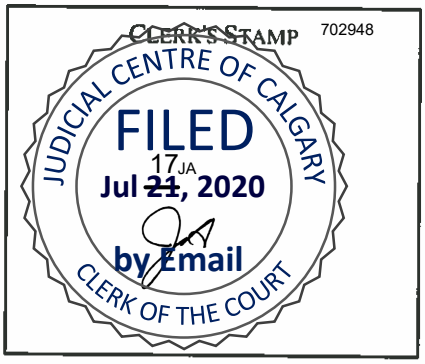

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July 28 2020
Justice D.B Nixon

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 (STRIKING/SUMMARY DISMISSAL)** For the hearing on July 28, 2020 at 10:00 a.m. before Mr. Justice D.B. Nixon
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INTRODUCTION

1. Perpetual Energy Inc., Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp. (the "**Perpetual Defendants**") apply to strike and/or dismiss the claim brought against them under s. 96 of the *Bankruptcy and Insolvency Act* (the "***BIA***") by PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. (the "**Trustee**").

2. The Perpetual Defendants' application is an abuse of process. Even on their own, each of the following four issues on its own amounts to an abuse of process. The cumulative effect of all four makes the conclusion inescapable.

    2.1. The Perpetual Defendants rely on alternative evidence. They deliberately had the same witness swear two separate affidavits on the same day, asserting two inconsistent versions of the key facts, to support two different applications.

    2.2. Although they have appealed the dismissal of their first application to strike and/or dismiss the Trustee's s. 96 claim, they have applied again for the same relief, contradicting the basis for their first application and their pending appeal.

    2.3. The defences asserted as the basis for the current application to strike and/or dismiss the Trustee's s. 96 claim have not only not been pleaded, but directly contradict specific admissions in the Perpetual Defendants' Statement of Defence.

3. Even if the merits of the application are viewed in isolation, the application should be dismissed. The three grounds raised by the Perpetual Defendants are without merit.

    3.1. The Perpetual Defendants now argue that there was no "transfer" to which s. 96 of the *BIA* could apply, because Sequoia Resources Corp. ("**Sequoia**" or "**PEOC**") entered into the October 1, 2016 Asset Purchase Agreement (the "**Asset Purchase Agreement**") with itself. This argument is inconsistent with the pleadings, the position taken by the Perpetual Defendants up to this point in

the litigation, the terms of the Asset Purchase Agreement and the relevant provisions of the *BIA*.

3.2. The Perpetual Defendants now argue that any transfer was not a transfer at "undervalue" within the meaning of s. 96, because the asset retirement obligations ("**ARO**") associated with the assets is "not a liability". The argument incorrectly assumes that unless ARO is a liability, it has no effect on the value of the assets with which they are associated. This is inconsistent with two decisions of the Supreme Court of Canada and the Perpetual Defendants' own submissions.

3.3. Finally, they argue that the transaction contemplated by the Asset Purchase Agreement (the "**Asset Transaction**") could not have rendered PEOC insolvent because ARO is "not a liability". This argument incorrectly assumes that the balance sheet insolvency test under the *BIA* is concerned only with liabilities and that ARO therefore need not be considered. However, the *BIA* expressly refers to "obligations, due and accruing due", not to "liabilities".

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 to strike and/or dismiss the Trustee's s. 96 claim raises four main issues:

5.1. Whether the application should be dismissed as an abuse of process, regardless of its merits;

5.2. Whether the Trustee's s. 96 claim should be struck or dismissed on the basis that there was no "transfer" within the meaning of s. 96;

5.3. Whether the Trustee's claim that the Asset Transaction was a transfer at undervalue should be struck or dismissed; and

5.4. Whether the Trustee's claim that the Asset Transaction rendered PEOC insolvent should be struck or dismissed.

PART III – ARGUMENT

A. The Perpetual Defendants' Application to Strike and/or Dismiss the Trustee's s. 96 Claim is an Abuse of Process

1. The Perpetual Defendants rely on alternative evidence

6. The Perpetual Defendants' security for costs application and application for summary dismissal should be dismissed as an abuse of this Court process.

7. As discussed in the Trustee's brief regarding the application for security for costs, the same witness for the Perpetual Defendants swore two affidavits on the same day, one ascribing "marginal value" to the Goodyear Assets as a result of the ARO in support of the Perpetual Defendants' application for security for costs and the other, in support of their application to strike and/or dismiss the Trustee's s. 96 claim, proposing a positive net value of $4,109,391[1] and a NIL value for ARO.

8. In each of Mr. Schweitzer's May 5, 2020 affidavits, both of which are referred to simply as the "May 2020 Schweitzer Affidavit" in the corresponding brief,[2] he asserts a contradictory version of the same key facts.

8.1. In his May 5 affidavit in support of the security for costs application, he agrees with the Trustee's representative that the assets in the estate are of "marginal value" because of the ARO associated with them.[3]

8.2. In his May 5 affidavit in support of the application for summary dismissal, he says the Goodyear Assets, a subset of the assets in the estate, have a "positive

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[1] May 5, 2020 Affidavit of M. Schweitzer in support of Security for Costs Application ("Security for Costs Affidavit"); May 5, 2020 Affidavit of M. Schweitzer in support of Summary Dismissal Application ("Summary Dismissal Affidavit");

[2] Perpetual Defendants Summary Dismissal Brief ("Summary Dismissal Brief) at footnote 11; Perpetual Defendants' Security for Costs Brief ("Security for Costs Brief"), at footnote 4.

[3] Security for Costs Affidavit, at para. 27.

value" of $4,109,391[4] and the Trustee's "opinion of value mischaracterizes ARO as a liability."[5]

9. It is an abuse of process for a party, with full knowledge, even to *plead* two inconsistent versions of the same facts in two *different* proceedings.[6] Here the Perpetual Defendants attempt to rely on two diametrically opposed affidavits in support of two parallel applications (requiring different supporting evidence) in the same proceeding. This kind of conduct undermines the "integrity of the administration of justice" and is what the abuse of process doctrine exists to prevent.[7]

2. Leaving aside their reliance on alternative evidence, the application to strike and/or dismiss the s. 96 claim is an abuse of process

10. Subject to certain exceptions, it is an abuse of process for a party to bring a second interlocutory application for the same relief.[8] In framing their first application to strike and/or dismiss the Trustee's s. 96 claim, the Perpetual Defendants were careful to scope the application narrowly to focus only on the "arm's length" issue.[9]

11. Although their appeal from the dismissal of that application is pending, they have brought a second application for the same relief. Once again, the application to strike and/or dismiss the s. 96 claim is narrowly focused on discrete issues. The abuse of process is particularly egregious because one of their new arguments for obtaining the same relief contradicts the basis for their first application, this Court's previous decision and their pending appeal.

12. When the Court declines to grant an application for summary dismissal, the decision is interlocutory, not final, and *res judicata* and issue estoppel does not apply. However, as the Court of Appeal confirmed in *Pocklington*, the abuse of process doctrine applies to

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[4] Summary Dismissal Affidavit, at para. 17.
[5] Summary Dismissal Affidavit, at footnote 3.
[6] *Mystar Holdings Ltd. v 24037 Alberta Ltd.*, 2009 ABQB 480, at para. 62 **[Trustee's Authorities, Tab 1]**
[7] *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]**
[8] *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1995 ABCA 111 (Pocklington), at paras. 8-14 **[Trustee's Authorities, Tab 3]**
[9] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 (Reasons), at paras. 60 and 90.

prevent the re-litigation of interlocutory applications, unless an exception applies.[10] A second interlocutory application for the same relief will not be an abuse of process only:

12.1. if the ruling on the first application was not based on the merits of the issue but on a technical objection;

12.2. if upon the first application the applicant failed to prove essential facts from mistake or inadvertence;

12.3. if there is new evidence that seriously justifies reconsideration of the issue; or

12.4. if there is a material change in circumstances of a non-evidentiary nature.[11]

13. In *Kwinter* Justice Tilleman:

13.1. applied this test to determine if a second application to compel answers was an abuse of process because the first application for the same relief had been dismissed[12] and cited *Pocklington* for the proposition that "the court is not powerless to deal with attempts to re-litigate issues already decided by it."[13]

13.2. Justice Tilleman rejected the argument that a change in the applicable law allowed the Court to hear the second application.[14] Although a Court of Appeal decision was released after the first application was dismissed, the decision would not have affected the outcome of the first application.[15]

14. In *Workum*, the Court of Appeal allowed an appeal from a chambers judge's decision granting a second application after the first application for the same relief had been dismissed.[16] The chambers judge had determined that she could reverse her previous

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[10] *Pocklington, supra*, at paras. 8-14 **[Trustee's Authorities, Tab 3]**
[11] *Ibid*, at para. 8 **[Trustee's Authorities, Tab 3]**
[12] *Schwartz Estate v Kwinter*, 2011 ABQB 169, at paras. 3, 4 **[Trustee' Authorities, Tab 4]**
[13] *Ibid*, at para. 13, citing *Pocklington*, supra, at para. 8 **[Trustee's Authorities, Tab 4]**
[14] *Ibid*, at para. 19 **[Trustee's Authorities, Tab 4]**
[15] *Ibid*, at para. 23-24 **[Trustee's Authorities, Tab 4]**
[16] *Proprietary Industries Inc. v Workum*, 2006 ABCA 226 (*Workum*), at para. 5 **[Trustee's Authorities, Tab 5]**

ruling because the applicant advanced an argument not made on the previous application.[17] In allowing the appeal, the Court stated that:

> [5] The appeal is allowed for two reasons. First, we conclude the chambers judge committed an abuse of process by allowing Workum to re-argue his case on the second application. [...]
>
> [6] This Court held in *Pocklington Foods Inc. v Alberta (Provincial Treasurer)* [citation omitted], at para. 14: "[w]here the second application seeks only to reargue the first application, *or to make arguments which were available at the time of the first*, it should be dismissed as an abuse of process, or as frivolous and vexation [emphasis added]
>
> [7] Nothing new arose from the time the ruling on the first application and the second application to strike. All that was advanced was an additional argument that should have been made on the first occasion. That is exactly what *Pocklington* precludes.

