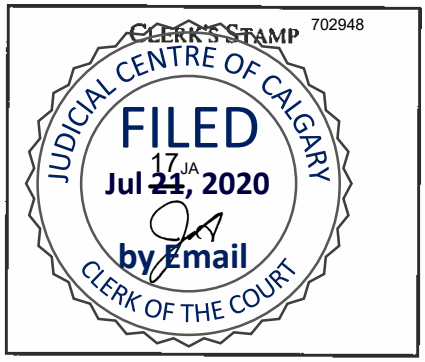


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|---|---|
| COURT FILE NUMBER | 1801-10960 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not 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 (COSTS OF THE 2018 APPLICATIONS)**<br><br>For the hearing on July 28, 2020 at 10:00 a.m. before Mr. Justice D.B. Nixon |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT | DE WAAL LAW<br>1010, 505 – 3RD Street SW<br>Calgary, AB T2P 3E6<br>Phone: (403) 266-0012<br><br>Attention: Rinus de Waal/Luke Rasmussen<br>Direct: (403) 266-0014<br>Facsimile: (403) 266-2632<br>E-mail: lrasmussen@dewaallaw.com<br><br>Rinus de Waal/Luke Rasmussen<br>Counsel for the Respondent |

COM
July 28 2020
Justice D.B Nixon

## INTRODUCTION

1. The Perpetual Defendants and Ms. Rose applied to have the Trustee's claims against them struck or summarily dismissed.

2. The Perpetual Defendants and Ms. Rose both seek costs on a "full-indemnity" basis against the Trustee.

   2.1. Ms. Rose was successful. The Trustee agrees that she is entitled to Schedule C costs, taxable in the normal course.

   2.2. The Perpetual Defendants were partially successful. However, they failed with their application to have the Trustee's main claim pursuant to s. 96 of the *Bankruptcy and Insolvency Act* (the "***BIA***") struck and/or dismissed. The Trustee was successful on its main *BIA* claim. Those costs should be in the cause.

## PART I – STATEMENT OF FACTS

3. The relevant facts will be referred to in the course of the submissions below.

## PART II – ISSUES

4. Are the Defendants entitled to enhanced or "full-indemnity" solicitor and own client client costs?

5. Is the Trustee or are the Perpetual Defendants entitled to costs for their first application to strike and/or dismiss its claims?

## PART III – ARGUMENT

### A. The General Rules

6. A successful party is generally entitled to a cost award, subject to the discretion of the Court.[1] In *Gordon v. Bourque*,[2] Justice Slatter summarized the general rules as follows:

> The general rules on costs are well known. Firstly, costs are always in the discretion of the Court. Secondly, the successful party is generally entitled to

[1] Rule 10.29(1) **[Perpetual Defendants' Authorities, Tab 3]**
[2] *Gordon v. Bourque*, 2002 ABQB 222, at para. 11 **[Trustee's Authorities, Tab 46]**

> costs, and should not be deprived of costs except for good reason. Thirdly, Court costs do not generally provide a full indemnity, even to a successful litigant; the costs are generally determined by reference to Schedule C.

7. The *Rules of Court* also set out the considerations a Court may take into account in making costs awards, including the results of the action and the degree of success of each party.[3] Pursuant to Rule 10.33, the Court can also consider the extent to which a step in an action was unnecessary, improper or a mistake and the extent to which a party engaged in misconduct.[4]

8. In *Manson Insulation Products Ltd v. Crossroads C & I Distributors,*[5] Justice Thomas noted that the Court of Appeal had recently clarified the law regarding elevated or enhanced costs:

> 548 *Solicitor and own client full indemnity costs are not usually available in civil litigation.* In *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at para 78, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.), leave to appeal to SCC refused, 37805 [2018 CarswellAlta 1113 (S.C.C.)] (7 June 2018), the Court concluded that this form of costs award "*... is virtually unheard of except where provided for by contract.*" Thus, costs awards on this level will only be available if one of the successful litigation parties identifies a contractual basis for full indemnification.
>
> 549 The more common indemnity costs award is "solicitor and client costs", which amount to "reasonable fees and disbursements", but not "frills or extras ... which should not be fairly passed on to [unsuccessful litigants]. ...":*Luft v. Taylor, Zinkhofer & Conway*, at para 77. Solicitor and client costs only apply to litigation expenses that arise from the litigation in question: *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92 (Alta. C.A.) at para 14.
>
> 550 Solicitor and client costs awards are also "rare" and "*... must be based on a finding of intentional misconduct during the litigation.*" [emphasis in original]: *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92 (Alta. C.A.) at para 14. The kinds of misconduct that attracts this level of award has been described as "*... reprehensible, egregious, scandalous or outrageous ...*": *Twinn v. Twinn*, 2017 ABCA 419 (Alta. C.A.) at para 25. In *Secure 2013 Group Inc v. Tiger Calcium Services Inc*, 2018 ABCA 110 (Alta. C.A.) at para 15, *Secure 2013 Group Inc v. Tiger Calcium Services Inc* (2018), 68 Alta. L.R. (6th) 56 (Alta. C.A.), the Court cited *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.*, 2016 ABCA 303, 403 D.L.R. (4th) 722 (Alta. C.A.), and identified a number of factors favouring an award of solicitor and client costs:
>
> a. blameworthiness in the conduct of the litigation;
>
> b. when justice can only be done by a complete indemnification for costs;
>
> c. when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive

[3] Alberta Rules of Court, AR 124/2010, s. 10.33 **[Perpetual Defendants' Authorities, Tab 3]**
[4] Alberta Rules of Court, AR 124/2010, s. 10.33 **[Perpetual Defendants' Authorities, Tab 3]**
[5] *Manson Insulation Products Ltd v. Crossroads C & I Distributors*, 2019 ABQB 684, at paras. 548-552 **[Trustee's Authorities, Tab 35]**

> proceedings, when the misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
>
> d. when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion;
>
> e. positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs;
>
> f. litigants found to be acting fraudulently and in breach of trust;
>
> g. fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and
>
> h. an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges.
>
> 551 Blameworthy conduct may warrant "enhanced costs", where a party received more than the Schedule C amount, either by awarding costs on a different Schedule C column, or a multiple of a Schedule C column: Rules 10.31(3), 10.33. In *Lotoski v. Lotoski*, 2019 ABCA 262 (Alta. C.A.) at para 7, enhanced costs were appropriate "... where the conduct of a litigant falls short of what is expected of a responsible litigant ...".
>
> 552 Another standard practice is that a trial judge may order a multiple of a Schedule C column to reflect the amount and complexity of a claim: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.) at paras 12-13, (2015), 609 A.R. 55 (Alta. C.A.); *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92 (Alta. C.A.) at para 7. *[Emphasis added].*

9. Accordingly, based on *Manson* and the Court of Appeal authorities cited therein:

   9.1. Some contractual basis is required for costs on a full indemnity basis.[6]

   9.2. Solicitor and client costs, meaning reasonable and disbursements, are "rare" and "must" be based on a finding of "intentional misconduct during the litigation"[7]

   9.3. The kinds of misconduct that attract this level of award have been described as "*reprehensible, egregious, scandalous or outrageous*".[8]

10. Although most of the submissions regarding the law on costs in Ms. Rose's written submissions refer to trite principles, the following submission is significant:

> Solicitor-client costs may be awarded to indemnify a party for their reasonable costs of the litigation where the opposite party's conduct was reprehensible, scandalous or

[6] *Manson*, at para. 548, citing *Luft v Taylor*, 2017 ABCA 228, at para. 78 **[Trustee's Authorities, Tab 35]**
[7] *Manson*, at para. 550, citing *Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92, at para. 14 **[Trustee's Authorities, Tab 35]**
[8] *Manson*, at para. 550, citing *Twinn v Twinn*, 2017 ABCA 419, at para. 25 **[Trustee's Authorities, Tab 35]**

> outrageous. Examples include: (i) where justice can only be done by indemnification; (ii) *where there was no serious issue of fact or law which required the proceedings*; and/or (iii) where there was no serious of fact or law which required the proceedings; and/or where a party delays or protracts the litigation (including where the party requires proof of facts that should have been admitted).[9] [Emphasis added.]

