, 2011 ABQB 169
5. *Proprietary Industries Inc. v Workum*, 2006 ABCA 226
6. Perpetual Defendants' August 28, 2018 Application for Summary Dismissal
7. Ms. Rose's October 19, 2019 Amended Amended Application for Summary Dismissal and Striking
8. Factum of the Appellants in Appeal No. 1901-0262AC
9. *Rudichuk v Gensis Land Development Corp.*, 2020 ABCA 42
10. Perpetual Defendants' Statement of Defence
11. *Elan Construction Ltd. v South Fish Creek Recreation Assn.*, 2016 ABCA 215
12. *Jin v Ren*, 2014 ABQB 250
13. *Precision Forest Industries Ltd v East Prairie Investment Corp.*, 2018 ABQB 489
14. *Lehdorff General Partner, Re*, [1993] O.J. No. 14
15. *Berry v Pully*, 2002 SCC 40
16. *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373
17. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 2, 4 and 96
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22. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49

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23. Trustee's Statement of Claim
24. *Stelco, Inc., Re*, [2004] O.J. No. 1257
25. *4519922 Canada Inc., Re*, 2015 ONSC 124
26. Perpetual Defendants' September 24, 2019 Memorandum of Argument for Security for Costs
27. Ms. Rose's September 23, 2019 Memorandum of Argument for Security for Costs
28. *Business Corporations Act*, RSA 2000, c B-9, ss. 1, 50(1), 161(2)(b)(iii) and 206.1
29. Trustee's February 10, 2020 Memorandum of Argument for Leave to Appeal
30. *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc.*, 2017 ABCA 373
31. *Alberta Civil Procedure Handbook, 2018*, Stevenson & Côté
32. *Sirron Systems Inc. v. Insyght Systems Inc.*, 2018 ONSC 2019
33. *1007374 Alberta Ltd. v. Ruggieri*, 2013 ABQB 420
34. *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66
35. *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2019 ABQB 684
36. May 1, 2020 Letter from D. McDonald, Q.C. to the Court of Appeal
37. May 1, 2020 Letter from S. Leiti, Q.C. to the Court of Appeal
38. Statement of Defence of Ms. Rose
39. Brief of Ms. Rose for November 2018 Hearing
40. *McKay-Cocker Constructions Ltd. v McMurdo*, 2001 CarswellOnt 3833 (ONSCJ)

41. *Tongue v Vencap Equities Alberta Ltd.*, 1994 CarswellAlta 35 (ABQB)
42. *Tongue v Vencap Equities Alberta Ltd.*, 1996 ABCA 208
43. *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278
44. *King v O'Toole*, 2017 ONSC 1915
45. *369413 Alberta Ltd. v Pocklington*, [2000] A.J. No. 410
46. *Gordon v Bourque*, 2002 ABQB 222