SCC Court File number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM *THE COURT OF APPEAL OF ALBERTA*)

B E T W E E N:

SUSAN RIDDELL ROSE

APPLICANT
(Respondent)

A N D:

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

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(SUSAN RIDDELL ROSE, APPLICANT)
(Pursuant to section 40 of the *Supreme Court Act*, RSC 1985, c S-26, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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3. DOCUMENTS RELIED UPON

4. AUTHORITIES (NOT AVAILABLE ONLINE)

File number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM *THE COURT OF APPEAL OF ALBERTA*)

BETWEEN:

SUSAN RIDDELL ROSE

APPLICANT
(Respondent)

AND:

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

RESPONDENT
(Appellant)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(SUSAN RIDDELL ROSE, APPLICANT)
(Pursuant to section 40 of the *Supreme Court Act*, RSC 1985, c S-26, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

TAKE NOTICE that Susan Riddell Rose applies for leave to appeal to the Supreme Court of Canada, under section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, from the judgment of the Court of Appeal of Alberta 1901-0255-AC made on January 25, 2021 and for an order granting leave to appeal.

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds:

1. The Court of Appeal's decision proposes that a trustee in bankruptcy may have *de facto* authority to sue a former director of the bankrupt in oppression, even where the subject claims do not belong to the bankrupt estate and the complaint does not directly relate to the interests of a recognized complainant, but to the bankrupt's inability to fund its abandonment and reclamation obligations (**ARO**).

2. In addition, the Court of Appeal's decision sanctions the plaintiff's use of corporate law remedies to pursue environmental regulatory objectives in a manner not

contemplated by the legislature, and suggests that directors of companies that are the target in a change of control transaction owe a duty to future stakeholders in respect of environmental claims that is intractably in conflict with the interests of the company's current and future shareholders.

3. The proposed appeal thus raises the following questions of national and legal importance:

   a) is a trustee in bankruptcy entitled to complainant status under the statutory oppression remedy in respect of claims that do not belong to the bankrupt, or to the general body of the bankrupt's creditors, but relate instead to public regulatory obligations or the claims of individual creditors with no financial interest in the estate?

   b) may a trustee in bankruptcy use the oppression remedy or allegations of breaches of fiduciary duty as a mechanism to render a former director of a bankrupt company personally liable for the bankrupt's subsequent inability to perform environmental and regulatory public duties, including asset retirement obligations?

   c) does a director of a single-purpose corporation that is the target in a change of control transaction owe a prevailing duty to future creditors and public interest stakeholders of the company in respect of the company's future inability to fund its ARO?

Dated at Calgary, Alberta, this 24th day of March, 2021

SIGNED BY

Marie-France Major, as agent for

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PricewaterhouseCoopers Inc., in its personal capacity

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*

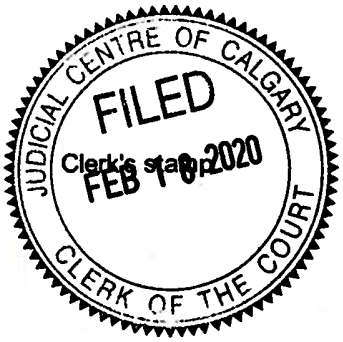
SCHEDULE "A"

A. Alberta Court of Queen's Bench Judgment, February 18, 2020

B. *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6

C. Alberta Court of Appeal Judgment, January 25, 2021

D. *PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2021 ABCA 16



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	**ORDER**

Feb. 18, 2020
Let this order be filed.
[signature]

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Norton Rose Fulbright Canada LLP** 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Steven H. Leitl | Gunnar Benediktsson steve.leitl@nortonrosefulbright.com | gunnar.benediktsson@nortonrosefulbright.com Tel: 403.267.8140 | 403.256.8256 Fax: +1 403.264.5973 Lawyers for the Defendant Susan Riddell Rose File no.: 1001040549

I hereby certify this to be a true copy of the original Order
Dated this 18 day of Feb 2020
for Clerk of the Court

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File No.: 59140-43

Counsel for Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp.

DATE ON WHICH ORDER WAS PRONOUNCED: August 15, 2019
NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon
LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATIONS of the Defendants; UPON review of the pleadings and evidence filed by the Defendants and the Plaintiff; AND UPON consideration of the written and oral submissions of the parties:

CAN_DMS: \1315923961\7

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Defendants' applications to strike and/or dismiss the Plaintiff's claim pursuant to s. 96(1) of the *Bankruptcy and Insolvency Act* are dismissed, subject to paragraph 5.

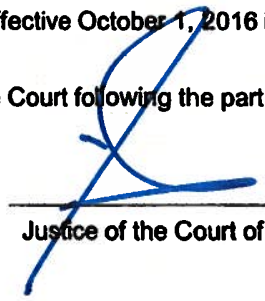
2. The Plaintiff's claims pursuant to s. 242 of the Alberta *Business Corporations Act* are struck as against all Defendants pursuant to Rule 3.68.

3. The Plaintiff's claims on the grounds of public policy, statutory illegality and equitable rescission are struck as against all Defendants pursuant to Rule 3.68.

4. The Plaintiff's claims against the Defendant Susan Riddell Rose (**Rose**) for breach of fiduciary duty and breach of duty of care are dismissed pursuant to Rule 7.3 and struck pursuant to Rule 3.68.

5. The application of Rose to dismiss all of the Plaintiff's claims against her on the basis of the Resignation & Mutual Release effective October 1, 2016 is granted pursuant to Rule 7.3.

6. Costs shall be determined by the Court following the parties' submissions thereon.



Justice of the Court of Queen's Bench of Alberta

CAN_DMS: \131592396\7

Court of Queen's Bench of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABQB 6

Date:
Docket: 1801 10960
Registry: Calgary

Between:

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

Plaintiff

- and -

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

Defendants

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

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I. Introduction

[1] A summary of my decision in this case was given orally on Thursday, August 15, 2019 from the bench. I advised the parties that I would be issuing written reasons. The detailed reasons and conclusions are provided below. If there are any discrepancies between the brief oral reasons provided and this written decision, this written decision takes precedence.

[2] The Applicant, PriceWaterhouseCoopers Inc, is the trustee in bankruptcy (the "**Trustee**" or "**PWC**") of the Estate of Sequoia Resources Corp ("**Sequoia Resources**"). Sequoia Resources was formerly known as Perpetual Energy Operating Corp ("**PEOC**").

[3] The Trustee commenced an action by way of a Statement of Claim (the **"Trustee SOC"**). The Trustee seeks an order declaring a particular sale of assets (the "**Asset Transaction**") void as against the Trustee. Alternatively, the Trustee seeks judgment for an amount not less than $217,570,800 based on the application of section 96(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***].

[4] The Defendants to the Trustee SOC are Perpetual Energy Inc ("**Perpetual Energy**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp ("**POC**") (collectively, the "**Perpetual Energy Defendants**") and Ms. Susan Riddell Rose ("**Ms. Rose**").

II. Issues

[5] I have framed the issues as follows.

A. Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA* (the "**BIA Claim**")?

B. Is the Trustee a "complainant" that is entitled to bring an oppression claim under section 242 of the Alberta *Business Corporations Act*, RSA 2000, c B-9 [***ABCA***] (the "**Oppression Claim**")?

C. Should the claim by the Trustee for relief on the grounds of public policy, statutory illegality, and equitable rescission be struck (the "**Public Policy Claim**")?

D. Is the release a complete bar to the claims against Ms. Rose (the "**Release Issue**")?

E. Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction ("**Director Claim**")?

III. Facts

[6] Perpetual Energy is a public company. It holds all of the shares in PEOC, and is the sole beneficiary of the POT.

[7] Ms. Rose was a director and shareholder of Perpetual Energy. Prior to October 1, 2016, she was also the sole director of PEOC.

[8] PEOC was the trustee of POT until October 1, 2016. Prior to that date, PEOC had no assets or operations, and existed solely to act as the trustee for POT.