15. As in *Pocklington*, *Kwinter* and *Workum*, the Perpetual Defendants' second application to strike and/or dismiss the Trustee's s. 96 claim is an abuse of process.

15.1. Their first application to strike and/or dismiss the s. 96 claim was not dismissed based on a "technical objection".[18]

15.1.1. There was complete cross-examination on the affidavits filed by the Parties, several days of oral submissions and supplemental written submissions.

15.1.2. The Reasons for Judgment devoted 66 paragraphs to the dismissal of the Perpetual Defendants' application.[19]

15.2. The second summary dismissal is not the result of issues not raised as a result of "mistake or inadvertence".[20]

15.2.1. The Perpetual Defendants were careful to confine their first application to dismiss the Trustee's s. 96 claim to "only" the "threshold" question of whether the parties were dealing at arm's length.[21]

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[17] *Ibid* **[Trustee's Authorities, Tab 5]**
[18] *Pocklington*, *supra*, at para. 8 **[Trustee's Authorities, Tab 3]**
[19] Reasons, at paras. 55-111.
[20] *Pocklington*, *supra*, at para. 8 **[Trustee's Authorities, Tab 3]**

15.2.2. As in *Workum*, they are precluded from seeking summary dismissal again based on "arguments which were available" at the time of the first application.[22]

15.3. There is no new evidence that "seriously justifies" reconsideration of the issue:

15.3.1. As noted in the Reasons, "the Perpetual Defendants were careful to assert that they were not challenging the 'value' issue in respect of their opposition to the *BIA* Claim, apparently on the basis that it was irrelevant to the arm's length issue."[23]

15.3.2. Mr. Schweitzer's evidence in support of the first application to strike and/or dismiss the s. 96 claim was that the Perpetual Defendants "will require factual and expert evidence to show that [sic] the fair market value of the consideration given and received by PEOC".[24] Mr. Schweitzer now purports to give contradictory evidence regarding the value of the Goodyear Assets;[25] neither of his versions of the facts justifies a reconsideration of the Perpetual Defendants' application.

15.4. There is no "material change in circumstance" of a non-evidentiary nature:

15.4.1. Mr. Schweitzer attempts to explain why "factual and expert evidence" of value is no longer required by stating that the *Redwater* decision was released after he swore his initial affidavit.[26] He states that, in *Redwater*, the Supreme Court "judicially determined" that "ARO is not a liability".[27]

15.4.2. The *Redwater* decision was released in January 2019. The Parties, including the Perpetual Defendants, made written submissions regarding

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[21] Perpetual Defendants' August 28, 2018 Application for Summary Dismissal, at para. 4 **[Trustee's Authorities, Tab 6]**; Reasons, at paras. 60, 89 and 90.
[22] *Workum*, *supra*, at para. 6 **[Trustee's Authorities, Tab 5]**
[23] Reasons, at paras. 60, 89 and 90.
[24] Summary Dismissal Affidavit, at para. 7.
[25] Security for Costs Affidavit, at para. 27; Summary Dismissal Affidavit, at para. 17 and footnote 3.
[26] Summary Dismissal Affidavit, at para. 8.
[27] Summary Dismissal Affidavit, at para. 8.

the effect of the *Redwater* decision prior to the release of this Court's decision on the Perpetual Defendants' application for summary dismissal. If *Redwater* "judicially determined" that "ARO is not a liability", as they now maintain, the Perpetual Defendants could simply have amended their first application for summary dismissal, as Ms. Rose did twice.[28]

15.4.3. In any event, as in *Kwinter*, the *Redwater* decision did not change the law regarding ARO as it applied to the Trustee's s. 96 claim. The Court in *Redwater* simply confirmed the position it had previously taken in its 2013 decision in *Daishowa*, which was expressly relied on by Ms. Rose. Like Ms. Rose, the Perpetual Defendants could have argued, based on *Daishowa* and *Redwater*, that ARO is not liability in making their first application to strike and/or dismiss the Trustee's s. 96 claim. They were careful not to raise that issue then and it would be an abuse of process to allow them to raise it now.[29]

16. As stated by the Court of Appeal in *Pocklington*:

> [W]e emphasize that the object of the exercise is to avoid re-argument and re-litigation of issues already dealt with by the Court and in respect of which an order has been taken out. Such re-litigation is unfair to the other party and wastes the valuable resources of the Court.[30]

17. If the Perpetual Defendants had simply brought a second application for the same relief disallowed the first time, it would be an abuse of process of the variety described in the above authorities. However, the abuse of process here is particularly egregious because one of the new grounds for striking and/or dismissing the s. 96 claim directly contradicts the basis for their first application and their pending appeal.

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[28] Amended, Amended Application for Summary Dismissal and Striking Pleadings of Ms. Rose, filed October 19, 2018 **[Trustee's Authorities, Tab 7]**

[29] Reasons, at paras. 60, 89 and 90.

[30] *Pocklington*, *supra*, at para. 9 **[Trustee's Authorities, Tab 3]**

18. In their first application, filed in August 2018, the Perpetual Defendants assert that:

> Even if the Asset Purchase Agreement is analyzed in isolation under s. 96(1) of the *BIA*, the parties were dealing at arm's-length. When that agreement was executed, 198 had *de facto* control and was negotiating on behalf of PEOC, *while Perpetual controlled and was negotiating on behalf of POT. 198 and Perpetual* were dealing at arm's-length.[31] [Emphasis added.]

19. Consistent with their application to strike and/or dismiss the s. 96 claim, the Perpetual Defendants' Factum sets out the "facts relevant to the appeal", including that:

> *POT sold its beneficial interest in the Goodyear Assets to PEOC* in the Asset Transaction, which combined the legal and beneficial interest in the Goodyear Assets in PEOC;[32] [Emphasis added.]

20. However, although they intend to proceed with their appeal on that basis, they ask this Court to grant a second application to strike and/or dismiss the Trustee's s. 96 claim on the basis *that there was no transfer from POT to PEOC*, that POT was merely a relationship and that PEOC transferred the beneficial interest to itself:

> *There was no transfer or disposition of property when PEOC as trustee* "transferred" all of the beneficial interest in the Goodyear Assets *to PEOC* in its own capacity.[33] [Emphasis added].

21. The abuse of process doctrine exists to preserve the "integrity of the administration of justice" including by preventing conduct that would lead to "inconsistent results".[34]

22. To illustrate the magnitude of the abuse of process here:

    22.1. the Perpetual Defendants seek an Order from this Court striking or dismissing the s. 96 claim on the basis that a PEOC to PEOC transaction is not a "transfer" within the meaning of s. 96; and

    22.2. at the same time, in their appeal from the Order dismissing their first application to strike or dismiss the s. 96 claim, the Perpetual Defendants seek an Order from

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[31] Perpetual Defendants' August 2018 Application for Summary Dismissal, at para. 8 **[Trustee's Authorities, Tab X]**

[32] Perpetual Defendants' Factum, at para. 13(a) **[Trustee's Authorities, Tab X]**

[33] Summary Dismissal Brief, at para. 39.

[34] 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.

the Court of Appeal allowing their appeal on the opposite basis, namely that "POT sold its beneficial interest in the Goodyear Assets to PEOC."[35]

23. The Court of Appeal in *Rudichuk* recently criticized parties engaged in three years of litigation on a motion to strike and summary judgment application:

> There were two special chambers motions before two different masters that resulted in detailed written judgments, followed by two special applications before a chambers judge that resulted in two further detailed written judgments, followed by two appeals.
>
> This multiplicity of interlocutory proceedings is not the culture shift contemplated by the Supreme Court of Canada in *Hyrniak v Mauldin*.[36]

24. As in *Rudichuk*, "this multiplicity of interlocutory proceedings" should not be permitted.[37] The Perpetual Defendants have abused this Court's process and their application should be dismissed on that basis.

3. The Perpetual Defendants case for striking and/or dismissal of the Trustee's s. 96 claim contradicts their own pleadings

25. All three of the grounds relied on by the Perpetual Defendants in re-applying to strike and/or dismiss the Trustee's s. 96 claim directly contradict their case in the Statement of Defence.

25.1. They now argue that the Asset Transaction was not a transfer at undervalue because (i) it was between PEOC and itself, as trustee for POT; and (ii) PEOC assets and liabilities before and after the Asset Transaction did not change. In the Statement of Defence, however, they plead that the Asset Transaction was a transfer between POT and PEOC and that PEOC had no liabilities or assets before the Asset Transaction.