11. The submission that full indemnity costs can be awarded where "there was no serious issue of fact or law which required the proceedings", without more, could suggest that full indemnity costs are appropriate wherever claims are struck or dismissed, as in this case.

12. The complete and correct statement of the principle, referred to in Justice Wakeling's dissent in *Primewest*, is that "a departure from party and party costs should only occur in rate and exceptional circumstances" including:

> Where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, *where there was no serious issue of fact or law which required these lengthy, expensive proceedings*, where the positively misconducting party was "contemptuous" of the aggrieved party *in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his* [citation omitted].[10]

13. The Court in *Trimac*, for example, applied this principle in awarding enhanced costs because the individual defendant's conduct was "calculated to force [the plaintiff] to exhaust the legal proceedings to obtain that which was obviously his.[11]

14. For clarity, there is no basis for any proposition that full indemnity costs can be awarded simply because "there was no serious issue of fact or law which required the proceedings".[12]

### B. The Defendants' Claim for Full Indemnity Costs

15. With some qualifications, the Perpetual Defendants endorse the argument for full indemnity costs set out in Ms. Rose's written submissions on costs.[13]

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[9] Ms. Rose's Costs Brief, at para. 92.
[10] Pillar Resource Services Inc. v Primewest Energy Inc., 2017 ABCA 19, at para. 8, citing Sidorsky v CFCN Communications Limited et all, 1997 ABCA 280, citing Jackson v Trimac (1993), 138 AR 161 (Trimac)at 172.
[11] Trimac, at para. 35 **[Trustee's Authorities, Tab X]**
[12] Ms. Rose's Costs Brief, at para. 92.
[13] Perpetual Defendants' Costs Brief, at paras. 8, 11, 13, 14, 16, 18, 19, 20 and 21.

16. The Defendants' submissions in support of their claim for enhanced costs are without merit. The Trustee advanced certain claims against them on behalf of the Estate. The claims against Ms. Rose were struck or dismissed and some of the claims against the Perpetual Defendants were struck or dismissed.

17. The Defendants' submissions suggest that the Trustee and its representative have engaged in conduct sufficiently "reprehensible, egregious, scandalous or outrageous" to justify an award of full indemnity costs.[14] It is submitted these submissions are not supported by the facts or the law.

18. As the Trustee submits in response to the Perpetual Defendants' other applications, the issues raised by the Trustee in this actions are novel[15] and of significant importance to the community.[16] There is no basis for any suggestion that the Trustee pursued claims against the Defendants that it did not believe were supported by the facts and law.

**1. The position of the Defendants on costs is diametrically opposed to their previous position before this Court**

**(a) The Costs Submissions**

19. In the Court of Appeal and again before this Court, the Perpetual Defendants and Ms. Rose argue that PwC personally should be ordered to pay enhanced costs in their favour because the Estate will be unable to pay a costs award in their favour.

19.1. In their May 1, 2020 cost submission to the Court of Appeal, the Perpetual Defendants cited authorities for the proposition that a trustee should be personally liable where "there will likely be insufficient assets in the estate to satisfy an award of costs".[17]

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[14] Manson, at para. 550, citing Twinn v Twinn, 2017 ABCA 419, at para. 25 **[Trustee's Authorities, Tab 35]**

[15] *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]**

[16] Trustee's Security for Costs Brief, at paras. 79-83.

[17] May 1, 2020 Letter from D. McDonald, Q.C. to the Court of Appeal **[Trustee's Authorities, Tab 36]**

19.2. In her May 1, 2020 costs submission to the Court of Appeal, Ms. Rose submitted that "an award of costs against the bankrupt estate will be worthless."[18]

20. This argument is repeated in Ms. Rose's submissions on costs before this Court:

20.1. Ms. Rose's submissions cite Mr. Darby's evidence in cross-examination confirming that the assets in the Estate are of "marginal value"[19] in submitting that the Trustee decided to sue Ms. Rose "knowing full well that the Sequoia estate could not pay one cent towards any adverse cost award."[20]

20.2. Ms. Rose submits that the Trustee sought civil remedies "knowing the estate could not pay an adverse cost award if it lost."[21]

21. In support of these submissions, Ms. Rose cites the findings of Justice Veldhuis in granting the Defendants' security for costs applications:

> In oral argument, the [Trustee] suggested 2,500 wells will remain in the estate, subject to the appeal, that may be used to satisfy any 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 *"2,500 wells", with nothing more, may well be equivalent to a $3 bill.*[22]

22. Justice Veldhuis finding that the 2,500 wells in the Estate may have no value because of the "liabilities associated with these assets" was not made *sua sponte*: in seeking security for costs in the Court of Appeal, Ms. Rose argued that:

> [T]he Sequoia estate stands to gain nothing from the Trustee's action; *any gains from this litigation will clearly be offset by Sequoia's ostensibly mounting asset retirement obligations.* Even in the unlikely event that a Court simply voids the impugned transaction, 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.[23]

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[18] May 1, 2020 Letter from S. Leitl to the Court of Appeal **[Trustee's Authorities, Tab 37]**
[19] Ms. Rose's Costs Brief, at para. 24 and footnote 26.
[20] Ms. Rose's Costs Brief, at para. 24.
[21] Ms. Rose's Costs Brief, at para. 104.
[22] Ms. Rose's Costs Brief, at para. 83, citing *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36, at para. 33.
[23] September 23, 2019 Memorandum of Argument of Ms. Rose **[Trustee's Authorities, Tab 27]**

23. Accordingly, the Perpetual Defendants and Ms. Rose seek enhanced costs before this Court, and obtained security for costs in the Court of Appeal, on the basis that the a costs award against the Estate is worthless because of the "liabilities associated" with the assets in the Estate.[24]

**(b) These submissions contradict their unamended pleadings and their previous submissions before this Court**

24. The position advanced by the Perpetual Defendants and Ms. Rose in seeking enhanced costs is directly inconsistent with their own pleadings and the basis upon which this Court summarily dismissed or struck many of the Trustee's claims.

25. The Perpetual Defendants' Statement of Defence, incorporated by reference into the Statement of Defence of Ms. Rose, denies any transfer at undervalue and pleads that:

> PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for other producing assets, and were considered in the value of the Goodyear Assets;
>
> [...]
>
> *the value of PEOC/Sequoia's liabilities at the time of the Transaction was approximately equivalent to the value of its assets*;[25] [Emphasis added.]

26. Thus, although the Defendants now argue that the liabilities associated with the assets in the Estate are sufficient to render any costs award against the Estate worthless, their unamended pleadings assert that there was no transfer at undervalue because these liabilities were "approximately equivalent" to the value of the assets.