[9] POT held a beneficial interest in various oil and gas properties and related assets (the "**Trust Assets**"). A subset of the Trust Assets included a large number of gas wells as well as certain other properties in Alberta identified for disposition (collectively, the "**Goodyear Assets**").

[10] In its capacity as trustee for POT, PEOC held the legal interests and licenses for the Goodyear Assets.

[11] During the first six months of 2016, Perpetual Energy decided to sell the Goodyear Assets. It solicited over ten potential third party buyers in respect of the Goodyear Assets.

[12] Confidentiality agreements were entered into with four parties concerning the Goodyear Assets. Those confidentiality agreements permitted the third parties to conduct due diligence, and review the information in the data room established by Perpetual Energy.

[13] Perpetual Energy provided multiple presentations to prospective purchasers. These presentations included: (i) the analysis of recently implemented operating models; (ii) a system of abandonment and reclamation activities and results; and (iii) workover, recompletion and drilling opportunities with respect to the Goodyear Assets.

[14] Perpetual Energy and Kailas Capital Corp ("**Kailas Capital**") entered into a letter of intent dated July 7, 2016 (the "**Kailas LOI**"). The Kailas LOI was non-binding, and was issued by Kailas Capital to Perpetual Energy. Kailas Capital incorporated 1986114 Alberta Inc ("**198Co**") to effect its business strategy.

[15] The Kailas LOI informed Perpetual Energy that Kailas Capital had participated in numerous successful transactions in Canada over the past 12 months, and that it managed producing energy assets in Canada.

[16] The Kailas LOI also stated that Kailas Capital desired to minimize commodity price risk. Consistent with that expressed desire, the Kailas LOI stipulated that concurrent with the signing of the "Definitive Agreement", Perpetual Energy would enter into commodity price risk management contract to secure price protection (the "**Gas Marketing Contract**").

[17] The sale of the Goodyear Assets from Perpetual Energy to Kailas Capital was effected though the following steps (collectively, the "**Aggregate Transaction**"):

(a) POT sold its beneficial interest in the Goodyear Assets to PEOC in the Asset Transaction. This step was effected through an asset purchase agreement dated October 1, 2016 (the "**Asset Purchase Agreement**"). The Asset Purchase Agreement caused the legal and beneficial interest in the Goodyear Assets to be combined in PEOC.

(b) Except for a 1% interest in the legal title to four East Edson wells (the "**Retained Assets**"), PEOC transferred legal title to all the remaining POT assets to POC. This transaction was effected because POC was the new trustee for POT.

(c) Perpetual Energy sold all of the shares in PEOC to 198Co (the "**Share Transaction**"). The Share Transaction was effected through a share purchase and sale agreement dated September 26, 2016 (the "**Share Purchase Agreement**").

(d) Rose resigned as the sole director of PEOC.

(e) PEOC changed its name to "Sequoia Resources Corp" ("**Sequoia Resources**").

(f) POC requested the transfer of the Retained Assets.

[18] The Aggregate Transaction was completed on October 1, 2016. In the course of the Aggregate Transaction, the "Resignation & Mutual Release" was negotiated and signed by the parties (the "**Release**").

[19] During the 17 months following the Aggregate Transaction, Sequoia Resources (formerly PEOC) operated the Goodyear Assets. In a public letter to its stakeholders issued in March 2018, Sequoia Resources reported that during the first 11 months of operations after October 1, 2016, the corporation steadily increase its production and reduced its overall environmental liabilities. In that same letter, Sequoia Resources also reported that it ranked fifth in the Province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017.

[20] On March 23, 2018, PWC was appointed the Trustee in Bankruptcy of PEOC, being the date on which the corporation assigned itself into bankruptcy.

IV. The Pleadings

[21] The Trustee filed the Trustee SOC on August 2, 2018. On that same date, the Trustee filed an application for relief (the "**Trustee Application**") and the affidavit of Mr. Paul J. Darby (the "**Darby Affidavit**"). The relief sought in the Trustee Application paralleled the relief sought in the Trustee SOC.

[22] The claims in the Trustee SOC are grounded on four approaches: (i) An alleged transfer at undervalue, which the Trustee asserts violated section 96 of the *BIA*. This is the *BIA* Claim. (ii) The alleged application of the oppression provisions of the *ABCA*. This is the Oppression Claim. (iii) An alleged violation of public policy, statutory illegality and equitable grounds. This is the Public Policy Claim. (iv) An alleged breach by Ms. Rose of her duties as the sole director of PEOC at the time of the Asset Transaction. This is a combination of the Release Issue and the Director Claim described above (collectively, the "**Breach Claim**").

[23] The Defendants filed two separate Statements of Defence. One Statement of Defence was filed by the Perpetual Energy Defendants. The other Statement of Defence was filed by Ms. Rose.

[24] The Defendants also filed four applications (collectively, the "**Defendants' Applications**"), two of which were "Stay Applications". The other two were "Summary Dismissal and Strike Applications" (collectively, the "**Summary Dismissal Applications**").

V. Remedies Sought by the Defendants

[25] The parties agreed that the Summary Dismissal Applications filed by the Defendants would be heard before the Trustee Application. Concerning the Stay Applications filed by the Defendants, they were to be addressed only if any of the Trustee's claims survived the Summary Dismissal Applications.

[26] The Defendants seek remedies under two different provisions of the *Alberta Rules of Court*, AR 124/2010 (the "**Rule**" or "**Rules**"). In numerical sequence, those provisions are as follows.

a. Pursuant to Rule 3.68, the Defendants seek to strike various claims made by the Trustee.

b. Pursuant to Rule 7.3, the Defendants seek to summarily dismiss various claims made by the Trustee.

[27] I first review the law concerning the striking of pleadings, including the limits of Rule 3.68(3), followed by a review of the current state of the law concerning summary dismissals. This is necessary because of the recent judicial developments emanating from ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Jones***].

A. Striking Pleadings

1. Background

[28] Striking claims that disclose no reasonable prospect of success is a valuable housekeeping measure. Striking claims in appropriate circumstances is essential to effective and fair litigation. It unclutters proceedings and weeds out hopeless claims. It also provides claims that have some chance of success a better opportunity to go on to trial on a timely basis: ***Knight v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at paras 19 and 20 [***Knight***].

[29] Striking claims is also consistent with the underlying philosophy of the Rules. That philosophy is to identify the real issues, and to facilitate the quickest means of resolving a claim at the least expense: ***Grenon v Canada Revenue Agency***, 2017 ABCA 96 at para 7 [***Grenon***].

[30] In summary, striking claims promotes litigation efficiency, reduces time and cost, and contributes to justice by permitting all stakeholders to focus on the serious claims: ***Knight*** at para 20. Notwithstanding the attractiveness of Rule 3.68, it is applied sparingly. It is often misused to strike out claims that are only probably bad, but not certainly bad: William A Stevenson & Jean E Côté, *Alberta Civil Procedure Handbook*, 2019 ed by Jean E Côté, F F Slatter & Vivian Stevenson (Edmonton: Juriliber, 2019) vol 1 [***Stevenson & Côté 2019***] at 3-123.

2. The Law

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

> **Court Options to Deal With Significant Deficiencies**
>
> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following: …
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim; …
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

[32] When considering an application under Rule 3.68(2)(b), "the Court must accept the allegations of fact as true expect to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof": ***Grenon*** at para 6. In other words, the decision must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application; and

(ii) the applicable statutory and common law: ***HOOPP Realty Inc v Guarantee Co of North America***, 2015 ABCA 336 [***HOOPP Realty***] at para 25, Wakeling JA, concurring.