25.2. They now argue that there was no transfer at undervalue because ARO is not a liability. In the Statement of Defence, however, they plead that PEOC's liabilities at the time of the Asset Transaction included ARO.

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[35] Perpetual Defendants' Factum, at para. 13(a) **[Trustee's Authorities, Tab 8]**
[36] *Rudichuk v Gensis Land Development Corp.*, 2020 ABCA 42, at paras. 34-35 **[Trustee's Authorities, Tab 9]**
[37] *Ibid*, at para. 35 **[Trustee's Authorities, Tab 9]**

25.3. They now argue that PEOC was not rendered insolvent by the Asset Transaction because ARO is not a liability. Again, in the Statement of Defence they plead that PEOC's liabilities at the time of the Asset Transaction included ARO.

(a) The Asset Transaction was not a transfer within the meaning of s. 96

26. The Perpetual Defendants' 19-page Statement of Defence provides a detailed factual and legal response to the allegations in the Trustee's Statement of Claim. The Perpetual Defendants' Statement of Defence does not include any suggestion:

26.1. that "there was no transfer or disposition of property when PEOC as trustee 'transferred' all of the beneficial interest in the Goodyear Assets to PEOC in its own capacity"[38]; or

26.2. that PEOC "always held the Goodyear Assets and associated liabilities" before and after the Asset Transaction.[39]

27. In fact, the Perpetual Defendants pleaded an entirely different version:

> [24] As part of the Transaction, Perpetual and 198 also negotiated the Purchase and Sale Agreement between PEOC and POT dated October 1, 2016. [...] PEOC paid POT a purchase price of $10 [...]. *POT transferred its beneficial interest* in the Goodyear Assets to PEOC."[40] [Emphasis added.]
>
> [...]
>
> [37] [...] The combination of the legal and beneficial interests in PEOC was a technical step required by 198 before it acquired PEOC's shares. The Plaintiff opportunistically attempts to isolate this step, *because it involved a transfer of the beneficial interest in assets between PEOC and POT*, and claims it is reviewable under s. 96 of the *BIA*, when in substance the Transaction was the sale of shares between Perpetual and 198. [Emphasis added.]
>
> [...]
>
> [48] Prior to the Transaction, PEOC was a bare trustee and only held the legal interest in POT's oil and gas assets, contracts, licenses, and permits. It held no beneficial interest in any property *and had no* material revenues, expenses, *assets or liabilities*. [Emphasis added.][41]

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[38] Summary Dismissal Brief, at para. 39.
[39] Summary Dismissal Brief, at para. 42.
[40] Perpetual Defendants' Statement of Defence, at para. 24 **[Trustee's Authorities, Tab 10]**
[41] Perpetual Defendants' Statement of Defence, at paras. 24, 37 and 48 **[Trustee's Authorities, Tab 10]**

28. The Perpetual Defendants now argue the Asset Transaction was between PEOC and itself and did not involve a transfer. In the Statement of Defence, however, they pleaded the opposite: that the Asset Transaction was between POT and PEOC and involved "a transfer of the beneficial interest in assets between PEOC and POT.[42]

29. The Perpetual Defendants now argue that the liabilities associated with the Goodyear Assets were always PEOC's, before and after the Asset Transaction. They plead the opposite: that, prior to the Transaction, PEOC was a "bare trustee" and had "no material revenues, expenses, assets or liabilities".[43]

(b) If there was a transfer, it was not at undervalue because ARO is not a liability

30. In seeking to strike and/or dismiss the Trustee's s. 96 claim, the Perpetual Defendants argue that the Asset Transaction could not have been at undervalue because ARO is not a liability.[44]

31. However, they acknowledge that:

> *PEOC/Sequoia's liabilities at the time of the Transaction* were comprised *of estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program* at a discount rate commensurate with the discount rate for other producing assets, and were considered in the value of the Goodyear Assets;[45] [Emphasis added.]

(c) PEOC could not have been rendered insolvent by the Asset Transaction because ARO is not a liability

32. In seeking to strike and/or dismiss the Trustee's s. 96 claim, the Perpetual Defendants argue that the Asset Transaction could not have rendered PEOC insolvent because ARO is not a liability.[46]

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[42] Perpetual Defendants' Statement of Defence, at para. 24 and 37 **[Trustee's Authorities, Tab 10]**
[43] Perpetual Defendants' Statement of Defence, at para. 48 **[Trustee's Authorities, Tab 10]**
[44] Summary Dismissal Brief, at paras. 50, 51, 56 and 57.
[45] Perpetual Defendants' Statement of Defence, at para. 44(c) **[Trustee's Authorities, Tab 10]**
[46] Summary Dismissal Brief, at para. 66, 67, 68, 88, 89 and 90.

33. Again, they specifically plead that "PEOC/Sequoia's liabilities at the time of the Transaction" were comprised of "estimated future costs to be incurred by Sequoia in an efficient abandonment and reclamation program."[47]

(d) The Perpetual Defendants' Statement of Defence is a complete answer to the application to strike and/or dismiss the s. 96 claim

34. The Perpetual Defendants are not permitted to seek any relief inconsistent with their own pleading[48] and have not sought to amend their Statement of Defence.

35. It would arguably be an abuse of process for the Perpetual Defendants to seek relief inconsistent with their pleadings *in another action*.[49] It is an obvious abuse of process for the Perpetual Defendants to seek the same relief *for the second time*, on a basis directly contrary to their Statement of Defence *in the same action*.

36. Perpetual Defendants have never suggested that they intend to amend their Statement of Defence. Even if the Perpetual Defendants applied to amend their Statement of Defence, the application should be refused on the basis, *inter alia*, that they should not be allowed to withdraw their admissions almost two years into the litigation, while both sides have appeals pending based on the existing pleadings.[50]

37. Accordingly, the Perpetual Defendants' application to strike and/or dismiss the Trustee's claim should be dismissed on the basis that it is inconsistent with their own Statement of Defence.

4. Conclusion on the abuse of process issue

38. The abuse of process doctrine exists to preserve the "integrity of the administration of justice" including by preventing conduct that would lead to "inconsistent results".[51] The

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[47] Perpetual Defendants' Statement of Defence, at para. 44(c) **[Trustee's Authorities, Tab 10]**

[48] *Elan Construction Ltd. v South Fish Creek Recreation Assn.*, 2016 ABCA 215 (*Elan*), at paras. 22-23 **[Trustee's Authorities, Tab 11]**

[49] *Mystar, supra*, at para. 62 **[Trustee's Authorities, Tab 1]**

[5050] *Jin v Ren*, 2014 ABQB 250, at paras. 25 and 32 **[Trustee's Authorities, Tab 12]**; *Precision Forest Industries Ltd v East Prairie Investment Corp*, 2018 ABQB 489, at para. 67 **[Trustee's Authorities, Tab 13]**

[51] *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, at para. 28 **[Trustee's Authorities, Tab 2]**

Perpetual Defendants' application to strike and/or dismiss the Trustee's s. 96 claim is an abuse of process for four reasons:

38.1. Firstly, the Perpetual Defendants rely on alternative evidence, advancing inconsistent versions of the same key facts in two different affidavits in support of two different applications at the same time.[52]

38.2. Secondly, the Perpetual Defendants have applied again for the same relief while their appeal for the dismissal of their first application is pending. None of the exceptions identified in Pocklington is engaged.[53]

38.3. Thirdly, the Perpetual Defendants' second application to strike and/or dismiss the Trustee's s. 96 claim contradicts the basis for their first application and their pending appeal.

38.4. Fourthly, the Perpetual Defendants' case for striking and/or dismissing the Trustee's s. 96 claim directly contradicts admissions in their own Statement of Defence, which they have not sought to withdraw by amendment.

39. Any of these issues would be sufficient to merit the dismissal of their application as an abuse of process. However, their cumulative effect calls out for judicial intervention.

B. The Perpetual Defendants' Application to Strike and/or Dismiss the Trustee's Claims on the Basis that there was no "Transfer" reviewable under s. 96

40. The Perpetual Defendants argue that there was no "transfer" reviewable under the *BIA* because the Asset Transaction was between PEOC and PEOC as trustee for POT.[54] They argue that POT, as a trust, was merely a relationship and, as a result:

40.1. the Asset Transaction "did not transfer assets between two entities";[55] and

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[52] Security for Costs Affidavit, at para. 27; Summary Dismissal, at para 17 and footnote 3.
[53] *Pocklington*, *supra*, at paras. 8-14 **[Trustee's Authorities, Tab 3]**
[54] Summary Dismissal Brief, at paras. 36, 38, 39,
[55] Summary Dismissal Brief, at para. 41.

40.2. any liabilities associated with the Goodyear Assets were liabilities of PEOC, before and after the Asset Transaction.[56]

1. The Perpetual Defendants' argument is inconsistent with their own Statement of Defence, their first application to strike and/or dismiss, and their pending appeal

41. The Perpetual Defendants argue that there was no "transfer" because POT was merely a relationship and PEOC transferred the beneficial interest to itself:

> *There was no transfer or disposition of property when PEOC as trustee* "transferred" all of the beneficial interest in the Goodyear Assets *to PEOC* in its own capacity.[57] [Emphasis added.]