27. The contradiction is even more apparent when the Defendants' submissions on costs are compared with the Defendants' previous submissions before this Court:

    27.1. Ms. Rose argued that the Trustee's theory that "ARO was a *current* liability of PEOC" was unfound because ARO is "not a liability".[26]

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[24] Ms. Rose's Brief on Costs, at paras. 24 and 104; Ms. Rose September 23, 2019 Memorandum of Argument, at para. 3; *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36, at para. 33.

[25] Perpetual Defendants' Statement of Defence, at para. 44(c) and (d); Statement of Defence of Ms. Rose, at para. 4 **[Trustee's Authorities, Tabs 10 and 38]**

27.2. In their submissions regarding the *Redwater* decision, the Defendants argued that "*Redwater* holds that the ARO was not a liability", only an "embedded component of value."[27]

27.3. In their reply submissions regarding the *Redwater* decision, the Defendants argued that *Daishowa*, "as confirmed in *Redwater*, demonstrates that the ARO was not a PEOC liability *to the AER at the time of the Transaction*" [Emphasis added.].[28]

28. This Court accepted the Defendants' submissions that ARO was "not a liability" in dismissing or striking the Trustee's claims with the exception of its s. 96 claim against the Perpetual Defendants. The Court found in favour of the Defendants that ARO "is not a liability".[29]

29. This Court's finding that ARO "is not a liability" is directly inconsistent with the alternative version of the law and facts accepted by Justice Veldhuis. in granting the Defendants' security for costs applications: that the value of the 2,500 wells in the Estate may be "equivalent to a $3 bill" because of the "liabilities associated with these assets."[30]

30. Having argued one version of the law and facts before this Court to obtain the Order striking and dismissing many of the Trustee's claims, it is an abuse of process for the Perpetual Defendants and Ms. Rose to now argue a diametrically opposed version of the same law and facts in seeking enhanced costs *resulting from the same Order.*[31]

### 2. Submissions regarding the Trustee's claims against Ms. Rose

31. Ms. Rose's written submissions rely on incorrect statements regarding the law and facts in asserting that she is entitled to enhanced costs. There is no reasonable basis for many, if not most, of the key submissions, as discussed below.

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[26] Ms. Rose Brief for November 8, 2018 hearing, at paras. 83 and 84 **[Trustee's Authorities, Tab 39]**
[27] June 4, 2019 Joint Submissions of the Defendants, at para. 26.
[28] June 14, 2019 Joint Reply of the Defendants, at para. 8.
[29] *PricewaterhouseCoopers Inc v Perpetual Energy Inc.*, 2020 ABQB 6 (Reasons), at paras. 224, 225, 226, 235, 239, 281, 341, 350, 353, 357, 366, 367 and 368.
[30] *PricewaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABCA 36, at para. 33.
[31] *Mystar Holdings Ltd. v 247037 Alberta Ltd.*, 2009 ABQB 480 (*Mystar*), *supra*, at para. 62 **[Trustee's Authorities, Tab 1]**

**(a) The Release**

32. Ms. Rose seeks enhanced costs against the Trustee and PwC personally on the basis that it was "reckless and vexatious" for the Trustee to advance any claims against Ms. Rose in the face of the Resignation and Mutual Release.[32]

33. Ms. Rose's submissions state that the "only document generated in the Aggregate Transaction that concerned Rose personally was the release".[33] There was no reasonable basis for this submission:

    33.1. As acknowledged in support of other submissions, the release in favour of Ms. Rose was "negotiated as a deliverable" in the Share Purchase Agreement.[34] There is no dispute that Ms. Rose alone executed the Share Purchase Agreement on behalf of PEI.[35]

    33.2. In addition to executing the Purchase and Sale Agreement on behalf of PEOC and PEOC in its capacity as the Trustee of PEOC,[36] Ms. Rose, as PEOC's sole director, executed the resolution approving the Asset Transaction.[37]

34. Ms. Rose's submissions goes on to state that it was "patently clear to the Trustee, even without additional investigation, that Rose could not have caused PEI to do anything."[38]

    34.1. There is no dispute that Ms. Rose *alone* executed the Share Purchase Agreement on behalf of PEI, as PEI's "President and CEO".[39]

    34.2. Section 5.1(d) of the Share Purchase Agreement includes a representation by PEI that "this Agreement has been duly executed" and does "constitute a legal and valid binding obligation" enforceable against PEI.[40]

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[32] Ms. Rose's Brief on Costs, at para. 2(c).
[33] Ms. Rose's Brief on Costs, at para. 13.
[34] Ms. Rose's Brief on Costs, at para. 44.
[35] Share Purchase Agreement, p. 55, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".
[36] Purchase and Sale Agreement, p. 28, August 2, 2018 Affidavit of P. Darby, at Exhibit "D".
[37] Certified Resolution of the Directors of PEOC, August 2, 2018 Affidavit of P. Darby, at Exhibit "Q".
[38] Ms. Rose's Brief on Costs, at para. 40.
[39] Share Purchase Agreement, p. 55, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".
[40] Share Purchase Agreement, s. 5(1)(d), p. 23, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".

35. Notwithstanding the submission to the contrary, Ms. Rose did, in fact, cause PEI to enter into the Share Purchase Agreement. There was no reasonable basis to suggest otherwise.

36. Ms. Rose's submission on costs proceeds to state that the Trustee "contrived allegations in an attempt to avoid the obvious consequences of the Release" and should have asked the principals of 198 "*Did you cause PEI to require you to execute [the Release] against your will?*"[41]

37. The Trustee's actual allegation against Ms. Rose in relation to the release is that Ms. Rose breached her duties to PEOC by:

> causing PEI to require 198 to agree that, as a condition of closing the Share Transaction, 198 would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to s. 122(3) of the ABCA.[42]

38. This allegation was not "contrived", as set out in Ms. Rose costs submission, and did not contain any allegation, again as set out in Ms. Rose's costs submission, that the new principals of PEOC executed the release "against [their] will".

    38.1. There is no dispute that the release "was negotiated as a deliverable pursuant to the Share Purchase Agreement".[43] As alleged by the Trustee, s. 8.2(xiii) of the Share Purchase Agreement required 198 to provide, as a delivery at closing, releases executed by PEOC's new directors in favour of PEOC's director and officers, including Ms. Rose.[44]

    38.2. There is also no dispute that Ms. Rose alone executed the Share Purchase Agreement on behalf of PEI and that her execution was binding on PEI.[45]

    38.3. As alleged by the Trustee, following its execution of the Share Purchase Agreement, 198 was contractually bound to provide a release in favour of Ms. Rose. The Share Transaction would not have closed, and 198 would not have

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[41] Ms. Rose's Brief on Costs, at para. 44.
[42] Trustee's Statement of Claim, at para. 16.5 **[Trustee's Authorities, Tab 23]**
[43] Ms. Rose's Brief on Costs, at para. 44.
[44] Share Purchase Agreement, s. 8.2(a)(xiii), p. 30, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".
[45] Share Purchase Agreement, s. 5(1)(d), p. 23, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".

received PEI's shares in PEOC, if it did not cause the new principals of PEOC to execute a release in favour of Ms. Rose.[46]

39. The added allegation, not made by the Trustee, that the principals of 198/PEOC executed the release in favour of Ms. Rose "against [their] will" supports the submission that the Trustee's allegations regarding the negotiation of the release are "preposterous."[47] The Trustee's actual allegations are supported by the evidence.