[33] In the course of assessing the application of Rule 3.68(3), the following judicial guidelines should be considered:

a. A Chambers Judge may consider "the content of any document referred to in a statement of claim because it is part of the statement of claim": ***HOOPP Realty*** at footnote 5, Wakeling JA, concurring.

b. A Chambers Judge "must ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff's prospects of success are extremely low": ***HOOPP Realty*** at footnote 8, Wakeling JA, concurring.

c. A Chambers Judge may consider "the underlying litigation context of a claim, even one which does not give rise to a novel cause of action": ***HOOPP Realty*** at para 19. On this particular point, the majority in ***HOOPP Realty*** suggest that the Court may go "outside the contents of the Amended Statement of Claim", albeit short of evidence. The debate in ***HOOPP Realty*** was whether it was open to the chambers judge to consider the fact that the principal debtor in another case had been released from its obligations to HOOPP, as had been confirmed in 2014 ABCA 20. At footnote 4, Wakeling JA is more categoric, and states that "[n]o other facts may be introduced by way of affidavits or judicial notice".

d. A Chambers Judge may consider a range of factors when considering the test for striking pleadings: ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140 at para 16. The factors that can be considered include the clarity of the factual pleadings and the case law.

[34] The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action is not absolute. Judicial comments in this regard are as follows:

a. The Supreme Court of Canada has stated that the rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true: ***Operation Dismantle v The Queen***, [1985] 1 SCR 441 at para 27. The Supreme Court in that case went on to state that "[t]he very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven": ***Operation Dismantle*** at para 27.

b. The Court of Queen's Bench of Alberta has stated that types of "[a]llegations that are not assumed to be true include those based purely on assumptions and speculation and those that are incapable of proof": ***PR Construction Ltd v Colony Management Inc***, 2017 ABQB 600 at para 29.

c. In the context of considering Rule 9-5(1) of the B.C. Supreme Court Civil Rules (which parallels Rule 3.68), the Supreme Court in that province stated that when determining "... whether it is plain and obvious the statement of claim does not disclose a reasonable cause of action ..., facts are considered true; assumptions and speculations are not": ***McGregor v Holyrood Manor***, 2014 BCSC 679 at para 10; see also ***Honborg v Private Career Training Institutions Agency***, 2015 BCSC 695 at para 32; ***Dempsey v Envision Credit Union***, 2006 BCSC 750 at para 7; and ***McDaniel v McDaniel***, 2009 BCCA 53 at para 22.

d. Courts have expressed the need for caution on this point. For example, the B.C. Court of Appeal has stated that great caution must be taken in relying on ***Operation Dismantle*** as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind: ***Young v Borzoni***, 2007 BCCA 16 at para 30. Notwithstanding that caution, the B.C. Court of Appeal went on to state that its consideration of the authorities led it "... to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases": ***Borzoni*** at para 30. It drew this inference "...from the statement of Estey J in ***Operation Dismantle*** that the 'rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven'": ***Borzoni*** at para 30.

e. This entitlement to look behind the allegations was also endorsed in a 1985 BC Supreme Court decision, where the following comment was made – "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure": ***Rogers v Bank of Montreal*** (1985), 64 BCLR 63 (SC) at 192.

f. The Court of Queen's Bench of Alberta has also stated that an exception exists where the facts pleaded are absurd, highly implausible or are considered bald allegations: ***Arabi v Alberta***, 2014 ABQB 295 at paras 72-75.

[35] Another instructive comment is from Master Schlosser. In his view, ***HOOPP Realty*** confirms that there is no simple bright line for the material that can be used in support of an application to strike under Rule 3.68(2)(b): ***McDonald & Bychkowski Ltd v Lougheed***, 2015 ABQB 792 at para 15. Materials are to be considered on a case-by-case basis. After considering the matter, Master Schlosser determined that the pleadings from another action (the ***Bhasin*** pleadings) fall into the category of acceptable materials permitted by ***HOOPP Realty*** because the subject pleadings were not in the nature of evidence: ***McDonald*** at para 15.

[36] In summary, the judicial guidelines indicate that it is appropriate to consider the circumstances, litigation history and allegations in a particular case, and to subject assumptions and speculations to skeptical analysis: ***Borzoni*** at para 31. In contrast to facts, assumptions and speculations are not considered true. That said, seldom will a party seek to strike a pleading based on a fatal flaw in the pleading pursuant to Rule 3.68; rather, an application for summary judgment may proceed instead. However, if there is an abuse of process or no cause of action, Rule 3.68 may apply and is often used.

B. Summary Judgment

1. Background

[37] Summary judgment applications are a valid means to adjudicate and resolve legal disputes: ***Hryniak v Mauldin***, 2014 SCC 7 [***Hryniak***] at para 36. The Supreme Court of Canada has directed that summary judgment motions be used more robustly by the courts because they are a less expensive, more expeditious way to determine actions: ***Hryniak*** at paras 4 and 67.

[38] The Alberta Court of Appeal has further directed that Courts in this province may summarily dismiss a case where there is no genuine issue requiring a trial. In particular, no trial is required where a judge is able to reach a fair and just determination on the merits of a motion for summary dismissal: ***Windsor v Canadian Pacific Railway***, 2014 ABCA 108 at para 13. This will be the case when the process:

a. allows the judge to make the necessary findings of fact;

b. allows the judge to apply the law to the facts; and

c. is a proportionate, more expeditious and less expensive means to achieve a just result.

(see ***Hryniak*** at para 49)

2. The Law

[39] Summary dismissal applications are permitted under Rule 7.3. That Rule reads as follows:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> a) there is no defence to a claim or part of it;
>
> b) there is no merit to a claim or part of it;
>
> c) the only real issue is the amount to be awarded.

[40] For purposes of this case, the relevant provision is Rule 7.3(1)(b). For the Defendants to be successful under that Rule, they need to establish that there is no merit to the particular claim or part of it.

[41] While the persuasive burden is initially on the applicant, once that burden is satisfied the persuasive burden shifts to the respondent: ***Wood Buffalo Housing & Development Corp v Flett***, 2014 ABQB 537 at para 33.

[42] As a matter of process, parties to a summary dismissal application are expected to put their "best foot forward". That being the case, gaps in the record will not necessarily prevent summary disposition: ***Stefanyk v Sobeys Capital Incorporated***, 2018 ABCA 125 at para 12.

[43] In recent years, the Alberta Court of Appeal had applied two different tests concerning the level of proof necessary to succeed on a summary dismissal application. That Court recently addressed this rift and clearly set out the applicable test in ***Weir-Jones v Purolator Courier***,

2019 ABCA 49 [***Weir-Jones***]. The Alberta Court of Appeal also outlined how Rule 7.3(1)(b) was to be applied to determine whether there is no merit to a claim or part of it.

[44] In addressing the application of Rule 7.3(1)(b), the Court of Appeal emphasized that a determination under Rule 7.3(1)(b) is not a result of a summary trial. It is a matter of summary judgment. In that regard, a summary judgment process is not to be construed as being on the summary trial process continuum: ***Weir-Jones*** at para 19. To underscore the point, the Alberta Court of Appeal stated that summary judgment "is a way of resolving disputes *without* a trial; a summary trial *is* a trial": ***Weir-Jones*** at para 18 (emphasis in original). Witnesses may give oral evidence at a summary trial; an application proceeds on affidavit evidence and transcripts of any cross examinations. In the course of its commentary, the Court of Appeal at para 21 reiterated that the three-part test in ***Hyrniak*** set out above is the correct analytical approach for when summary judgment may be appropriate: see ***Hryniak*** at para 49.

[45] With respect to assessing the facts when applying the ***Hyrniak*** test, the Alberta Court of Appeal directed that a judge can make findings of fact if the record permits that to be done, when viewed from an overall perspective: ***Weir-Jones*** at para 38. Further, that Court indicated that a judge may draw inferences as necessary, and need not restrict themselves only to cases where the facts are not in dispute.

[46] In connection with that judicial guideline, a plaintiff cannot resist summary dismissal merely by raising a "doubt": ***Stefanyk*** at para 16. That said, the Alberta Court of Appeal provided caution on a couple of fronts. First, it stated that for a matter to be appropriate for summary judgment, there ought not to be a dispute on material facts: ***Weir-Jones*** at paras 21 and 35-36. Second, the presiding judge must consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily: ***Weir-Jones*** at para 34.