42. In their first application, filed in August 2018, the Perpetual Defendants assert that:

> Even if the Asset Purchase Agreement is analyzed in isolation under s. 96(1) of the *BIA*, the parties were dealing at arm's-length. When that argument was executed, 198 had de facto control and was negotiating on behalf of PEOC, *while Perpetual controlled and was negotiating on behalf of POT. 198 and Perpetual* were dealing at arm's-length.[58] [Emphasis added.]

43. In their factum before the Court of Appeal they assert the following "fact" among others:

> *POT sold its beneficial interest in the Goodyear Assets to PEOC* in the Asset Transaction, which combined the legal and beneficial interest in the Goodyear Assets in PEOC;[59] [Emphasis added.]

44. However, although they intend to proceed with their appeal on that basis, they ask this Court to grant a second application to strike and/or dismiss the Trustee's s. 96 claim on the basis *that there was no transfer from POT to PEOC*. POT was merely a relationship and PEOC transferred the beneficial interest to itself:

> *There was no transfer or disposition of property when PEOC as trustee* "transferred" all of the beneficial interest in the Goodyear Assets *to PEOC* in its own capacity.[60] [Emphasis a

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[56] Summary Dismissal Brief, at paras. 38 and 42.
[57] Summary Dismissal Brief, at para. 39.
[58] Perpetual Defendants' August 2018 Application for Summary Dismissal, at para. 8 **[Trustee's Authorities, Tab 6]**
[59] Perpetual Defendants' Factum, at para. 13(a) **[Trustee's Authorities, Tab 8]**
[60] Summary Dismissal Brief, at para. 39.

45. In their Statement of Defence, they plead that "POT transferred its beneficial interest in the Goodyear Assets to PEOC" and the Asset Transaction "involved a transfer of the beneficial interest in assets between PEOC and POT."[61]

46. Their new argument that there was no transfer because PEOC "always held the Goodyear Assets and liabilities"[62] is also directly contradicted by their Statement of Defence. They plead that prior to the Transaction, PEOC was a "bare trustee" and had "no material revenues, expenses, assets or liabilities."[63]

47. This ground for striking and/or summary dismissal should be dismissed on the basis that it contradicts the position taken by the Perpetual Defendants up to this point in the litigation.

2. The Perpetual Defendants' argument is inconsistent with terms of the Asset Purchase Agreement and the provisions of the *BIA*

48. The argument that the Asset Transaction was entered into between PEOC and itself, as trustee, is inconsistent with the terms of Asset Purchase Agreement confirming that POT was PEOC's counterparty. It is also inconsistent with the provisions of the *BIA*.

49. The allegations in their Statement of Defence regarding the role of POT and the transfer between POT and PEOC are consistent with the Asset Purchase Agreement:

49.1. The definition of "Person" expressly includes a "trust".[64]

49.2. "Vendor" is described as "Perpetual Operating Trust, a trust registered to carry on business in the Province of Alberta" with no reference to PEOC.[65]

49.3. In s. 4.01(b), POT represents that "Vendor has the requisite capacity, power and authority to execute this Agreement and to perform the obligations to which it thereby becomes subject".[66]

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[61] Perpetual Defendants' Statement of Defence, at paras. 24 and 37.
[62] Summary Dismissal Brief, at para. 42.
[63] Perpetual Defendants' Statement of Defence, at para. 48.
[64] Asset Purchase Agreement, s. 1.1(gg), Affidavit of P Darby, Exhibit "D".
[65] Asset Purchase Agreement, p. 1, Affidavit of P Darby, Exhibit "D".
[66] Asset Purchase Agreement, s. 4.01(b), Affidavit of P Darby, Exhibit "D".

49.4. In s. 4.01(d), POT represents that this Agreement "has been validly executed and delivered by Vendor" and "shall constitute valid and binding obligations of the Vendor".[67]

50. The terms of the Asset Purchase Agreement are inconsistent with any suggestion that it was an agreement by PEOC with itself, as trustee, as the Perpetual Defendants now contend.[68]

51. The argument that POT could not be a "party" to the Asset Transaction is also inconsistent with the provisions of the *BIA*.

52. In arguing their first application for summary dismissal, the Perpetual Defendants submitted that "if POT was not an entity nor a person" then, "[g]iven that s. 96 only applies to transfers between persons, the alleged 'transfer' from POT to PEOC is not captured within the meaning of s. 96."[69]

53. In footnote 44, the Perpetual Defendants point out that "the definition of 'person' in the *BIA* does not refer to a trust, although it does refer to a corporation." However, the definition is not exhaustive and "includes" both a partnership and an unincorporated association, neither of which is traditionally recognized as a separate legal entity.[70] As noted by Justice Romaine in *Networc Health*, the *BIA* is "remedial legislation" that should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[71]

54. In a s. 96 transfer involving a trust, the interpretation now urged by the Perpetual Defendants would focus the analysis on the trustee of the trust, rather than the beneficiary:

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[67] Asset Purchase Agreement, s. 4.01(d), Affidavit of P Darby, Exhibit "D".
[68] Summary Dismissal Brief, at para. 39.
[69] Summary Dismissal Brief, at para. 40.
[70] *Lehndorff General Partner, Re*, [1993] O.J. No. 14, at para. 19; *Berry v Pully*, 2002 SCC 40, at paras. 34 and 51 **[Trustee's Authorities, Tabs 14 and 15]**
[71] *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373, at para. 20 **[Trustee's Authorities, Tab 16]**

54.1. They now say that there was no transfer because PEOC as trustee "transferred" a beneficial interest to itself.[72]

54.2. This is inconsistent with their previous argument on the "arm's length" issue, in which they alleged that POT and PEOC were at arm's length because POT was controlled by its beneficiary PEI and PEOC was controlled by 198.[73]

54.3. The new interpretation urged, focusing on POT's trustee rather than its beneficiary, would be inconsistent with the remedial purposes of the *BIA*.[74] A transfer to or from a trust with an arm's length trustee but a non-arm's length beneficiary would arguably be treated as an arm's length transfer, creating an opportunity for parties to avoid the more stringent provisions in s. 96(1)(b).[75]

55. Consistent with the broad definition of "person" in s. 2 of the *BIA*, which expressly includes other non-legal entities, and the remedial purpose of the *BIA*, s. 96 should not be interpreted in a way that would exclude a transfer to or from a trust like POT.

56. Accordingly, the Perpetual Defendants' argument that there was no "transfer" within the meaning of s. 96 because the Asset Transaction was between PEOC and itself as trustee must be rejected:

56.1. It is inconsistent with the terms of the Asset Purchase Agreement, which contains no suggestion that POT is not the "Vendor" with "valid and binding obligations".[76]

56.2. It is inconsistent with the broad definition of "person" in *BIA* s. 2 and would undermine the remedial purpose of s. 96 by excluding trusts with non-arm's length beneficiaries from the scope of s. 96(1)(b).

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[72] Summary Dismissal Brief, at para. 39.
[73] Perpetual Defendants' August 2018 Summary Dismissal Application, at para. 8 **[Trustee's Authorities, Tab 6]**
[74] *Networc Health*, *supra*, at para. 20 **[Trustee's Authorities, Tab 16]**
[75] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, s. 96 **[Trustee's Authorities, Tab 17]**
[76] Asset Purchase Agreement, s. 4.01(d), August 2, 2018 of Affidavit of P Darby, Exhibit "D".

3. Prior to the Asset Transaction, PEOC was not "the legal owner of the Goodyear Assets and the person liable for associated liabilities"[77]

57. The Perpetual Defendants argue that s. 96 should not apply because the position of PEOC's creditors "remained the same" before and after the Asset Transaction: "PEOC held the Goodyear Assets" and was the "person liable for associated liabilities".[78]

58. This argument is directly inconsistent with the Perpetual Defendants' Statement of Defence, which pleads that, prior to the Transaction, PEOC was a "bare trustee" and had no "assets or liabilities."[79]

59. The Perpetual Defendants also now argue that, although the liabilities associated with the Goodyear Assets were always PEOC's liabilities, PEOC was not insolvent at the time of Asset Transaction because it had right to claim reimbursement from POT pursuant to the POT Trust Indenture.[80]

60. This argument relies on an excerpt from the POT Trust Indenture, *which is not in evidence*. Footnote 82 to the Perpetual Defendants' summary dismissal brief states that:

> See the First Amended and Restated Trust Indenture: Article 4.2(t) "to settle and pay and satisfy out of the Trust Properties...any of the obligations of the Trust, including, without limitation...(i) the amount of any...property...or other tax..." and Article 5.4(b): "...the Trustee...shall be entitled to be indemnified and saved harmless out of the Trust Properties...in respect of...all other liabilities...taxes"

61. The Perpetual Defendants' Statement of Defence suggests that the POT Trust Indenture is inconsistent with their current argument that POT was merely a relationship. They plead that "at all material times prior to the Transaction (defined) below, the beneficial interest in the assets was administered *by POT* pursuant to the POT Trust Indenture" (emphasis added).[81]

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[77] Summary Dismissal Brief, at para. 45.
[78] Summary Dismissal Brief, at paras. 42-43 and 45.
[79] Perpetual Defendants' Statement of Defence, at para. 48 **[Trustee's Authorities, Tab 10]**
[80] Summary Dismissal Brief, at paras. 77 and footnote 82.
[81] Perpetual Defendants' Statement of Defence, at para. 10 **[Trustee's Authorities, Tab 10]**

62. The Perpetual Defendants' Statement of Defence also pleads, presumably based on the POT Trust Indenture that, prior to the Transaction, PEOC was a "bare trustee" and had no "assets or liabilities."[82] This is directly inconsistent with the other argument they now seek to advance, that the Asset Transaction "did not materially change" PEOC's position because it already "held the Goodyear Assets" and was the "person liable for associated liabilities".[83]

63. Even though this is their second attempt at striking and/or dismissing the Trustee's s. 96 claim, the Perpetual Defendants seek to rely on a brief excerpt from one of their own documents, *which they have not put into evidence*. Based on the excerpt, this document appears to relate directly to all of the various grounds advanced by the Perpetual Defendants. As with the deliberate decision not to produce any of the records of the Trustee which have been provided to the Perpetual Defendants, the failure to put the POT Trust Indenture before the Court raises an inference that the document would not support their case.