40. Ms. Rose's submission on costs concludes by stating that "Darby fought against the inevitable admission that the parties signed the Release of their free will."[48]

    40.1. The provision of a release in favour of Ms. Rose, executed by PEOC's new principals was a condition of closing the Share Transaction.

    40.2. If these new principals of PEOC, who were also the principals of 198,[49] had not executed the release, 198 would have been in breach of its closing obligations under the Share Purchase Agreement and it would not have received PEI's shares in PEOC.[50]

41. It is reasonable to submit that 198 and its principals entered into the Share Purchase Agreement "of their free will".[51] However, following the execution of the Share Purchase Agreement, 198 was contractually bound to cause the new principals of PEOC to execute the release, if it wanted PEI's shares in PEOC. "Free will" was no longer an issue at that point.

42. Ms. Rose's submission on costs presents a "straw man" version of the Trustee's allegations regarding the negotiation of the release, inconsistent with the pleadings and the evidence. The "straw man" version of the Trustee's allegation is that the new principals of

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[46] Share Purchase Agreement, s. 8.2(a)(xiii), p. 30, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".
[47] Ms. Rose's Brief on Costs, at para. 45.
[48] Ms. Rose's Brief on Costs, at para. 45.
[49] Transcript of October 2, 2018 Cross-Examination of P. Darby, at p. 20, lines 23-26; October 19, 2018 Affidavit of S. Rose, at para. 40.
[50] Share Purchase Agreement, s. 8.2(a)(xiii), p. 30, August 2, 2018 Affidavit of P. Darby, at Exhibit "E".
[51] Ms. Rose's Brief on Costs, at para. 45.

PEOC executed the release "against [their] will"[52] and it is promptly knocked down with the equally baseless submission that the parties "signed the release of their free will".[53]

43. It is significant that, although the Trustee's allegations are repeatedly characterized as "preposterous" and even "contrived", Ms. Rose's submission on costs makes no reference to the basis actually pleaded by the Trustee in asserting that the release was of no assistance to Ms. Rose: s. 122(3) of the Alberta *Business Corporations Act* (the "***BCA***").

44. The two cases relied on by Ms. Rose in arguing her interpretation of s. 122(3) stand for a propositions directly opposite to the ones for which they were cited in her previous written submissions before this Court: *McKay-Cocker Construction Ltd. v. McMurdo* and *Tongue v Vencap Equities Alberta Ltd.*

45. Ms. Rose's November 2018 written submission stated that:

> Considering the parallel provision in Ontario's *Business Corporations Act*, the Superior Court of Justice in *McKay-Cocker Construction Ltd. v. McMurdo* held that the "policy of the legislation is to regulate the conduct of directors and officers of the corporation..." The Ontario equivalent of section 122(3) may have retrospective effect, but only insofar as it precludes officers and directors from contracting out of their duties while they held their positions with the corporation. That is to say, they cannot subsequently deny that they had the duty on the basis of a contract. That is not the case here.[54]

46. There was no reasonable basis for these submissions, which are directly inconsistent with what the Court in *McMurdo* actually said. The Court in *McMurdo* confirmed that Ontario's equivalent of s. 122(3) applies equally to former directors or officers and precludes them from contracting out of "liability for" breaches of their duties:[55]

    46.1. The Court did state that the "policy of the legislation is to regulate the conduct of the directors and officers of the corporation", but in the remainder of the

[52] Ms. Rose's Brief on Costs, at para. 44.
[53] Ms. Rose's Brief on Costs, at para. 45.
[54] Ms. Rose's Brief for November 8, 2018, at para.
[55] *McKay-Cocker Construction Ltd. v McMurdo*, 2001 CarswellOnt 3833, at para. 16 **[Trustee's Authorities, Tab 40]**

sentence, cut off by Ms. Rose's counsel, the Court continues: "whenever they served in either capacity."[56]

46.2. The Court also confirmed that Ontario's equivalent of s. 122(3) does more than "preclud[e] officers and directors from contracting out of their duties".[57] It also precludes "former directors and officers" from "contract[ing] out of liability for the breach of the duty imposed by subsection 134(3).[58]

47. The presentation of the other authority relied on by Ms. Rose in support of her interpretation of s. 122(3), *Tongue v Vencap*, was equally inaccurate. Ms. Rose's written submission was that the trial judge had stated that "Directors cannot obtain a valid release from liability for future breaches of the CBCA" and the Court of Appeal held that a releasor could not release his or her rights under s. 131 of the ABCA.[59] According to her written submission, "the point is that where the releasor grants a release with 'eyes wide open', as was the case with the Release, it must be given its intended effect."[60]

48. Although the trial judge in *Tongue* did say that directors cannot obtain a valid release from liability for futures breaches of the CBCA, in the following paragraph he found that the release did not apply to bar the plaintiffs' breach of fiduciary duty claims either. The Court found that a fiduciary could only benefit from a release if the releasor had knowledge of all relevant circumstances and had received independent legal advice.[61]

49. The Court of Appeal's statements in *Tongue* were also inconsistent with the submissions of Ms. Rose's counsel. The Court of Appeal found that any argument that the releasors had sufficient knowledge to put them on inquiry "was not available to the appellants" because of s. 122(3):

> In our view, the learned trial judge was correct to say that this provision renders unenforceable any attempt by contract to have a releasor waive or release his

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[56] *Tongue v Vencap Equities Alberta Ltd.*, 1994 CarswellAlta 35 (*Tongue*), at para. 140; *Tongue v Vencap Equities Alberta Ltd.*, 1996 ABCA 208 (*Tongue CA*) **[Trustee's Authorities, Tabs 40 and 41]**

[57] Ms. Rose's Brief for November 8, 2018 Hearing, at para. 75 **[Trustee's Authorities, Tab 39]**

[58] Tongue, supra, at paras. 139-140 **[Trustee's Authorities, Tab 40]**

[59] Ms. Rose's Brief for November 8, 2018 Hearing, at para. 76-78 **[Trustee's Authorities, Tab 39]**

[60] Ms. Rose's Brief for November 8, 2018 Hearing, at para. 78 **[Trustee's Authorities, Tab 39]**

[61] *Tongue*, *supra*, at para. 136 **[Trustee's Authorities, Tab 40]**

> right to be dealt with fairly under s. 131 in a case where he does not know he was not dealt with fairly.[62]

50. The Court went on to say that the situation might be otherwise if a person executed a release "after a breach and with full knowledge of the breach details".[63]

51. Although this Court distinguished *Tongue* on the basis that "there is no suggestion in this case that there was not full disclosure", the fact remains that the *Tongue* decisions cited by Ms. Rose's counsel did not support her interpretation of s. 122(3).

52. It is significant that, although Ms. Rose submission seeks enhanced costs on the basis that it was "reckless and vexatious" for the Trustee to advance any claims against Ms. Rose "in the face of" the release,[64] she still has not provided this Court with any authority supporting her interpretation of s. 122(3).

53. Ms. Rose's costs submission merely suggests that a trustee can be liable for enhanced costs if it "took a position opposite clear precedent."[65] Although the Court can be forgiven for drawing the inference that there was a "clear precedent" entitling Ms. Rose to rely on the release notwithstanding s. 122(3), it is not identified by her counsel.