[47] Summary judgment also may be granted where, "even if the facts asserted by the resisting party were true, they would not support that party's claim": ***Weir-Jones*** at para 38.

[48] In terms of the standard of proof, the moving party must begin by proving the factual basis of the application on the balance of probabilities: ***Weir-Jones*** at paras 30 and 33. Once that has occurred, the presiding judge must be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial: ***Weir-Jones*** at para 30. In short:

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

[49] In this regard, it is important to note that summary judgment cannot be resisted merely by speculating as to what may arise at trial: ***Weir-Jones*** at paras 37 and 39.

[50] Summary judgment also may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: ***Weir-Jones*** at para 21. In general, the

sufficiency of the record will depend on the nature of the issues, the source and continuity of the evidence, and other relevant considerations: ***Weir-Jones*** at para 36.

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

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

a. Where there is a dispute on material facts, or one depending on issues of credibility: ***Weir-Jones*** at para 35.

b. Where there is a realistic prospect that a trial will create a better record: ***Weir-Jones*** at para 39.

c. Where the factual issues are sufficiently complicated that a trial is appropriate: ***Weir-Jones*** at para 45.

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

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

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

VI. Analysis

A. *BIA* Claim – Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA*?

1. Incremental Facts and Context

[55] Kailas Capital was incorporated in Alberta. The voting shares of that corporation are owned 50% by Mr. Hao Wang and 50% by Mr. Wentao Yang. Those two individuals are the only directors of the corporation. I infer from the evidence before me that each of Mr. Wang and Mr. Yang are at arm's length with all members of the Perpetual Energy group of entities and Ms. Rose.

[56] Kailas Capital initiated an offer to purchase shares of PEOC. That offer was made in the Kailas LOI. That letter stipulated that PEOC was to hold the legal and beneficial interest in the Goodyear Assets.

[57] Separate teams and their respective counsel represented each of the Perpetual Energy group and the Kailas Capital group in the negotiations concerning the Aggregate Transaction (as a whole) and the Asset Purchase Agreement (on its own). (I will refer to these negotiation teams as, the "**Vendor Team**" and the "**Purchaser Team**", respectively.)

[58] The Aggregate Transaction involved multiple steps, all of which were structured in sequence. That sequence occurred on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[59] Concerning the negotiation of the Asset Transaction, the Trustee agreed that Kailas Capital, 198Co, Mr. Wang and Mr. Yang (collectively, the "**Kailas Group**") had an "interest" in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised "influence" in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

[60] Perpetual Energy Defendants framed their response to the *BIA* Claim as only involving the question of whether the parties were dealing at arm's length[1]. In particular, the Perpetual Energy 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.

2. The Law

a. Statutory Framework - The *BIA*

[61] The two relevant statutory provisions in respect of the *BIA* Claim are section 4 and 96 of the *BIA*. The relevant portions of those sections are outlined below.

---

[1]See paragraph 4(a) of the Application for Summary Dismissal and to Strike filed by Perpetual Energy, POT and POC on October 19, 2018. See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which is categoric in the use of the term "only".

[62] Section 4 of the *BIA* defines "related persons", and addresses whether such persons are dealing at arm's length. It reads, in part, as follows.

> **4 (1)** In this section, ...
>
> **Definition of *related persons***
>
> **(2)** For the purposes of this Act, persons are related to each other and are "related persons" if they are ...
>
> **(c)** two entities
>
> **(i)** both controlled by the same person or group of persons, ...
>
> **Relationships**
>
> **(3)** For the purposes of this section,
>
> **(a)** if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;
>
> ...
>
> **Question of fact**
>
> **(4)** It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.
>
> **Presumptions**
>
> **(5)** Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, *in the absence of evidence to the contrary*, deemed not to deal with each other at arm's length.
>
> [Emphasis added.]

[63] Section 96 of the *BIA* addresses "Transfer at undervalue". It reads, in part, as follows.

> **96(1)** On application by the trustee, a court may declare that a transfer at undervalue is void as against, ... the trustee—or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor—if
>
> (a) *the party was dealing at arm's length with the debtor and*
>
> **(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> ...
>
> (b) *the party was not dealing at arm's length with the debtor and*

...

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

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

[Emphasis added.]

[64] The "arm's length" issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Section 96 of the *BIA* is concerned with transfers that are effected at undervalue.

[65] If a transfer was between arm's length parties and was effected within one year of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(a) of the *BIA*. If a transfer was between non-arm's length parties and was effected within five years of the initial bankruptcy, then the transfer can be challenged: see section 96(1)(b) of the *BIA*.

[66] Concerning this arm's length issue, section 4 of the *BIA* outlines the rules as to who is a related party. Generally, persons who are related to each other are deemed not to deal with each other at arm's length.

[67] Section 4(5) of the *BIA* regarding presumptions was amended a few years ago to make it a rebuttable presumption. Because of its recency, this presumption has not been extensively considered in the context of the *BIA*.

[68] A review of the amendments to section 4(5) of the *BIA* is relevant to the analysis that will be required to address the arm's length question in this case. Section 4(5) of the *BIA* was amended to make it clear that the rules in the statute that otherwise deem persons to not be dealing with each other at arm's length can be rebutted in limited circumstances. Section 4(5) of the *BIA* now provides that for the purposes of establishing whether persons are dealing at arm's length in a transfer at undervalue, persons who are related to each other are, *in the absence of evidence to the contrary*, deemed not to deal with each other at arm's length.

[69] As a result of the inclusion of the phrase "in the absence of evidence to the contrary" in section 4(5) of the *BIA*, the general presumption that related persons are not dealing with each other at arm's length may be rebutted. This rebuttable presumption applies to two particular scenarios. One of those scenarios concerns an alleged transfer at undervalue pursuant to section 96(1)(b) of the *BIA*. That legislative change was introduced into section 4(5) of the *BIA* to better ensure that legitimate agreements were not inadvertently captured by the avoidance transaction provisions of the *BIA*. The second scenario, which does not apply here, relates to section 95(1)(b) regarding a payment or obligation allegedly made in favour of a creditor who is not dealing at arm's length with the insolvent person.

[70] The example used in the legislative commentary that introduced the amended section 4(5) of the *BIA* was an agreement in the family law context. The commentary states that the

rebuttable presumption was added to section 4(5) of the *BIA* to ensure that legitimate family law agreements were not inadvertently captured by the avoidance transaction provisions in the *BIA*.

[71] I infer that the example of the agreement in the family law context was used in the legislative commentary because in divorce proceedings the parties bargain keenly, notwithstanding that the *BIA* might otherwise deem those individuals to be related. While the legislative commentary to Bill C-12 used "legitimate family law agreements" as an example, the wording in the amended provisions is not restricted to family circumstances. It is of general application.

b. The Jurisprudence

[72] The Alberta Court of Appeal considered the meaning of the phrase "arm's length" in the *BIA*: ***Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd***, 2013 ABCA 293 [***Piikani Energy***] at paras 20-23, 26 and 29; see also ***Juhasz (Trustee of) v Codeiro***, 2015 ONSC 1781 at paras 38-44. In connection with a review of section 4 of the *BIA*, the Alberta Court of Appeal observed that the phrase "arm's length" is not defined in the *BIA*: ***Piikani Energy*** at para 20.

[73] In circumstances such as this, the jurisprudence under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("***ITA***") provides appropriate principles for determining whether two parties deal at arm's length: ***Piikani Energy*** at para 21. As a starting point, the definitions of "related persons" and "arm's length" are either identical or similar as between the *ITA* and the *BIA*: ***Piikani Energy*** at para 21. That said, it should be noted that the *ITA* does not contain a provision that parallels the rebuttable presumption provision inherent in section 4(5) of the *BIA*. Notwithstanding that difference, the jurisprudence that has considered the *ITA* provides instructive guidance for purposes of the *BIA*.