64. The Court cannot dispose of an issue summarily when the applicants seek to rely on an excerpt from a document they failed to put into evidence.[84] The Trustee can only speculate regarding what else the document says and the implications of its contents for the Perpetual Defendants' arguments.

65. The Perpetual Defendants' attempt to rely on an excerpt from their own document, which they have not put into evidence, is a sufficient basis to dismiss their application.

4. Conclusion on first ground for striking and/or dismissing the Trustee's s. 96 claim

66. The Court should not accept the Perpetual Defendants' argument that there was no "transfer" within the meaning of s. 96:

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[82] Perpetual Defendants' Statement of Defence, at para. 48 **[Trustee's Authorities, Tab 10]**
[83] Summary Dismissal Brief, at paras. 42-43 and 45.
[84] *Toronto Dominion Bank v Leffler*, 2017 ABQB 154, at paras. 75 and 79 **[Trustee' Authorities, Tab 18]**

66.1. The Perpetual Defendants' assertion that the Asset Transaction was between PEOC and itself, as trustee, is directly inconsistent with their Statement of Defence, their first application and their pending appeal.

66.2. The Perpetual Defendants' assertion that PEOC "always held the Goodyear Assets and associated liabilities" is inconsistent with their own Statement of Defence.

66.3. The argument is inconsistent with terms of the Asset Purchase Agreement, which describe POT as the counterparty bound by its terms.

66.4. The argument is also inconsistent with the broad definition of "person" under the *BIA* and its acceptance would undermine the *BIA*'s remedial purpose.

66.5. In making the argument, the Perpetual Defendants rely on an excerpt for one of their own records, which they have not put into evidence.

C. The Perpetual Defendants' Application to Strike and/or Dismiss the Trustee's s. 96 Claim on the Basis that there was no Transfer at Undervalue

67. This argument incorrectly assumes that ARO must be a "liability" in order to affect the value of the Goodyear Assets transferred to PEOC in the Asset Transaction.

68. That assumption is inconsistent with *Daishowa* and *Redwater*, both of which confirm that regulatory obligations like ARO are an "embedded" future cost that "serves to depress the tenure's value *at the time of sale*."[85] [Emphasis added.]

69. This is consistent with the Perpetual Defendants' Statement of Defence[86] and even their written submissions in this application, which acknowledge that ARO are "built into the market value of the assets".[87]

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[85] *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]**

[86] Perpetual Defendants' Statement of Defence, at para. 44(c) **[Trustee's Authorities, Tab 10]**

[87] Summary Dismissal Brief, at para. 56(a).

1. The Perpetual Defendants have failed to establish that the Trustee's claim that there was a transfer at undervalue can be struck for failing to disclose a reasonable claim

(a) The Perpetual Defendants' submissions

70. The Perpetual Defendants' present a simple argument for striking the Trustee's allegations that there was a transfer at undervalue within the meaning of s. 96:

70.1. The Trustee's allegations regarding a transfer at undervalue "are based on the assumption in the Statement of Claim that the ARO with the Goodyear Assets was a liability".[88]

70.2. That assumption was "wrong, incapable of proof and bound to fail" because of *Redwater* and the Reasons.

70.3. As a result, the claim that there was a transfer at under value is "bound to fail" and the *BIA* claim generally are "bound to fail" and should be struck for failing to disclose a reasonable cause of action.[89]

(b) The Perpetual Defendants' misapprehend the allegations in the Trustee's Statement of Claim

71. The Perpetual Defendants suggest that the Trustee alleges that the Asset Transaction was a transfer at undervalue because the ARO was a significant liability assumed by PEOC.[90]

72. That suggestion is incorrect. In fact, the Trustee alleges, consistent with the approach mandated by *Daishowa* and *Redwater*, that the ARO associated with the Goodyear Assets "depressed their value" at the time of the Asset Transaction, such *the Goodyear Assets* themselves had a negative value to PEOC. The Trustee pleads that:

> [13] *The Goodyear Assets* had no positive fair market value at the time of the Asset Transaction, *but represented a significant net liability*;

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[88] Summary Dismissal Brief, at para. 50.
[89] Summary Dismissal Brief, at paras. 50-54.
[90] Summary Dismissal Brief, at para. 48.

> [13.1] The value of the actual consideration given by Sequoia, then known as PEOC, in the Asset Transaction was at least $223,241,000 and
>
> [13.2] The value of the actual consideration received by Sequoia in the Asset Transaction was at most $5,670,200.
>
> [14] As a result of the Transactions [...] Sequoia acquired assets with associated ARO and other liabilities *which exceed the value of the assets.*[91] [Emphasis added.]

73. In any event and regardless of whether the ARO constitutes a separate liability, there is no dispute that it affects the present value of the assets with which they are associated.[92] The Trustee alleges that consideration given by PEOC in the Asset Transaction included its acceptance of *the negative value Goodyear Assets.*[93] As a result, it is the Goodyear Assets themselves that are alleged to represent a "a significant net liability", not the ARO separately.[94]

74. In arguing that the Trustee's transfer at undervalue allegations can be struck, the Perpetual Defendants misapprehend or misstate the Trustee's case as alleging that PEOC assumed a "significant" liability: the ARO.[95]

    74.1. Whether ARO is a separate "liability" is irrelevant, as long as it depressed the value of the Goodyear Assets to the point where these assets represented a significant net liability for the estate and made the transfer "a disposition of property ... for which the consideration received by [PEOC] conspicuously less than the fair market value of the consideration given by [PEOC]."[96]

    74.2. Whether ARO is a separate "liability" also is irrelevant to the transfer at undervalue allegations actually made by the Trustee in its Statement of Claim,

75. In any event, in determining whether to strike a claim for failing to disclose a reasonable cause of action, the Court "must be generous and err on the side of permitting a novel but

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[91] Statement of Claim, at paras. 13-14 **[Trustee's Authorities, Tab 23]**
[92] *Redwater*, at para. 157, citing *Daishowa*, at para. 29 **[Trustee's Authorities, Tabs 19 and 20]**
[93] Statement of Claim, at paras. 13, 14 and 22.1 **[Trustee's Authorities, Tab 23]**
[94] Statement of Claim, at para. 13 **[Trustee's Authorities, Tab 23]**
[95] Summary Dismissal Brief, at para. 48.
[96] *BIA*, s. 96(1) **[Trustee's Authorities, Tab 17]**

arguable claim to proceed to trial."[97] The allegations in the Statement of Claim must be "read generously" in favour of the plaintiff.[98]

76. On that standard, the Perpetual Defendants have not provided this Court with any basis to strike the Trustee's transfer at undervalue allegations.

2. The Perpetual Defendants' application to dismiss the Trustee's transfer at undervalue allegations

77. The Perpetual Defendants' dismissal argument suffers from the same flaw as their striking argument: they assume that the Trustee's case is premised on ARO being a distinct liability. It is not. This argument is also inconsistent with the Perpetual Defendants' Statement of Defence.

78. The Perpetual Defendants also seek to dismiss the Trustee's claim that there was a transfer at undervalue without providing real evidence to challenge the Trustee's opinion on the value of the consideration given and received. They simply assert that "[t]he Darby Affidavit is wrong".[99]

(a) The Perpetual Defendants' submissions

79. The Perpetual Defendants present a very simple case for summary dismissal on the transfer at undervalue issue:

> The Trustee's opinion of value of the consideration given by PEOC is set out in the Darby Affidavit:
>
> (a) ARO of $218,958,274 (comprising $192,127,214 for the Goodyear Wells and $26,831,000 for the facilities associated with the Goodyear Wells); and
>
> (b) municipal property taxes of $10,047,744.20.
>
> *The Darby Affidavit is wrong.*[100] [Emphasis added.]

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[97] *Rudichuk v Genesis Land Development Corp.*, 2020 ABCA 42, at paras. 5-6 **[Trustee's Authorities, Tab 9]**
[98] *Rudichuk v Genesis Land Development Corp.*, 2017 ABQB 119, at para. 39, citing *Festival Hall Developments Ltd. v. Michael Wilkings* (2009), 57 BLR (4th) 210, at para. 15 **[Trustee's Authorities, Tab 21]**
[99] Summary Dismissal Brief, at para. 56.
[100] Summary Dismissal Brief, at para. 55.