**(b) The personal benefit obtained by Ms. Rose**

54. Ms. Rose's submission on costs states that "without a moment's investigation of the facts, Darby, an officer of this Court, falsely swore under oath that: 'Rose personally benefited from the Goodyear Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of PEOC.'"[66]

55. Ms. Rose's submission goes on to state that "an officer of the Court was plotting to sue Rose for almost a quarter of a billion dollars and did not even consider whether it should investigate the facts."[67] Ms. Rose's submission concludes by stating that

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[62] *Tongue CA*, *supra*, at paras. 27-28 **[Trustee's Authorities, Tab 41]**
[63] *Ibid*, at para. 30 **[Trustee's Authorities, Tab 41]**
[64] Ms. Rose's Brief on Costs, at para. 2(c).
[65] Ms. Rose's Brief on Costs, at para. 112.
[66] Ms. Rose's Brief on Costs, at para. 26.
[67] Ms. Rose's Brief on Costs, at para. 28.

> [W]hen Rose tendered unchallenged evidence that she clearly did not benefit – a lynchpin of personal liability – the Trustee would blindly press on with its claim against her nonetheless, making up new baseless arguments on the fly.[68]

56. With respect to the allegation from that Mr. Darby, the Trustee's representative gave false evidence under oath, the portion of his affidavit omitted from Ms. Rose's submission states *correctly* that:

> *At the time, Rose was the President, CEO and a shareholder of PEI, which controlled POT through its trustee PEOC.* Rose personally benefited from the Goodyear Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of PEOC. *The Trustee has seen no disclosure in writing by Rose to PEOC, in the PEOC minute book or elsewhere, of her interest in the Asset Transaction* or in any party to the Asset Transaction.[69] [Emphasis added.]

57. It is common ground that Ms. Rose was a director, officer and shareholder of PEI and did not disclose any interest she had in the Asset Transaction to PEOC. Ms. Rose's counsel simply dismissed the allegation that Ms. Rose had a duty to disclose anything to PEOC as "so artificial it's bizarre" because as PEOC's only director, she was "the repository of all of knowledge of the company."[70]

58. With respect to the statement that Ms. Rose "tendered unchallenged evidence that she clearly did not benefit", the only citation made in support of this submission is to Ms. Rose's own previous brief.[71] The paragraphs cited from Ms. Rose's previous brief include another bald allegation in a written submission: "the Trustee chose to allege that Rose personally benefitted when it knew it had no supporting evidence".[72] No citation was provided for that submission.

59. Presumably the "unchallenged evidence that [Ms. Rose] clearly did not benefit" is Ms. Rose's statement that "there was no material impact on the Perpetual Share Price following the Transaction".[73] The cross-examination of the Trustee's representative by Ms. Rose's counsel confirmed that this evidence was not "unchallenged" and did not show that "she clearly did not benefit":

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[68] Ms. Rose's Brief on Costs, at para. 29.
[69] August 2, 2018 Affidavit of P. Darby, at para. 49.
[70] Hearing Transcript, p. 64, lines 17-26.
[71] Ms. Rose's Brief on Costs, at paras. 29 and Footnote 32.
[72] Ms. Rose's Brief for November 18, 2018 Hearing, at para. 154 **[Trustee's Authorities, Tab 39]**
[73] October 19, 2018 Affidavit of S. Rose, at para. 79.

59.1. The Trustee's representative pointed out that the removal of $220 million in obligations for no consideration would only have had a positive impact on PEI's share price if the shares were not "overvalued to start with."[74]

59.2. The Trustee's representative also confirmed that the allegation that Ms. Rose benefited personally had nothing to do with an increase in PEI's share price, including any increase over the "short-term window" addressed in her affidavit.[75]

60. There was no reasonable basis in the evidence for the above statements in Ms. Rose's costs submission, including the statements that Mr. Darby "falsely swore" an affidavit and the Trustee was "plotting to sue Rose" without considering "whether it should investigate the facts."[76]

**(c) The Trustee's allegation that Ms. Rose breached her director's duties**

61. Ms. Rose's submission states that the Trustee "obdurately maintained" that Rose personally was the "directing mind" of PEOC and caused it to enter into the Asset Transaction, in spite of the fact that "the only document generated in the Aggregate Transaction that concerned Rose personally was the Release."[77]

62. The other "Aggregate Transaction" documents that concern Ms. Rose personally are discussed above: the Share Purchase Agreement she executed on behalf of PEI, the Purchase and Sale Agreement she executed on behalf of both parties and the resolution she executed as PEOC's sole director, authorizing it to enter into the Asset Transaction.

63. There cannot be any dispute that Ms. Rose caused PEOC to enter into the Asset Transaction. Ms. Rose was PEOC's sole director and she alone executed the director's resolution authorizing PEOC to enter into the Asset Transaction. Ms. Rose's counsel suggests that it was actually PEI, as PEOC's shareholder, that caused PEOC to enter into the Asset Transaction, but that would disregard basic principles of corporate law

[74] Transcript of Cross-Examination on August 2, 2018 Affidavit, at p. 96, lines 5-20.
[75] Transcript of Cross-Examination on August 2, 2018 Affidavit, at p. 96, lines 21-27, p. 97, lines 1-12.
[76] Ms. Rose's Brief on Costs, at paras. 26 and 28.
[77] Ms. Rose's Brief on Costs, at para. 13-14.

governing the respective roles of shareholders and directors,[78] as well as the director's resolution authorizing the Asset Transaction, which is in evidence.[79]

64. The Trustee's allegation, confirmed by the evidence, that Ms. Rose caused PEOC to enter into the Asset Transaction is one of the allegations her counsel accuses the Trustee of maintaining "recklessly" in the "face of contradictory information in its possession, and later in the face of cogent and unchallenged responding evidence."[80]

65. No evidence is cited in support of this submissions, which was made without any reasonable basis.

**(d) The Trustee's Oppression Claim against Ms. Rose**

**(i) Standing issue**

66. Ms. Rose's submission refers repeatedly to the Trustee's lack of standing to seek relief from oppression:

66.1. "Imagine an officer of the court with no standing to sue";[81]

66.2. The Trustee's "preposterous allegations" were made "without legal authority";[82]

66.3. The Trustee did not reply to Ms. Rose's allegation that it did not have standing and did not apply to have its standing determined as a preliminary issue.[83]

67. As Ms. Rose points out, this Court did strike the Trustee's oppression claim on the basis that the Trustee should not be granted standing to seek relief from oppression.[84] However, the Court did not accept the version of the law presented by the Defendants: that the Trustee was *required* to have its standing determined as a threshold issue, *prior to* seeking oppression relief.

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[78] *Business Corporations Act*, s. 101(1), RSA 2000 c B-9 **[Trustee's Authorities, Tab 28]**
[79] Certified Resolution of the Directors of PEOC, August 2, 2018 Affidavit of P. Darby, at Exhibit "Q".
[80] Ms. Rose's Brief on Costs, at para. 14.
[81] Ms. Rose's Brief on Costs, at para. 39.
[82] Ms. Rose's Brief on Costs, at para. 49.
[83] Ms. Rose's Brief on Costs, at para. 50.
[84] Reasons, at paras. 237-239.

68. Ms. Rose's November 2018 brief presented the following version of the law on that point:

> There is strong authority for the proposition that, as a matter of due process, the issue of a putative complainant's standing should be determined as a threshold issue prior to the determination of the merits of a putative oppression.[85]

69. As with the submissions regarding s. 122(3), none of the six authorities cited for the above proposition support it.[86] They say the opposite:

69.1. The applicant in *Sammi* sought leave to bring "a derivative and/or oppression action".[87] There is no dispute that leave must be obtained prior to commencing an derivative action and nothing in the decision suggests similar leave is required to bring an oppression action.