[74] The Alberta Court of Appeal has endorsed judicial comments that in choosing to incorporate the term "control" into the *BIA*, Parliament must have intended to adopt the meaning it had in the *ITA* insofar it used almost identical terminology in the *BIA*: see ***Duro Lam Ltd v Last***, 1971 2 OR 202, (SCJ) at 385. Our Court of Appeal has applied similar logic to the phrase "arm's length": ***Piikani Energy*** at para 23.

[75] In the course of its analysis, the Court of Appeal in ***Piikani Energy*** at paras 28-29 considered ***Canada v McLarty***, 2008 SCC 26 [***McLarty***]. In ***McLarty***, the Supreme Court of Canada discussed the phrase "not dealing at arm's length" within the meaning of the *ITA*.

[76] The Court of Appeal in ***Piiknai*** held that the factors the Supreme Court considered in interpreting arm's length under the *ITA* "provide helpful guidance and apply in the *BIA* context to determine whether, as a question of fact, two parties deal with each other at arm's length…": ***Piikani*** at paras 29-30. I turn to outline those factors, to the extent they may be relevant in this case.

[77] In ***McLarty***, Rothstein J commented as follows, at para 43:

> 43 It has long been established that when parties are not dealing at arm's length, there is no assurance that the transaction "will reflect ordinary commercial

dealing between parties acting in their separate interests" (*Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at p. 1152). ...

[78] Later in the same decision, Rothstein, J continued, at paras 61-62:

> 61 In this case, while the initial focus is on the transaction between the vendor and the agent of the acquiring taxpayer, all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length.
>
> 62 The Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 "Meaning of Arm's Length" (June 8, 2004) sets out an approach to determine whether the parties are dealing at arm's length. Each case will depend on its own facts. However, there are some useful criteria that have been developed and accepted by the courts: see for example *Peter Cundill & Associates Ltd. v. R.*, [1991] 1 C.T.C. 197 (Fed. T.D.), aff'd [1991] 2 C.T.C. 221 (Fed. C.A.). The Bulletin provides:
>
> > 22. ... By providing general criteria to determine whether there is an arm's length relationship between unrelated persons for a given transaction, it must be recognized that all-encompassing guidelines to cover every situation cannot be supplied. Each particular transaction or series of transactions must be examined on its own merits. The following paragraphs set forth the CRA's general guidelines with some specific comments about certain relationships.
> >
> > 23. The following criteria have generally been used by the courts in determining whether parties to a transaction are not dealing at "arm's length":
> >
> > - was there a common mind which directs the bargaining for both parties to a transaction;
> >
> > - were the parties to a transaction acting in concert without separate interests; and
> >
> > - was there "de facto" control.

[79] While the Supreme Court of Canada acknowledged that the parties in ***McLarty*** were not related, the analysis of that Court is still instructive because of the consideration that the Supreme Court gave to the arm's length issue in that case. The Supreme Court stated that because the parties were not related, the issue as to whether they were dealing at arm's length was a question of fact: ***McLarty*** at para 45. That judicial comment is instructive for purposes of the Asset Transaction because of the need to consider the possible application of the rebuttable presumption in section 4(5) of the *BIA*.

[80] In subsequent cases dealing with either the *BIA* or *ITA*, the above analysis concerning what constitutes "arm's length" was been adopted: see ***Juhasz***; ***National Telecommunications v Stalt***, 2018 ONSC 1101; and ***Montor Business Corp v Goldfinger***, 2016 ONCA 406.

3. Application of the Law to the Facts

[81] Concerning the *BIA* Claim, the primary objective of the Defendants is to seek summary dismissal. In considering the application of summary dismissal to that claim, I am required to assess whether the Defendants have established that the record makes it possible to resolve the respective disputes on a summary basis.

[82] I must also assess whether the Defendants have demonstrated on the balance of probabilities that, on the facts as proven, there is no merit to the *BIA* Claim. If the Defendants discharge this burden, I must assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the *BIA* Claim. This latter assessment will be based on the nature of the issues, and their merits. Lastly, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the *BIA* Claim: ***Geophysical Service Incorporated v Falkland Oil and Gas Limited***, 2019 ABQB 162 at para 40.

[83] The first step in respect of the application of the law to the facts is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. If so, I will address that step in detail. If not, the second step is to determine whether the *BIA* Claim should be struck. If not, then the *BIA* Claim needs to proceed to a regular trial.

[84] Before I address the first step in the analysis, I acknowledge that the non-arm's length issue in respect of the *BIA* Claim arises because Kailas Capital wanted the Goodyear Assets bundled into PEOC. As such, the Asset Transaction was implemented to address the request of the Kailas Group, in its capacity as purchaser. That request was stated in the Kailas LOI.

[85] The Trustee asserts that the Asset Transaction should be viewed in isolation from the other components of the Transaction, and that the parties were not dealing at arm's length. The Trustee does not assert that the Share Transaction was not at arm's length.

[86] The Asset Transaction is an issue in this case because the Trustee SOC alleges that the underlying disposition of property involved circumstances where the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC. The PWC commencement document goes on to assert that the Asset Transaction was entered into between PEOC and POT in circumstances where PEOC, Perpetual Energy, POC, POT and Ms. Rose were not dealing at arm's length with each other within the meaning of the *BIA*.

a. Can the *BIA* Claim be determined on a summary judgment basis?

[87] Given the above context, I turn to consider the first step, which is to determine whether the record makes it possible to resolve the *BIA* Claim on a summary judgment basis. In considering this claim, my sole focus is on the arm's length issue, and not on value.

[88] The reason that I am not considering value is because my focus is dictated by the pleadings, and the relevant provision is clause 4(a) of the Summary Dismissal Application filed by Perpetual Energy. That pleading focuses the challenge of the *BIA* Claim on the arm's length

issue. [2] Indeed, it would be an error of law for me to consider the value issue since that would be outside the scope of this Application: ***Online Constructors Ltd v Speers Constructions Inc***, 2020 ABCA 132 at para 15; see also ***Stevenson & Côté 2019*** at page 13-23.

[89] This focus on the "arm's length issue" (and not on "value") was also emphasized by the Perpetual Energy Defendants during the hearings. This focus away from the value issue was evident in the submissions of Counsel for Perpetual Energy when he asserted:

a. that ***PriceWaterhouseCoopers v Legge***, 2011 NBQB 255 was not good authority. The ***Legge*** decision states that because the disputed transaction in that case was not at fair market value, it was not at arm's length;

b. that focusing on the "consideration" underlying the transaction to answer the "arm's length" question was wrong;

c. that the current "evidence" before me concerning value was "highly unreliable"; and

d. that the "arm's length" issue could be determined without regard to the consideration (value) exchanged on the deal.

[90] This narrow focus on the "arm's length" issue made sense at the time that the Perpetual Energy Defendants drafted the Summary Dismissal Application in respect of the *BIA* Claim because they wanted to terminate the *BIA* Claim without getting into the valuation issue. The Perpetual Energy Defendants could have a number of reasons for wanting to avoid the valuation issue, including the fact that if valuation needed to be addressed, *viva voce* evidence likely would be required. If *viva voce* evidence was required, that would preclude a summary dismissal of the *BIA* Claim.

[91] The critical issue at this stage is to determine the nature of the relationship between the key players involved in the Aggregate Transaction. During the negotiation leading up to that transaction, the Vendor Team and the Purchaser Team represented the Perpetual Energy group and the Kailas Group, respectively, in the Aggregate Transaction.

[92] The Aggregate Transaction involved multiple components, all of which were structured in sequence. Although the Asset Purchase Agreement was signed on September 26, 2016, the closing sequence was effected on October 1, 2016. The Asset Purchase Agreement was closed two minutes before the Share Purchase Agreement.

[93] Concerning the negotiation of the Asset Transaction, the Trustee agreed that the Kailas Group had an "interest" in knowing what assets were in PEOC. In that regard, the Trustee acknowledged that the Kailas Group exercised "influence" in respect of the Asset Purchase Agreement. Further, the Trustee conceded that the Purchaser Team had influence in the negotiations of the Asset Transaction.