80. The Perpetual Defendants then argue that "ARO is not liability", merely "implied end-of-life obligations built into the market value of the assets", and the only potential liabilities were unpaid municipal taxes in the amount of $1,560,890.[101] As a result, "based on the Trustee's evidence and the Reasons", there was no transfer at undervalue.[102]

81. Although the Perpetual Defendants' assert there is no genuine issue requiring a trial, their seven-paragraph argument fails to address some important issues.[103]

(a) Assuming that ARO is not a liability, the Perpetual Defendants' argument assumes incorrectly that ARO has *no effect* on the value

82. The contradiction between the Perpetual Defendants' argument and their Statement of Defence is discussed above and is not repeated here.

83. The Trustee's evidence is that ARO associated with the Goodyear Assets at the time of Asset Transaction was $218,958,274.[104] The Trustee's opinion as to value of the consideration given and received by PEOC in the Asset Transaction is set out in Mr. Darby's affidavit:

> In the opinion of the Trustee:
>
> [44.1] the Goodyear Assets, transferred to PEOC pursuant to the Asset Transaction, had not positive fair market value at the time of the Asset Transaction, but represented a significant net liability of at least $223,241,000;
>
> [44.2] the value actual consideration given by PEOC in the Asset Transaction was therefore at least $223,241,000; and
>
> [44.3] the value of the actual consideration given by PEOC in the Asset Transaction was at most $5,670,200.[105]

84. The Perpetual Defendants are prepared to accept the Trustee's opinion as to the value of the consideration received by PEOC, but the Trustee's opinion as the value of the consideration given by PEOC is "wrong" because "ARO is not a liability".[106]

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[101] Summary Dismissal Brief, at para. 56.
[102] Summary Dismissal Brief, at para. 57.
[103] Summary Dismissal Brief, at paras. 54-60.
[104] Summary Dismissal Brief, at para. 55.
[105] August 2, 2018 Affidavit of P Darby, at para. 44.
[106] Summary Dismissal Brief, at para. 56.

85. Although he previously swore that the Perpetual Defendants "will require factual and expert evidence to show that [sic] the fair market value of the consideration given and received by PEOC", one of Mr. Schweitzer's May 5 affidavits now asserts that "[t]he Trustee's opinion of value mischaracterizes ARO as a liability" such that PEOC gave only $1,560,809 in consideration because ARO can simply be excluded.[107]

86. Assuming that ARO is "not a liability", the flaw in the Perpetual Defendants argument is their assumption that ARO *must be liability in order to have any effect on value*. Based on this assumption, they simply delete ARO from the value equation and assert, through Mr. Schweitzer, that the Asset Transaction resulted in "a positive value to PEOC of $4,109,391".[108]

87. The following passage from their written submissions illustrates this:

> ARO is not a liability (its implied end-of-life obligations *are built into the market value of the assets*);[109]

88. Although they acknowledge, based on *Daishowa* and *Redwater*, that the ARO are "built into the market value of the assets", they then do not build the ARO into their valuation of the resulting transaction at all. They simply exclude ARO completely as a factor in determining the value of the consideration given and received by PEOC.

89. The evidence actually given by the Trustee is entirely consistent with *Daishowa* and *Redwater*. Once the ARO were "built into the market value of the assets", the assets had a significant net negative value:

> [T]he Goodyear Assets, transferred to PEOC pursuant to the Asset Transaction, had no positive fair market value at the time of the Asset Transaction, but represented a significant net liability of at least $231,241,000.[110]

90. As a result, PEOC gave consideration of at least $223,241,000 when it accepted the transfer of the negative value Goodyear Assets in the Asset Transaction.[111]

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[107] Summary Dismissal Affidavit, at paras. 7, 16, 17 and footnote 3.
[108] Summary Dismissal Brief, at para. 57; Summary Dismissal Affidavit, at para. 17 and footnote 3.
[109] Summary Dismissal Brief, at para. 56(a).
[110] August 2, 2018 Affidavit of P. Darby, at para. 44.1.
[111] August 2, 2018 Affidavit of P. Darby, at para. 44.2.

91. The Court in *Daishowa* confirmed that regulatory obligations have a present effect on the fair market value of the asset:

> The effect of Alberta's scheme is to embed the reforestation obligations into the forest tenure, such the obligations cannot be severed from the property itself. As such, the reforestation obligations *are simply a future cost tied to the tenure that depresses the value of the tenure.* A prospective purchaser of the tenure would take into account the income-earning potential of the tenure as well as the expected future costs associated with the ownership of the tenure. The existence of reforestation obligations, *a future cost that cannot be severed from the tenure would decrease the amount such a prospective purchaser would be willing to pay*; see J. Frankovic, "Supreme Court to Hear Daishowa Appeal – Back to Basics on Basis and Proceeds" (July 12, 2012), CCH Tax Topics No. 1205, at pp. 2-3.[112] [Emphasis added.]

92. The Supreme Court in *Redwater* endorsed this approach and applied it to ARO:

> All licenses held by Redwater were received by it subject to end-of-life obligations that would one day arise. *These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front.*[113] [Emphasis added.]

93. The Court in *Daishowa* could not have been more clear in illustrating how regulatory obligations affect the fair market value of an asset at the time of sale:

> Here, for instance, the record establishes that Tolko valued the High Level Division's forest tenure $31 million *less the $11 million estimated cost of future reforestation obligations.* The forest tenure *thus had a value of $20 million.* To include the full $31 million in DMI's proceeds of disposition would disregard the fact that DMI did not have $31 million of value to sell. *Under no circumstances could DMI have received $31 million for the forest tenure.*[114] [Emphasis added.]

94. If the Perpetual Defendants approach were applied to the facts in *Daishowa*, the "$11 million estimated cost of future reforestation obligations" would have no effect on the present value of the forest tenure. So, instead of being "built into built into the market value of the assets" at the time of sale, as required by *Daishowa* and *Redwater*,[115] the cost of complying with regulatory obligations would simply be excluded from the value equation on the basis that it is "not a liability".[116]

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[112] *Daishowa*, *supra*, at para. 31 **[Trustee's Authorities, Tab 20]**
[113] *Redwater*, *supra*, at para. 157, citing Daishowa, supra, at para. 29 **[Trustee's Authorities, Tab 19]**
[114] *Daishowa*, *supra*, at para. 31 **[Trustee's Authorities, Tab 20]**
[115] *Redwater*, *supra*, at para. 157, citing Daishowa, at para. 29 **[Trustee's Authorities, Tab 19]**
[116] Summary Dismissal Brief, at paras. 56(a) and 57.

95. Even if it were not contradicted by their own pleadings, the Perpetual Defendants' argument that there was no transfer at undervalue is inconsistent with their own understanding of *Daishowa* and *Redwater*. On their version, ARO must be "built into the market value of the assets", not simply ignored.[117]

96. In any event, to the extent that Mr. Schweitzer's May 5 summary dismissal affidavit purports to disagree with the Trustee's opinion regarding the effect of ARO on the value of assets:

    96.1. His evidence is contradicted by his other May 5 affidavit, in which his other "understanding" was consistent with the Trustee's position.[118]

    96.2. More importantly, it is only sufficient, *at best*, to create a conflict in the evidence on a material fact, meaning that summary dismissal should not be granted.[119]

    96.3. Section 96(2) provides, in any event, that "the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee."

97. The Perpetual Defendants' application to dismiss the Trustee's s. 96 claim on the basis that there was no transfer at undervalue should be dismissed.

D. The Perpetual Defendants' Application to Strike and/or Dismiss the Trustee's s. 96 Claim on the Basis that PEOC was not rendered insolvent by the Asset Transaction

98. The Perpetual Defendants' argument on this issue suffers from the same flaw as their argument on the transfer at undervalue issue: it assumes that the finding that ARO is "not a liability" is relevant and a complete answer to the Trustee's allegations.

99. The specific flaw in the Perpetual Defendants' reasoning on this issue is the assumption that the balance sheet insolvency test under the *BIA* is concerned with *liabilities*, when it is actually concerned with "*obligations, due or accruing due*".

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[117] Summary Dismissal Brief, at para. 56.
[118] Security for Costs Affidavit, at para. 27.
[119] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49, at para. 38 **[Trustee's Authorities, Tab 22]**

100. The Trustee's allegation is that PEOC was rendered insolvent by the Asset Transaction "if it was not already insolvent".[120]

1. The Perpetual Defendants have failed to establish that the Trustee's allegations should be struck

(a) The Perpetual Defendants' submissions

101. The Perpetual Defendants argue that the Trustee's allegation that PEOC was rendered insolvent by the Asset Transaction should be struck for failing to disclose a reasonable claim. Their argument is simple and is essentially a repetition of their argument for striking the Trustee's transfer at undervalue allegations:

101.1. The Trustee alleges that PEOC was rendered insolvent by the Asset Transaction because it acquired assets with significant associated ARO and municipal property taxes.[121]

101.2. The allegation that the ARO associated with the Goodyear Assets was a liability "is wrong, incapable of proof and bound to fail".[122]

101.3. The Trustee's Statement of Claim "does not allege an amount" of municipal taxes associated with the Goodyear Assets for which PEOC became liable.[123]

101.4. As a result, the allegation that PEOC was rendered insolvent by the Asset Transaction should be struck for failing to disclose a reasonable cause of action.[124]

102. As with their application to strike the Trustee's transfer at undervalue allegations, the Perpetual Defendants rely on little more than this Court's finding that "ARO is not a liability". Their five-paragraph argument fails to address a number of important issues.