69.2. In *Levy-Russell*, the respondent corporation brought a motion challenging the creditors' standing as complainants, and the motion was dismissed.[88]

69.3. *Zimmer*, like *Levy-Russell*, concerned an application by the respondents challenging the alleged complainants' standing. The Court in *Zimmer* correctly cited *Boychuk* for the proposition that, while the ABCA does not require that leave be obtained prior to seeking oppression relief, the Court retains discretion to determine standing as a threshold issue.[89] The Court in *Zimmer* found the applicants had proper standing.[90]

69.4. In *Newcastle Projects*, the Court rejected the appellant's argument that an amendment to plead an oppression claim should not have been permitted because standing had not been determined.[91] The Court noted the "recent trend" was to deal with "standing at the same time as the substantive allegations of oppression"

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[85] Ms. Rose's Brief for November 18, 2018 Hearing, at para. 109 **[[Trustee's Authorities, Tab 39]**
[86] Ms. Rose's Brief for November 18, 2018 Hearing at para. 109 and footnote 94 **[Trustee's Authorities, Tab 39]**
[87] *Sammi Altas Inc., Re*, [1997] O.J. No. 4767, at paras. 3 and 7 **[Rose's November 18 Authorities, Tab 24]**
[88] *Levy-Russell Ltd. v. Shieldings Inc.*, [1998] O.J. No. 3571, at paras. 2 and 36 **[Rose's November 18 Authorities, Tab 25]**
[89] *Zimmer v DenHollander*, 2004 ABQB 493, at para. 4 **[Rose's November 18 Authorities, Tab 26]**
[90] *Ibid*, at para. 54 **[Rose's November 18 Authorities, Tab 26]**
[91] *Newcastle Projects Inc. v. Percon Projects Inc.*, 2010 BCCA 563, at para. 23 **[Rose's November 18 Authorities, Tab 27]**

but acknowledged that a *defendant could apply* to have standing determined as a threshold issue.[92]

69.5. *Ratner* cited *Newcastle Projects* for the proposition that standing "may in an appropriate case" be raised and determined as a separate issue.[93] Consistent with *Newcastle Projects*, there was no suggestion that the plaintiff was required to apply to have its standing determined as a threshold issue.

69.6. Justice Paperny's decision in *HSBC* is also inconsistent with the proposition for which it is cited by Ms. Rose's counsel: that "as a matter of due process, the issue of a putative complainant's standing should be determined as a threshold issue".[94] Justice Paperny dealt with the standing issue at the same hearing as the alleged complainant's entitlement to oppression relief.[95]

70. Ms. Rose's November 2018 brief cited the above decisions as "strong authority" for the proposition that "the issue of a putative complainant's status should be determined as a threshold issue." The authorities provide no support for that proposition and merely confirm that the Court has the discretion to deal with standing as a threshold issue.

71. This Court did not accept that "as a matter of due process", standing "should be determined as threshold issue":

> *Generally, Courts prefer to resolve questions of standing in conjunction with an assessment of the substantive merits of oppression claim.* Indeed, some Courts have taken the position that the issue of standing on preliminary motions courts should be allowed where resolutions of the issues requires them to explore the merits of the application: [citation omitted.]
>
> Second, *there are exceptions to the position that standing should not be addressed in preliminary motions courts.*[96] [Emphasis added.]

72. Although Ms. Rose's November 2018 brief advanced an incorrect legal proposition on the basis of authorities that did not support it and although the Court did not accept that

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[92] *Ibid*, at paras. 29 and 30 **[Rose's November 18 Authorities, Tab 27]**
[93] *Ratner v L.H. Ratner Construction Ltd.*, 2010 BCCA 593, at para. 21 **[Rose's November 18 Authorities, Tab 28]**
[94] Ms. Rose's Brief for November 18, 2018 Hearing at para. 109 and footnote 94 **[Trustee's Authorities, Tab 39]**
[95] *HSBC Capital Canada Inc. v First Mortgage Alberta Fund*, 1999 ABQB 406, at paras. 2, 21, 35 and 38 **[Rose's November 18 Authorities, Tab 28]**
[96] Reasons, at paras. 175-176.

proposition, Ms. Rose's brief on costs seeks enhanced costs *on the very same basis*: that the Trustee was required to obtain an Order confirming its status as a complainant *before* bringing an oppression claim against Ms. Rose.

73. Ms. Rose's submission on costs states that:

> *The story* is all the more remarkable when one considers that the Trustee *did all of this without standing to sue Rose*. Its preposterous allegations were made *without legal authority*.
>
> Rose's Statement of Defence expressly pleaded that the Trustee did not have standing to sue, and should have applied for a determination as to whether it qualified as a complainant. The Trustee did not reply, and *did not apply to have its standing determined*. Instead, it proceeded with all of its claims *on the basis of an arrogant and ill-conceived assumption of authority*.[97]

74. This "story" is based on the same incorrect legal proposition advanced in Ms. Rose's November 2018 brief: that the Trustee was required to obtain leave prior to bringing seeking oppression relief.

75. Even if it was permissible to rely on an incorrect legal proposition at first instance, it is an abuse of process for Ms. Rose to seek enhanced costs on the same basis after that proposition was not accepted by this Court.[98] Ms. Rose seeks to re-litigate an issue already decided by this Court.[99]

**(ii) The submission that Mr. Darby had "no knowledge" regarding Ms. Rose's allegedly oppressive conduct**

76. Ms. Rose's brief on costs states that:

> The Darby Affidavit would also make very serious uninformed allegations regarding Rose's judgment and loyalty, going so far as to opine that Rose had engaged in oppressive conduct. *Darby had no knowledge about that*, yet asked her no questions on the subject.[100] [Emphasis added.]

77. In support of the submission that Mr. Darby had "no knowledge" regarding Ms. Rose's allegedly oppressive conduct, Ms. Rose's submission on costs cites only her November

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[97] Ms. Rose's Brief on Costs, at paras. 49-50.
[98] Reasons, at paras. 175-176.
[99] *Pocklington Foods Inc. v Alberta (Provincial Treasurer)*, 1995 ABCA 111 (*Pocklington*), at para. 8 **[Trustee's Authorities, Tab 3]**
[100] Ms. Rose's Brief on Costs, at para. 31.

2018 brief.[101] The referenced paragraph cites the statement from the Trustee's counsel that the Trustee "is not a witness to these events" and is "relying on the records obtained from [Perpetual]."[102]

78. There would be an arguable basis for a submission that Mr. Darby had "no *personal* knowledge" regarding Ms. Rose's allegedly oppressive conduct. However, as the Trustee's counsel pointed out in oral argument, (i) the Trustee was entitled to rely on the Defendants' own records in advancing a claim against them;[103] and (ii) the Trustee's representative could obtain personal knowledge through a review of the Defendants' business records.[104]

79. The submission actually made in Ms. Rose's brief on costs is that Mr. Darby had "no knowledge", without qualification, regarding Ms. Rose's allegedly oppressive conduct. Mr. Darby's affidavit and the August 30 hearing transcript referenced in Ms. Rose's November 2018 brief confirm there was no reasonable basis for that submission. As stated by Mr. Darby in his affidavit and confirmed by the Trustee's counsel, Mr. Darby relied on Perpetual's own records, including the Perpetual records attached to his affidavit, in coming to the conclusion that Ms. Rose had engaged in oppressive conduct.