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[2] See also paragraph 36 of the Brief of the Perpetual Energy Defendants, which states that "[t]he first threshold issue addresses only the question of whether the parties were dealing at arm's length" (underlining added). The first threshold issue is referenced in that Brief as the *BIA* claim.

[94] The threshold issue in respect of the *BIA* Claim in the context of the Summary Dismissal Application concerns the involvement of the Purchaser Team in respect of the Asset Transaction, in general, and the degree of influence that the Purchaser Team had over PEOC, in particular.

[95] As noted above, the involvement of the Purchaser Team in respect of the Asset Transaction, generally, and the degree of influence that the Purchaser Team had over PEOC, in particular, must be determined. If the Perpetual Energy Defendants provide sufficient evidence to allow the Court to make the necessary findings on the balance of probabilities, then the rebuttable presumption in section 4(5) of the *BIA* must be considered by the Court in the context of the evidence before it.

[96] In considering the evidence before me, I acknowledge the particulars about the transaction that the Perpetual Energy Defendants emphasized. Those particulars include the emails between the Purchaser Team and the Vendor Team during the course of negotiations.

[97] While that evidence certainly provides a factual basis to support the assertion that the Purchaser Team exercised *de facto* control over PEOC in respect of its purchase of the Goodyear Assets, I am not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily: ***Weir-Jones*** at para 34. In particular, while I may be able to draw certain inferences, those inferences are not robust enough to permit me to determine on the balance of probabilities that the Purchaser Team established the necessary control over the subject transactions.

[98] Given the importance of that factual issue, I find that the determination of the "arm's length issue" will turn on the credibility of witnesses who were directly involved in the negotiation of the Asset Transaction, including their alleged control of PEOC. Given the importance of the issue, I have scrutinized the evidence before me with considerable care. I find that the cogency of the evidence does not allow me to conclude that it is more probable than not that the Purchaser Team had the degree of "influence" that would be necessary for me conclude that they exercised the prerequisite control.

[99] Concerning an issue such as this, the totality of the surrounding circumstances should be assessed and weighed as a prerequisite to determining whether the Perpetual Energy Defendants, in their capacity as the moving party, have satisfied the burden of proof. In short, the critical factual evidence pivots on this credibility point, and the inferences that I can draw from the current record are too weak to allow me to draw the necessary conclusions on the balance of probabilities.

[100] While I concede that there is some supporting evidence from the Perpetual Energy Defendants, I find that it should be tested in a *viva voce* context. Further, the "interest" and "influence" of the Kailas Group should be tested in open court so that both (i) the "credibility" of those participants can be assessed, and (ii) the "location" of the alleged arm's length activities can be determined. I refer to "location" because it is important to consider how, what and when critical steps on the negotiation continuum occurred as between the Vendor Team and the Purchaser Team. In my view, that evidence is necessary before an informed finding can be made on the arm's length issue.

[101] Given the above facts and analysis, I find that the Perpetual Energy Defendants have not demonstrated on a balance of probabilities that there is no merit to the *BIA* Claim. I make this finding because they rely on witnesses whose credibility must be assessed. Evidence of the witnesses from both the Vendor Team and Purchaser Team needs to be tested in order to establish, on the balance of probabilities, the necessary evidentiary foundation. This assessment occurs as part of the adversarial process, and is necessary in that system. Accordingly, the first step fails with the result that the *BIA* Claim cannot be dismissed on a summary basis.

[102] Again, I emphasize that the above finding is only made on the basis of the arm's length issue, and not on value.

b. Can the *BIA* Claim be struck?

[103] Given the above finding, I now turn to consider whether the record makes it possible to strike the *BIA* Claim under Rule 3.68 on the basis that it discloses no reasonable claim. In considering this question, my sole focus continues to be on the arm's length issue, and not on value.

[104] My narrow focus is based on my understanding of the pleadings concerning the *BIA* Claim and the above noted emphasis by the Perpetual Energy Defendants that the "arm's length" issue should be determined without regard to the consideration (value) exchanged on the deal. As I noted above, the Perpetual Energy Defendants framed the *BIA* Claim so that the underlying issue addressed "...only the question of whether the parties were dealing at arm's length".

[105] As framed, the *BIA* Claim raises an interesting arm's length issue, which involves a mixture of facts, deeming rules and rebuttable presumptions. In the context of the arm's length issue that the Perpetual Energy Defendants are challenging, there is neither a fatal flaw nor an abuse of process. Technically, the arm's length question raises an issue that is worthy of consideration by a Court.

[106] Subject to a comment that I will make below in respect of the Oppression Claim, I find that the Perpetual Energy Defendants have not provided me with the necessary foundation to strike the *BIA* Claim. Accordingly, the *BIA* Claim will not be struck.

4. Conclusion

[107] Concerning the following determinations, I emphasize that they are made on the premise that the sole focus of the *BIA* Claim is on the arm's length issue. To underscore the point, the "arm's length" issue in respect of the *BIA* Claim relates to whether section 96 of the *BIA* applies to the Asset Transaction. Since the moving parties (the Perpetual Energy Defendants) framed the *BIA* Claim to focus on the arm's length issue, I have not touched on value. I am constrained by the manner in which the issue was framed in the Summary Dismissal Application, as reinforced by the Brief provided by the Perpetual Energy Defendants. That being the case, my only focus under the *BIA* Claim component of the decision is on whether section 96(1)(b) of the *BIA* is displaced because of the arm's length argument advanced by the Perpetual Energy Defendants.

[108] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[109] Given the above facts and analysis, I will not strike the *BIA* Claim.

[110] In making these findings, I am bound to decide the *BIA* claim within the confines of the underlying application: ***MNP (Next Friend of) v Bablitz***, 2006 ABCA 245 at para 9 leave to appeal to SCC refused, 31686 (12 April 2001) citing ***Rodaro v Royal Bank*** (2002), 59 OR (3d) 74 (ONCA) at para 60. I cannot make a decision on an issue that is not pleaded or argued: ***Humphries v Lufkin Industries Canada Ltd***, 2011 ABCA 366 at para 49. To do so is an error of law: ***Online Constructors*** at para 15; see also ***Stevenson & Côté 2019***, at page 13-23. While there were good practical reasons for the Perpetual Energy Defendants to confine the *BIA* Claim to the arm's length issue, I note for the record, without deciding the point, that my findings below in respect of the Oppression Claim may have caused me to arrive at a different conclusion in respect of the *BIA* claim if I had not been restricted to addressing the arm's length issue.

[111] As a final comment, the Trustee argues that the presumption that related parties do not deal at arm's length for the purposes of section 96 of the *BIA* can only be rebutted by proof that the transaction was at fair market value. While I agree that the arm's length issue can be rebutted by proof that the transaction was at fair market value, I do not agree that is the only way it can be rebutted for the purposes of section 96 of the *BIA*. While nothing turns on the point in this decision, I concur with the arguments advanced by the Perpetual Energy Defendants to the effect that section 4(5) of the *BIA* provides a foundation by which to rebut the application of section 96 of the *BIA* independent of proof of fair market value.

B. Oppression Claim – Is the Trustee a "complainant" that is entitled to bring an oppression claim under section 242 of the *ABCA*?

1. Incremental Facts and Context

[112] The handling of environmental regulatory obligations in receivership, bankruptcy and CCAA proceedings has long been challenging. This case exemplifies some of the challenges, including the status of a trustee and creditor to seek corporate remedies.

[113] The principals behind 198Co and Sequoia Resources (formerly named PEOC) took steps between October 1, 2016 and March 23, 2018 (being the date that Sequoia Resources assigned itself into bankruptcy) to pursue a business in respect of the Goodyear Assets. The evidence is that the operational activities of Sequoia Resources during that period of slightly over 17 months included steps to abandon some wells. In contrast, there is no evidence that the Trustee has taken any steps to abandon any PEOC wells.