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[120] Statement of Claim, at para. 14.3 **[Trustee's Authorities, Tab 23]**
[121] Summary Dismissal Brief, at para. 66.
[122] Summary Dismissal Brief, at para. 68.
[123] Summary Dismissal Brief, at para. 74.
[124] Summary Dismissal Brief, at paras. 70.

(b) The Perpetual Defendants' argument is inconsistent with their own Statement of Defence

103. The Perpetual Defendants plead that ARO was one of PEOC's "liabilities" at the time of the Asset Transaction.[125] They are not entitled to seek relief on an alternative basis which has not been pleaded and is inconsistent with their Statement of Defence.[126]

104. That is a sufficient basis to dismiss their application on this issue.

(c) The Perpetual Defendants' argument assumes that ARO must be a liability in order for the Asset Transaction to have rendered PEOC insolvent

105. Like their argument on the transfer at undervalue issue, the Perpetual Defendants proceed directly from this Court's finding that "ARO is not a liability" to the desired conclusion: PEOC could not have been rendered insolvent by the Asset Transaction.[127] Their argument on the solvency issue suffers from a similar flawed assumption: that ARO *must be* a liability in order for PEOC to have been rendered insolvent by Asset Transaction.

106. The allegation actually made by the Trustee's in its Statement of Claim is that the ARO and municipal property taxes associated with the Goodyear Assets exceeded any positive value such that *the Goodyear Assets* "had no positive fair market value at the time of the Asset Transaction but represented a significant net liability".[128]

107. The Trustee alleges that "as a result of the Transactions generally, and the Asset Transaction in particular":

> [20.1] if PEOC was not insolvent, it was rendered insolvent;
>
> [20.1] PEOC was liable for, but unable to pay, the municipal property taxes with respect to the Goodyear Assets pursuant to the Municipal Government Act; and
>
> [20.2] PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;[129]

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[125] Perpetual Defendants' Statement of Defence, at para. 44(c) **[Trustee's Authorities, Tab 10]**
[126] Elan, supra, at paras. 22-23 **[Trustee's Authorities, Tab 11]**
[127] Summary Dismissal Brief, at paras. 68 and 70.
[128] Statement of Claim, at para. 13 **[Trustee's Authorities, Tab 23]**
[129] Statement of Claim, at para. 20 **[Trustee's Authorities, Tab 23]**

108. Consistent with *Daishowa* and *Redwater*, the Trustee's allegation is that, when the ARO and municipal tax liabilities were "built into" the value of the Goodyear Assets,[130] the Goodyear Assets themselves had a significant negative value at the time they were transferred to PEOC in the Asset Transaction.

109. As a result, following the Asset Transaction, PEOC could not pay the municipal taxes and ARO associated with the Goodyear Assets and was rendered insolvent.[131]

110. This Court's finding that ARO "not a liability" has no effect on the Trustee's case that the Asset Transaction rendered PEOC insolvent. There is no dispute that, consistent with the Trustee's allegations, ARO must be "built into the market value" of the Goodyear Assets at the time of the Asset Transaction.[132]

111. In deciding whether to strike the allegation that the Asset Transaction rendered PEOC insolvent, the Court "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."[133] The Trustee's allegations must be "read generously" in favour of the Trustee.[134]

112. Even if their arguments were not contradicted by their own Statement of Defence, the Perpetual Defendants have not shown that the Trustee's allegation that PEOC was rendered insolvent can be struck in accordance with those principles. Their application should be dismissed.

2. The Perpetual Defendants have failed to show that the Trustee's claim that the Asset Transaction rendered PEOC insolvent can be dismissed summarily

113. The Perpetual Defendants' argument on this issue should be dismissed for at least three reasons:

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[130] *Redwater*, at para. 157, citing *Daishowa*, at para. 29 **[Trustee's Authorities, Tab 19]**; Summary Dismissal Brief, at para. 56(a).

[131] Statement of Claim, at para. 20 **[Trustee's Authorities, Tab 23]**

[132] *Redwater*, at para. 157, citing *Daishowa*, at para. 29 **[Trustee's Authorities, Tab 19]**; Summary Dismissal Brief, at para. 56(a).

[133] *Rudichuk v Genesis Land Development Corp.*, 2020 ABCA 42, at paras. 5-6 **[Trustee's Authorities, Tab 9]**

[134] *Rudichuk v Genesis Land Development Corp.*, 2017 ABQB 119, at para. 39, citing *Festival Hall Developments Ltd. v. Michael Wilkings* (2009), 57 BLR (4th) 210, at para. 15 **[Trustee's Authorities, Tab 21]**

113.1. The Perpetual Defendants' case for summary dismissal is inconsistent with their own Statement of Defence.

113.2. They assume, incorrectly, that the balance sheet insolvency test under the *BIA* is concerned with "liabilities" rather than obligations, with the result that PEOC could not have been rendered insolvent if ARO is not a liability.

113.3. If Mr. Schweitzer's alternative evidence is considered, it creates, *at best*, a conflict in the evidence on a material issue.

(a) The Perpetual Defendants' submissions

114. Although the solvency tests prescribed by the *BIA* are disjunctive, the Perpetual Defendants devote only 3 paragraphs to their argument that PEOC was not rendered insolvent by the Asset Transaction.[135]

115. The Perpetual Defendants argue that "the value of PEOC's assets exceeded its liabilities by at least $4,109,391 (the difference between the positive value of the Goodyear Assets of $5,670,200 and the associated municipal property taxes of at most $1,560,809).[136]

116. Again, the Perpetual Defendants argument proceeds directly from the finding that ARO is "not a liability" to the desired conclusion that PEOC was not insolvent following the Asset Transaction. The Perpetual Defendants simply assume that ARO can be assigned a value of "nil" in applying the balance sheet solvency test. This is directly inconsistent with the express terms of the *BIA*, as discussed below.

(b) "Test (c)" under the *BIA* definition of "insolvent person"

117. Section 96(1)(b)(ii) of the *BIA* provides that a transfer at undervalue between the debtor and a party not dealing at arm's length may be set aside if:

(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.[137]

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[135] Summary Dismissal Brief, at paras. 88-90.
[136] Summary Dismissal Brief, at para. 88.

118. Although the *BIA* does not define the term "insolvent", s. 2 of the *BIA* incorporates the following disjunctive test in defining an "insolvent person" as a person:

> (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 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*;[138] [Emphasis added.]

119. In *Stelco Inc., Re*, Justice Farley considered the *BIA* definition of "insolvent person" in determining whether a *CCAA* Initial Order should be set aside on the basis that the applicant corporation was not "insolvent".[139] In interpreting the part (c) test for insolvency, Justice Farley stated that:

> To my view the preferable interpretation to given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken to have sold everything. There would be no residual assets and undertaking to pay off an obligation which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. *It seems to be that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.*[140] [Emphasis added.]

120. Justice Farley also confirmed that the term "obligations" included "contingent and unliquidated claims",[141] finding that:

> It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test.[142].

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[137] *BIA*, s. 96(1)(b)(ii) **[Trustee's Authorities, Tab 17]**
[138] *BIA*, s. 2 **[Trustee's Authorities, Tab 17]**; *Stelco Inc., Re*, [2004] O.J. No. 1257 (*Stelco*), at para. 28 **[Trustee's Authorities, Tab 24]**
[139] *Ibid*, at paras. 1, 6 and 22 **[Trustee's Authorities, Tab 24]**
[140] *Ibid*, at para. 50 **[Trustee's Authorities, Tab 24]**
[141] *Ibid*, at para. 52 **[Trustee's Authorities, Tab 24]**
[142] *Ibid*, at para. 59 **[Trustee's Authorities, Tab 24]**

121. Justice Farley's analysis in *Stelco* has been cited with approval in numerous decisions, including *4519922 Canada Inc., Re*, in which the Court applied the *BIA* definition of "insolvent person" to determine whether a corporation was insolvent. The Court described the "obligations" relevant under "test (c)":

> At present CLCA's outstanding obligations for which the applicant is liable include: [...] contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.[143]

122. The Court rejected the solvency analysis of the party seeking to set aside the *CCAA* Initial Order on the basis, *inter alia*, that it "also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation". The Court found that:

> These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the *BIA* which refers to obligations due and accruing due. In *Stelco Inc.*, Re, supra, Farley J. states that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J [Commercial List]) (per Farley J.).[144]

123. Accordingly, in determining whether an entity satisfies the balance sheet insolvency test under the *BIA*, all of the entity's "obligations due and accruing due" are considered. This includes "contingent and unliquidated claims" to cover off "all obligations of whatever nature and kind and leave nothing in limbo."[145]

124. The Perpetual Defendants' cite only two authorities in support of their argument that PEOC was not rendered balance sheet insolvent by the Asset Transaction, a journal article and a recent decision from the Ontario Court of Appeal concerning a personal bankruptcy.