**(iii) The AER and Municipalities**

80. Ms. Rose's submission on costs states that:

> The Trustee's oppression claims were premised on the allegation that the AER and certain municipalities were aggrieved creditors of PEOC at the time of Aggregate Transaction, yet Darby to even bother to ask the AER or the municipalities if that was true. He just made an assumption.
>
> If Darby had asked PEI, he would have quickly learned his assumption about the municipal taxes was wrong. If Darby had looked at PEOC's balance sheet at the time of the Aggregate Transaction, he would have seen that the AER was not a

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[101] Ms. Rose's Brief on Costs, at para. 31, footnote 34, citing Ms. Rose's Brief for the November 18, 2018 hearing at para. 24 **[Trustee's Authorities, Tab 39]**

[102] Ms. Rose's Brief for the November 18, 2018 hearing, at para. 24, citing the transcript of the August 30, 2018 hearing **[Trustee's Authorities, Tab 39]**

[103] Transcript, p. 212, lines 39-41, p. 213, lines 1-24.

[104] Transcript, p. 232, lines 18-31, citing Trustee's Answer to Question at Para. 6 citing *Attila Dogan v. AMEC Americas Ltd.*, 2015 ABQB 120, at paras. 64-75, *Principal Savings* (1991) 1 C.P.C. (3d) 206, at para. 13, *Anderson, Re*, 2012 BCSC 956, at para 3, *Meyers Norris Penny Ltd. v Barcellona*, 2005 MBQB 10, at paras. 11, 46 and 51, *National Telecommunications, Re*, 2017 ONSC 1475, at paras. 27-28.

> creditor. If the Trustee had considered *Redwater*, it would have seen that the steadfast position of the AER has been that it does not become a creditor; and that, as a matter of law, ARO is not liability. Instead of admitting the obvious, in the course of these proceedings counsel for the Trustee would agonizingly resist admitting that basic point when pressed by the Court. *Why resist? Why would an officer of the Court fight the evidence and the law in its attempt to punish Rose?*[105]

81. *"If Darby had asked PEI, he would have quickly learned his assumption about the municipal taxes was wrong"*

81.1. Mr. Darby's evidence regarding the taxes owed at the time of the Asset Transaction was based on the records provided to the Trustee by the Perpetual Defendants, described as the "Perpetual Disclosure".[106] In the same affidavit, he stated that it was not clear how much of the annual total taxes were due and immediately payable on October 1, 2016 but this was "not material" to the Trustee's analysis.[107]

81.2. The Court found that the $10,047,744 figure cited by the Trustee was based on a 2015 listing and that the outstanding municipal property taxes at the time of the Transaction was $1,560,890. There was no suggestion that no municipal property taxes were outstanding or that the Trustee's reliance on the 2015 listing provided by Perpetual was improper.[108]

82. *"If Darby had looked at PEOC's balance sheet at the time of the Aggregate Transaction, he would have seen that the AER was not a creditor"*[109]

82.1. No citation to the evidence is provided, but if the submission refers to Schedule I to the Share Purchase Agreement, the table is expressly "excluding asset retirement obligations."[110]

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[105] Ms. Rose's Brief on Costs, at para. 35.
[106] August 2, 2018 Affidavit of P. Darby, at paras. 11, 40.3 and Exhibit "M".
[107] August 2, 2018 Affidavit of P. Darby, at para. 41.2.
[108] Reasons, at paras. 334.
[109] Ms. Rose's Brief on Costs, at para. 35.
[110] October 19, 2018 Affidavit of Ms. Rose, at Exhibit "H".

82.2. The Trustee's did rely on the Perpetual consolidated financial statements for the period ending September 30, 2016, which listed decommissioning obligations of $131,024,000 as [111]"transferred to assets held for sale".

83. *If "the Trustee had considered Redwater, it would have seen that the steadfast position of the AER has been that it does not become a creditor"*

83.1. The Supreme Court's *Redwater* decision was released in January 2019, more than 5 months *after* the Trustee brought its claim. In that decision, the majority dealt with the preliminary issue of the AER's concession "in the courts below that it was a creditor".[112]

83.2. As Justice Wakeling noted in declining to stay the Court of Appeal's decision in *Redwater*, the Court could not "stay the precedential effect of a Court of Appeal opinion".[113]

83.3. It is unfair for Ms. Rose to suggest that she is entitled to enhanced costs because the Trustee should have anticipated that the Court of Appeal's decision in *Redwater* would be overturned by the Supreme Court.

84. *If "the Trustee had considered Redwater" it would have seen that "as a matter of law, ARO is not liability"*

84.1. The Trustee respectfully disagrees with this Court's conclusion that the Redwater decision stands for the proposition that "ARO is not a liability" and has appealed, inter alia, on that basis.

84.2. In any event, the Supreme Court's decision in Redwater was not released until 5 months after the Trustee's claim had been filed. Based on the Court of Appeal's decision, ARO was not only a liability but a claim provable in bankruptcy. As

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[111] Perpetual Energy Inc. Condensed Interim Consolidated Statements of Financial Position, p. 9, August 2, 2018 Affidavit of P. Darby, at Exhibit P.

[112] Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5 (*Redwater*), at para. 125 **[Trustee's Authorities, Tab 19]**

[113] *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278, at para. 11 **[Trustee's Authorities, Tab 43]**

noted by Justice Wakeling, that was the "legal regime" in place until the Supreme Court issued its opinion.

### 3. Conclusion regarding the Defendants' application for enhanced costs

85. As noted by Justice Thomas in Manson, citing a number of Court of Appeal authorities:

85.1. Some contractual basis is required for costs on a full indemnity basis.[114]

85.2. Solicitor and client costs, meaning reasonable and disbursements, are "rare" and "must" be based on a finding of "intentional misconduct during the litigation"[115]

85.3. The kinds of misconduct that attract this level of award have been described as " *reprehensible, egregious, scandalous or outrageous*".[116]

86. Ms. Rose's submission on costs, endorsed by the Perpetual Defendants with some qualifications, suggests that the Trustee and its representative, Mr. Darby, engaged in various forms of misconduct, including by bringing claims against the Defendants without any belief that they were well founded, legally and factually. As discussed above, there was no reasonable basis in law or fact for these submissions.

87. The Defendants' application for enhanced costs should be dismissed. Ms. Rose was successful in her application and is entitled to normal Schedule C costs pursuant to Rule 10.29.

## C. Costs Issues between the Trustee and the Perpetual Defendants

### 1. The Perpetual Defendants were not substantially successful

88. The Perpetual Defendants were only partially successful with their application. Perpetual Defendants argue that they were substantially successful because "two-thirds" of the Trustee's claims against them were dismissed.[117]

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[114] *Manson*, *supra*, at para. 548, citing *Luft v Taylor*, 2017 ABCA 228, at para. 78 **[Trustee's Authorities, Tab 35]**
[115] *Manson*, *supra*, at para. 550, citing *Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92, at para. 14 **[Trustee's Authorities, Tab 35]**
[116] Manson, at para. 550, citing Twinn v Twinn, 2017 ABCA 419, at para. 25 **[Trustee's Authorities, Tab 35]**

89. They rely on two authorities, *Murphy Oil Canada Ltd. v Predator Corp.* and *King v O'Toole* in support of their request for two thirds of their full indemnity costs.[118] Neither authority assists the Perpetual Defendants.