[114] Amongst other facts, the Trustee SOC includes the following.

a. The Goodyear Assets had significant associated abandonment and reclamation obligations ("**ARO**") when PEOC acquired that property in the context of the Asset Transaction: para 5 of the Trustee SOC.

b. The amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified: para 6.1 of the Trustee SOC.

c. The Goodyear Assets had significant net liability at the time of the Asset Transaction: para 13 of the Trustee SOC.

d. The liabilities assumed by PEOC when it acquired the Goodyear Assets were at least $223,241,000: para 13.1 of the Trustee SOC.

e. The value of the Goodyear Assets acquired in the Asset Transaction were at most $5,670,200: para 13.2 of the Trustee SOC.

f. The Goodyear Assets were high liability assets: para 16.3.1 of the Trustee SOC.

g. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.

h. PEOC will suffer costs incurred: (i) until the Goodyear assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.

i. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242: para 18 of the Trustee SOC.

j. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[115] The Oppression Claim is plead in three components, contained in paragraphs 18, 19 and 20 of the Trustee SOC. Those three paragraphs are under the heading "Oppression".

[116] Paragraph 18 of the Trustee SOC states that the Trustee is a "proper complainant" within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute.

[117] The Trustee SOC pleads the Oppression Claim as follows:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:
>
> 19.1 Rose exercised her powers as a director of PEOC and its affiliates in a manner; and
>
> 19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:
>
> oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors (emphasis added).

[118] The Trustee SOC addresses the "interests of the creditors of PEOC", and is focused on the ARO and unidentified municipalities. The text reads as follows.

> 20. As a result of the [Aggregate Transaction] generally, and the Asset Transaction in particular:
>
> 20.1 if PEOC was not insolvent, it was rendered insolvent;
>
> 20.2 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
>
> 20.3 PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of PEI, POC and [Ms.] Rose personally.

[119] In cross examination on the Darby Affidavit filed by the Trustee, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction.

2. The Policy and The Law

a. The Policy

[120] The issue of who is liable for well abandonment, reclamation, release of substances and contaminated sites, or ARO, is an on-going challenge for the oil and gas industry. It has broad implications, and has been a matter for discussion for many years.

[121] For example, the Energy Resources Conservation Board ("**ERCB**") published *Recommendations to Limit the Public Risk from Corporate Insolvencies Involving Inactive Wells* in December 1989. It recommended the primary beneficiaries, or well licensees, should bear responsibility, rather than the working interest owners of the well: N Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (Calgary: University of Calgary, 2000) at 49. The ERCB set out a proposed order as to who would bear the obligation for abandoned wells. Its recommendations were not adopted: Vlavianos at 50.

[122] In response to the ERCB report, representatives of three petroleum industry associations formed a task force that presented its report to the government in December 1990: Vlavianos at 51. The industry task force rejected the ERCB's proposed order of responsibility. Under the ERCB's proposal, the original well licensee could potentially be liable for the well indefinitely: Vlavianos at 51. Instead, the industry task force recommended the licensee of record should be liable for abandoned wells, and recommended an abandonment fund be available to cover these costs: Vlavianos at 52. These recommendations were largely adopted in legislative changes in 1994: Vlavianos at 53.

[123] This history illustrates the policy discussions that have been ongoing surrounding liability for abandoned oil and gas wells. The position now advanced by the Trustee is what was advanced by the ERCB, and rejected by the legislature, that the prior licensee should be liable for abandoned wells.

[124] I acknowledge the importance of environmental protection, as well as the need to address who pays to remediate abandoned wells and contaminated sites. That said, the actions of the Trustee pose an interesting question. Should the Trustee be permitted to engage the oppression remedy to challenge the Asset Transaction or ought environmental protection and reclamation be pursued under a position advanced by an appropriate regulatory framework that is developed in conjunction with the stakeholders?

[125] It is not the function of the Court to fix legislative or regulatory regimes. That is the domain of the legislature or Parliament. Until laws are past, policy is not enforceable. In this case, the Trustee asks the Court to frame a legal regime that has been rejected by the legislature.

b. The Law

i. Statutory Framework – The *ABCA*

[126] "Complainant" is defined in section 239(b) of the *ABCA* as follows:

> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (iii) a creditor
>
> (A) in respect of an application under section 240 [derivative action], or
>
> (B) in respect of an application under section 242 [oppression], if the Court exercises its discretion under subclause (iv),
>
> or
>
> (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.
>
> [Emphasis added.]

ii. The Jurisprudence

(A) Creditor as a Complainant

[127] Creditors have been permitted to use the oppression remedy for some years. The authority of creditors to do so was confirmed in 2004 by the Supreme Court of Canada: ***Peoples Department Store Inc (Trustee of) v Wise***, 2004 SCC 68 [***Peoples***].

[128] The entitlement of creditors to use the oppression remedy, however, was constrained by the Supreme Court of Canada. In particular, that appellate Court stated that creditors could use the oppression remedy to protect their interests from the harmful conduct of directors if they qualify as a "proper person": ***Peoples*** at para 48 to 50; see also section 239(b)(iv) of the *ABCA*.

[129] In making these statements in 2004, the Supreme Court of Canada did not provide guidance on what constituted a "proper person". It left that task to the determination and discretion and of the lower courts. The trial courts and provincial appeal courts have taken on that task, and have effectively put a fence around the oppression remedy in respect of creditors. Creditors are only granted access to the oppression remedy if they meet certain criteria.

[130] The law in this area has evolved over the years. An early case that is still authoritative on this point is ***Royal Trust Corp of Canada v Hordo*** (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)), [1993] OJ No 1560 [***Hordo***].

[131] The Court in ***Hordo*** commented that debt actions should not normally be turned into oppression actions. That Court also stated that "complainant" status should be refused to creditors, unless the creditor was "in a position analogous to a minority shareholder" with some "particular legitimate interest in the manner in which the affairs of the company are managed": ***Hordo*** at para 14. This has been interpreted to mean having "a direct financial interest in how the company is being managed" but having "no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interests": ***PRW Excavating Contractors Ltd v Louras***, 2016 ONSC 5652 at paras 17-19 [***PRW***].

[132] The Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: ***Hordo*** at para 15, citing ***Re Daon Development Corporation*** (1984) 54 BCLR 235 at 13, 10 DLR (4th) 2016.

[133] The status of a person as a "complainant" under the oppression remedy is a prerequisite to the application of the two-step framework that is outlined in the BCE case: ***Re BCE Inc***, 2008 SCC 69. If a person does not qualify as a complainant in the first instance or, where section 239(b)(iii)(B) or section 239(b)(iv) of the *ABCA* apply, a person has not been granted standing as a "complainant", the quest for an oppression remedy in respect of that person ends, full stop.

(B) Trustee as a Complainant

[134] Trustees in bankruptcy are not always recognized as being "proper persons." Accordingly, they are not automatically "complainants" that are entitled to bring oppression proceedings. It depends on the circumstances.

[135] There are circumstances where the Alberta Court of Appeal determined that a trustee did not have status to bring an oppression claim pursuant to section 234 of the *ABCA*: ***Carter Oil and Gas Ltd (Trustee of) v 400133 BC Ltd***, 1998 ABCA 372 at para 27. In another case, the Ontario Superior Court of Justice stated that while the standing of a trustee in an oppression action was not fully settled in the jurisprudence, it also was not obvious that the trustee in bankruptcy does not have such capacity: ***Dulex Ltd (Trustee of) v Anderson*** (2003), 63 OR (3d) 659 (SCJ) at para 18.

[136] In effect, these cases confirm that the status of a trustee in bankruptcy does not automatically determine that a trustee is a "proper person" to be accorded standing as a "complainant".

[137] Generally, a trustee in bankruptcy must pursue the common interests of all of the creditors at the time of bankruptcy. The Alberta Court of Appeal has provided the following instructive comments on this point: see ***BDO Canada Limited v Dorais***, 2015 ABCA 137 at para 8.

> Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. Of particular importance are sections 30 and 72:
>
> 30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:

> (d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;
>
> . . .
>
> The case law establishes that a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors.
>
> [Emphasis added.]