125. They cite Professor Roderick Wood's statement that:

> Paragraph (c) is a balance sheet test that assesses whether the debtor's liabilities exceed the debtor's assets.

126. As discussed in *Stelco*, the language in "test (c)" is not limited to current liabilities: it asks whether the person's assets are sufficient to enable payment of "all of his obligations, due

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[143] *4519922 Canada Inc., Re*, 2015 ONSC 124, at para. 27 **[Trustee's Authorities, Tab 25]**
[144] *Ibid*, at para. 32 **[Trustee's Authorities, Tab 25]**
[145] *Stelco, supra*, at para. 50 **[Trustee's Authorities, Tab 24]**; *4519922 Canada Inc., Re, supra*, at para. 31 **[Trustee's Authorities, Tab 25]**

and accruing due."[146] Professor Wood uses the term "obligation" in discussing the other two solvency tests under the *BIA*.[147] Presumably he was therefore using "liability" in a general sense analogous with the term "obligation" used in "test (c)".

127. In *Kormos*, the other authority cited by the Perpetual Defendants, the Court considered a situation in which an individual assigned herself into personal bankruptcy to avoid paying a $25,565.64 judgment debt owed to her neighbours.[148] The Court was not even required to even consider the balance sheet test, which was not in issue below.[149]

128. The Perpetual Defendants have not provided any authority overruling *Stelco* and the cases citing it. The balance sheet insolvency test under the *BIA* is concerned with "obligations due or accruing due", not with "liabilities".

(c) The evidence regarding PEOC's solvency

129. Mr. Schweitzer swore two affidavits on May 5, 2020, one affidavit in support of the Perpetual Defendants' application for summary dismissal and the other affidavit in support of their security for costs application. The affidavits present contradicting evidence on the key facts, specific to each application.

129.1. In his affidavit in support of the application for security for costs, Mr. Schweitzer states that his understanding is consistent with the evidence of the Trustee's representative: the assets in the estate have "marginal value" because of the ARO associated with them.[150]

129.2. However, in his other affidavit, Mr. Schweitzer cites the Reasons in stating that, at the time of the Asset Transaction, PEOC had "no other liabilities" other than $1,560,890 in municipal taxes.[151] He cites the Reasons again in stating that, based on the Trustee's valuation of the assets received by PEOC and the "nil"

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[146] *BIA*, s. 2 **[Trustee's Authorities, Tab 17]**
[147] Summary Dismissal Brief, at para. 33.
[148] *Kormos v Fast*, at paras. 1-3, 13 and 15 **[Perpetual Defendants' Authorities, Tab 9]**
[149] *Ibid*, at para. 6 **[Perpetual Defendants' Authorities, Tab 9]**
[150] Security for Costs Affidavit, at para. 27.
[151] Summary Dismissal Affidavit, at paras. 11(b) and 11(c).

value attributable to ARO, the "net financial result of the Asset Transaction" was a gain for PEOC in the amount of $4,109,391.[152]

130. Mr. Schweitzer concludes that "[t]he above fully explains that PEOC was not insolvent at the time of the Asset Transaction and was not rendered insolvent by the Asset Transaction."[153]

131. One version of the facts presented by Mr. Schweitzer's is directly inconsistent with the Perpetual Defendants' application for summary dismissal. The other version he presents is based on two incorrect assumptions made by the Perpetual Defendants: (i) ARO has no effect on the value of assets; and (ii) the balance sheet test is concerned only with liabilities and ignores obligations.

132. Mr. Schweitzer's summary dismissal affidavit also contradicts his earlier statement, presumably based on the Perpetual Defendants' Statement of Defence, that they "will require factual and expert evidence to show that the fair market value of the consideration given and received by PEOC, *as well as to address PEOC's solvency at the time of and after the Transaction*" (emphasis added).[154]

133. The Trustee's representative, on the other hand, directly addresses the correct balance sheet insolvency test in his affidavit:

> As a result of the Asset Transaction, PEOC had no property which, at a fair valuation, was sufficient to enable payment of all of its obligations.[155]

134. The Trustee's evidence is that ARO associated with the Goodyear Assets transferred to PEOC represented "costs" of $218,958,274:

> [40.1] ARO of $192,127,274 for the Goodyear Wells (abandonment costs of $98,855,218 and reclamation costs of $93,272,056);
>
> [40.2] ARO of $26,831,000 for the facilities associated with the Goodyear Wells, calculated as the costs attributable to the Goodyear Assets, proportionate to the total ARO for all POT facilities.[156]

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[152] Summary Dismissal Affidavit, at para. 13.
[153] Summary Dismissal Affidavit, at para. 14.
[154] Summary Dismissal Affidavit, at para. 7.
[155] August 2, 2018 Affidavit of P Darby, at para. 47.

135. The Trustee's evidence also confirmed that the $5,670,200 positive value attributed to the assets transferred to PEOC in the Asset Transaction "used the reserve report received as part of the Perpetual Disclose that attributes the highest value to the Goodyear Assets."[157]

136. The Trustee's representative also referred to PEI's own Third Quarter 2016 Interim Financial Statements effective September 30, 2016, which reflected ARO as $131.0 million.[158]

(d) The Trustee's claim that PEOC was rendered insolvent by the Asset Transaction cannot be dismissed summarily

137. Even ignoring the contradictory version of the key facts presented by Mr. Schweitzer in his other May 5 affidavit (where the assets in the estate have marginal value because of ARO), the Perpetual Defendants have failed to establish that PEOC was not rendered insolvent by the Asset Transaction.

138. As discussed above, the flaw in the Perpetual Defendants' insolvency analysis is that the relevant definition of "insolvent person" under the *BIA* is not concerned with "liabilities," as defined in the Reasons, but with "obligations due or accruing due."

139. Justice Farley in *Stelco* confirmed that "obligations due or accruing due" includes "all obligations of whatever nature or kind" so as to the leave no "orphan" obligations in "limbo."[159] This includes contingent and unliquidated claims, as stated in Stelco and *4519922 Canada Inc., Re.* [160]

140. The Reasons address, among other things, the issue of whether the ARO are *a liability*. There was no dispute that ARO are an "obligation," as confirmed by the Supreme Court in *Redwater*.[161] The Reasons held that this reference confirmed that ARO were not a

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[156] August 2, 2018 Affidavit of P Darby, at para. 40.
[157] August 2, 2018 Affidavit of P Darby, at paras. 37.2, 38, 41.1 and 44.3.
[158] August 2, 2018 Affidavit of P Darby, at pra. 42.
[159] *Stelco, supra*, at para. 50 **[Trustee's Authorities, Tab 24]**
[160] *Stelco, supra*, at para. 52, *4519922 Canada Inc., Re, supra*, at para. 31 **[Trustee's Authorities, Tabs 24 and 25]**
[161] *Redwater, supra*, at para. 157; *Daishowa, supra*, at para. 29 **[Trustee's Authorities, Tabs 19 and 20]**; Reasons, at para. 357.

"current debt or liability" and then cited *Daishowa* for the proposition that a "contingent liability is not liability in law".[162]

141. Consistent with *Redwater*, the ARO associated with the Goodyear Assets transferred to PEOC in the Asset Transaction became an "obligation" of PEOC. As in *Stelco*, the ARO must be included, along with all of PEOC's other obligations *"of whatever nature or kind"* in determining whether PEOC was rendered insolvent by the Asset Transaction.

142. The Perpetual Defendants have not provided evidence to contradict the Trustee's valuation of the ARO associated with the Goodyear Assets transferred to PEOC in the Asset Transaction. They simply state, through Mr. Schweitzer, that the ARO are not *liabilities*, based on the Reasons, so they can be ignored. Accordingly, pursuant to s. 96(2), the values on which the Court makes *any finding under this section*, are the values stated by the Trustee. This will include findings regarding whether PEOC was solvent at the time of the transfer or rendered insolvent by the transfer.

143. As the balance sheet insolvency test under the *BIA* is concerned with obligations, not liabilities, the Perpetual Defendants cannot satisfy the test for summary dismissal on this point.[163] That is so even if we ignore Mr. Schweitzer alternative version of the key facts, in which he concurs with the Trustee's view that these assets had "marginal value" because of the ARO associated with them.[164]

144. The Perpetual Defendants application to dismiss the Trustee's claim on the basis that PEOC was not rendered insolvent by the Asset Transaction should be dismissed.

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[162] Reasons, at paras. 357 and 360.
[163] *BIA*, s. 2 **[Trustee's Authorities, Tab 17]**
[164] Security for Costs Affidavit, at para. 27.

PART IV - RELIEF SOUGHT

145. The Trustee respectfully request that the Perpetual Defendants' application to strike and/or dismiss its s. 96 claim 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.

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6. Perpetual Defendants' August 28, 2018 Application for Summary Dismissal
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15. *Berry v Pully*, 2002 SCC 40
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17. *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, ss. 2, 4 and 96
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19. *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5

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Part 2

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

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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

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36. May 1, 2020 Letter from D. McDonald, Q.C. to the Court of Appeal

37. May 1, 2020 Letter from S. Leitl, 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)

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