90. With respect to *Predator*, the Perpetual Defendants' description of the facts is sufficient to show that it is of no assistance:

> In *Murphy Oil Canada Ltd. v. Predator Corp.*, the plaintiffs (defendants by counterclaim) Murphy and Apache had sought summary dismissal of the counterclaim on the basis that it raised no genuine issue for trial. Justice McMahon granted summary dismissal of the majority of the claims in the counterclaim, but was not satisfied that there was no genuine issue for trial in respect of the four claims, and dismissed that part of the application. *As a result, counterclaims totalling $3.242 billion were dismissed, leaving claims of approximately $363 million*. The claims in the main action totalled $30 million. [Emphasis added.]

91. The defendants by counterclaim in Predator were successful in reducing the total value of the counterclaims against them *by almost an order of magnitude*. The Court still only awarded them 50% of the costs they would otherwise have been entitled to.[119]

92. The three-paragraph costs decision in *King* cited by the Perpetual Defendants provides little context. However, the substantive decision[120] confirms that the Court in King:

    92.1. Dismissed the indemnification claims against Gowling on the basis that the plaintiff had joined the firm after he incurred the liability at issue[121];

    92.2. Dismissed one of the claims against O'Toole, the Canadian lawyer who advised the plaintiff regarding the Italian proceedings, on limitations grounds.[122]

93. Significantly, O'Toole and Gowling were represented by the same counsel,[123] which likely explains why the Court considered the aggregate claims against them in dealing with costs. However, when the factual context is considered, *King* cannot be compared to

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[117] Perpetual Defendants' Costs Brief, at para. 30.
[118] Perpetual Defendants' Costs Brief, at paras. 28 and 29, citing *Murphy Oil Canada Ltd. v Predator Corp.* (*Predator*) and *King v O'Toole* (*King*) **[Perpetual Defendants' Costs Authorities, Tabs 5 and 6]**
[119] Perpetual Defendants' Costs Brief, at para. 28.
[120] *King v O'Toole*, 2017 ONSC 1915 **[Trustee's Authorities, Tab 44]**
[121] *Ibid*, at paras. 13 and 74 **[Trustee's Authorities, Tab 44]**
[122] *Ibid*, at paras. 9 and 74 **[Trustee's Authorities, Tab 44]**
[123] *Ibid*, at para. 1 **[Trustee's Authorities, Tab 44]**

those in the present case. The plaintiff in *King* brought separate claims against the two defendants, including two claims against O'Toole. The Trustee brought the same claims against all three Perpetual Defendants.

94. The better authority is *Predator*. Even though the defendants by counterclaim were successful in reducing the dollar value of counterclaims by almost a factor of ten, they only received 50% of the costs they would otherwise have been entitled to.[124]

95. In the present case, the striking and/or dismissal of several of the Trustee's claims had no effect on the remaining dollar value of the claims against the Perpetual Defendants. The basis for the Perpetual Defendants' potential liability remains the same even though only the s. 96 claim remains: the Trustee seeks to set aside the Asset Transaction or recover the economic benefit obtained by the Perpetual Defendants at PEOC's expense.

96. The Perpetual Defendants were not substantially successful.

### 2. Costs of the *BIA* Claim

97. The Perpetual Defendants submit with respect to the *BIA* claim that:

> While the application to summarily dismiss or strike the *BIA* Claim was unsuccessful, it was not because the Court concluded that the *BIA* Claim has any reasonable prospect of success (which it does not), but the Court was not satisfied that the Perpetual Energy Defendants' evidence permitted the Court to conclusively adjudicate the *BIA* Claim summarily. At best, this is a finding that the Trustee "lives to fight [the *BIA* Claim] another day." It is far from a finding that the Trustee has a good case.[125]

98. In arguing the merits of the BIA Claim in their security for costs application, the Perpetual Defendants point to this Court's finding that "there is some supporting evidence from the Perpetual Energy Defendants."[126] They also note that this Court found there was evidence of *de facto* control by Purchaser Team.[127]

99. However, as the Trustee pointed out in its submissions on the security for costs issue, this Court also noted that the rebuttable presumption in s. 4(5) of the *BIA* had to be

[124] Perpetual Defendants' Costs Brief, at para. 28.
[125] Perpetual Defendants' Costs Brief, at para. 23.
[126] Perpetual Defendants' Security for Costs Brief, at para. 30(a).
[127] Perpetual Defendants' Security for Costs Brief, at para. 30(a).

considered. Although *de facto* control is factor in the "arm's length" analysis, a significant factor is whether the transaction was at fair market value. The Perpetual Defendants have been careful to avoid dealing with that issue to this point.[128]

100. The more concerning submissions regarding the BIA Claim are the following:

> The parties' efforts in seeking and resisting summary dismissal of the *BIA* Claim *were not wasted*. The work done in connection with the application for summary dismissal of the *BIA* Claim created a record, *narrowed the issues* and *resulted in findings of fact* that will benefit the parties, and the litigation generally, going forward.[129] [Emphasis added.]

101. These submissions should be viewed in the context of the abuse of process concerns raised by the Trustee, relating to the application to strike and/or dismiss in particular.

102. Although the Perpetual Defendants assert here that their first application to strike and/or dismiss the Trustee' s. 96 claim "narrowed the issues", they have re-applied to strike and/or dismiss the Trustee's s. 96 claim on the basis of new issues that they elected not to raise the first time around.[130] These new issues are inconsistent with their own Statement of Defence, which provided the basis for the first application to strike and/or dismiss.

103. The new case for striking and/or dismissal contradicts basis the first application and the Perpetual Defendants' pending appeal. They argued (and argue, in the Court of Appeal) that the Asset Transaction was at arm's length because Perpetual Energy Inc. controlled Perpetual Operating Trust and 1986114 Alberta Inc. controlled PEOC.[131] In their present application, they argue a different version: that POT is merely a relationship and PEOC entered into the Asset Transaction with itself.[132]

104. The Perpetual Defendants first application to strike and/or dismiss did not lead to any meaningful forward progress in the litigation. Consistent with the "multiplicity of

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[128] Reasons, at paras. 60, 89 and 90.
[129] Perpetual Defendants' Costs Brief, at para. 34.
[130] Reasons, at paras. 60, 89 and 90.
[131] Perpetual Defendants' August 2018 Application for Summary Dismissal, at para. 8 **[Trustee's Authorities, Tab 6]**
[132] Summary Dismissal Brief, at para. 39; Perpetual Defendants' Factum, at para. 13(a) **[Trustee's Authorities, Tab 8]**

interlocutory proceedings" approach criticized by the Court of Appeal in *Rudichuk*,[133] the Perpetual Defendants have simply re-started the striking/dismissal process, with another narrowly scoped application.[134]

105. Success on the Perpetual Defendants' first application to strike and/or dismiss the Trustee's claims was divided. The costs of that application should be in the cause. This was the approach adopted by Justice Mason in 369413 Alberta Ltd. v. Pocklington, on the basis that success on the summary judgment motion was divided.[135]

## PART IV - RELIEF SOUGHT

106. The Trustee respectfully request that the application for enhanced 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.

[133] *Rudichuk v Genesis Land Development Corp.*, 2020 ABCA 42, at paras. 34-35 **[Trustee's Authorities, Tab 9]**
[134] Reasons, at paras. 60, 89 and 90.
[135] *369413 Alberta Ltd. v Pocklington*, [2000] A.J. No. 410, at paras. 46, 47 and 52 **[Trustee's Authorities, Tab 45]**

**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. *Lehndorff 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
18. *Toronto Dominion Bank v Leffler*, 2017 ABQB 154
19. *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5

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

21. *Rudichuk v Genesis Land Development Corp.*, 2017 ABQB 119

22. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49

**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

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. 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)

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