(C) Redwater Factor

[138] The recent decision of the Supreme Court of Canada in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 [***Redwater***] is relevant to the Oppression Claim, and other matters touched on below. At paragraph 37 of ***Redwater***, the three-part test in ***Newfoundland and Labrador v AbitibiBowater Inc***, 2012 SCC 67 [***Abitibi***] is set out for determining when an environmental obligation imposed by a regulator will be a provable claim in the insolvency context. In ***Abitibi***, the Supreme Court of Canada said, at para 26:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation (emphasis in original).

(I) *Redwater* – AER Creditor Status

[139] The ***Abitibi*** test and the status of the AER as a creditor was addressed in ***Redwater***. Insofar as that status may impact the "facts" that have been included in the Trustee SOC, that case needs to be considered carefully.

[140] In ***Redwater***, the Supreme Court stated its position concerning the creditor status of the AER as follows, at paras 121 and 122:

> [121] In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599 (CanLII), 368 D.L.R. (4th) 122 ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.
>
> [122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers

> against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

[141] The Supreme Court made it clear in ***Redwater*** that whether the AER has a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test, which presupposes that the AER is a creditor: ***Redwater*** at para 130. That is, the "creditor" test cannot be bypassed on the basis of a contingency.

[142] A contingent claim must be capable of valuation in order to be a provable claim. It cannot be too remote or speculative: ***Redwater*** at para 138. As a matter of law, it must be established that enforcement by the regulator results in the regulator attaining the status of creditor: ***Redwater*** at para 146. Absent any such establishment, the AER is not a creditor. As I read the ***Abitibi*** test, it is binary. There is no middle ground. The regulator either is a creditor or is not.

[143] ***Redwater*** holds that the AER is not a creditor. As stated by the Supreme Court, "[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes": ***Redwater*** at para 158.

[144] This holding by the Supreme Court in ***Redwater*** is consistent with the findings by the Alberta Court of Appeal in ***Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd***, 1991 ABCA 181, leave to appeal to SCC refused 22655 (16 January 1992) [***Northern Badger***]. In ***Northern Badger***, the Alberta Court of Appeal acknowledged that the legislative framework embedded in the *Oil and Gas Conservation Act*, RSA 2000, c O-6 gave it the right to incur costs in respect of abandoned boreholes, and become a creditor for the amounts incurred. While the regulator had the right to incur costs in respect of abandoned boreholes, it did not do so in respect of the Northern Badger wells. Instead, the steps taken by the regulator were "...simply in the course of enforcing observance of a part of the general law of Alberta": ***Northern Badger*** at para 34.

[145] The Alberta Court of Appeal further stated that the statutory abandonment obligations were part of the general law of Alberta: ***Northern Badger*** at para 33. It commented that such obligations bind every citizen in a manner that parallels many other laws, including, for example, health and safety laws.

[146] The Alberta Court of Appeal went on to state that such public duties are owed to all citizens of the community, rather than being owed to the public authority enforcing them: ***Northern Badger*** at para 33. That appellate Court further stated that the regulator was not a

creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: ***Northern Badger*** at para 33 and 34.

[147] While the Alberta Court of Appeal commented that Northern Badger had a liability, it described that liability as being "inchoate": ***Northern Badger*** at para 32. Given the use of the term "inchoate", that appellate Court was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: ***Northern Badger*** at para 32.

(II)*Abitibi* – Insufficient Certainty

[148] ***Abitibi*** confirmed that a remediation order could be a contingent obligation, which is commonly understood to be an obligation that only becomes a debt upon the occurrence of a future event that may or may not occur. If the future event is too remote or speculative, the claim will not be included in the insolvency process. Given this background, if the AER has not triggered the enforcement mechanism, will not be performing the remediation work, or will not be asserting a monetary claim to have its costs reimbursed, then the future event is too remote or speculative for the AOR associated with the Goodyear Assets to be included in the insolvency process: ***Redwater*** at paras 36, 140 and 152.

[149] As noted above, in ***Redwater***, the Supreme Court of Canada revisited the test in ***Abitibi***. In the course of considering the ***Abitibi*** test, the Supreme Court found that it was not "...sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process": ***Redwater*** at para 142. That Court reinforced this determination by commenting as follows, at para 145:

> The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy.

[150] Accordingly, under the ***Abitibi*** test, the AER did not have a claim provable in bankruptcy.

[151] In summary, the Supreme Court of Canada in ***Redwater*** held that the AER had no status as a creditor in relation to the ARO of a licensee. Further, even if it could be said that the AER were a creditor, there is not sufficient certainty that the AER would ever perform any remediation work and have a claim for reimbursement.

(III) ARO a Component of Value

[152] The Trustee alleges that the ARO obligation is a liability. That being the case, it is necessary to consider the meaning of the term "liability".

[153] The jurisprudence has stated the term "liable" is not a legal term, and that it has no technical meaning: ***Laurance (Re)*** (1923), 55 OLR 196 at para 7, 25 OWN 482 (Ont SC). That

same jurisprudence went on to state that the concept of "liability" is "...primarily referable to the existence of the obligation and is not to be confined to the present right to enforce it": ***Laurance*** at para 7. The Court also commented that the exact meaning of the term "liability" may vary with the context: ***Laurance*** at para 7.

[154] The ***Laurance*** decision involved the question as to whether a landlord was entitled to rank as a preferred creditor concerning certain property taxes paid by him, which were properly payable by an insolvent tenant. Mr. Laurance was the tenant of Mr. McConnell's farm. Under the terms of the lease, Mr. Laurance had covenanted to pay the property taxes in respect of the subject farm land.

[155] The trustee in ***Laurance*** at para 4 opposed the claim for preference concerning the property taxes. He argued that a liability had not yet arisen because a specified time period had to lapse after a demand was made before the collector was entitled to seizure.

[156] The Court in ***Laurance*** at para 5 stated that the liability to pay property taxes does not arise only when payment is demanded. The Court noted that the liability for property taxes under the *Municipal Act* attached on January 1 of the particular calendar year for which the rates were imposed. That legislative framework establishes a liability in law, because it was referable to an existing legal obligation. Thus, the landlord, Mr. McConnell, was entitled to include in his proof of claim the portion of the 1923 property taxes that were properly payable by the insolvent, Mr. Laurance, under the terms of the lease: ***Laurance*** at para 11.

[157] There also have been occasions where the jurisprudence has recognized a liability in circumstances where no current action can be taken to enforce payment. This judicial recognition has occurred in the context of an undeclared dividend on preferred shares: ***Fairhall v Butler***, [1928] SCR 369.

[158] The ***Fairhall*** decision involved a circumstance where Mr. Butler, on behalf of White Star Refining Company ("**White Star**"), had an option to acquire common shares in Western Motor Corporation Limited. ("**Western Motor**"). White Star accepted the option on the condition that Mr. Fairhall would furnish a statement "showing the assets and liabilities ...of Western Motor" (the "**Western Motor Financial Report**"): ***Fairhall*** at para 3.

[159] The Western Motor Financial Report was prepared by Chartered Accountants. That report included a balance sheet that allegedly disclosed the assets and liabilities of Western Motor.

[160] The context within which the Western Motor Financial Report was requested and prepared is important. White Star was interested in acquiring a controlling interest in Western Motor, and it planned on doing so through the acquisition of common shares in that target company. White Star protected itself under the option by stipulating the need for full disclosure of assets and liabilities because, I infer, any undisclosed liabilities would reduce the value of the Western Motor common shares.

[161] The capital structure of Western Motor included issued and outstanding preference shares (the "**Western Motor Preferred Shares**"). The Western Motor Preferred Shares were non-

participating and nonassessable, and they entitled the holders to a first, fixed, cumulative dividend at 8% per annum: ***Fairhall*** at para 6.

[162] White Star accepted the option, but noted that the acceptance was based on the disclosure presented in the Western Motor Financial Report: ***Fairhall*** at para 8. However, at the time of settlement, the undeclared and unpaid dividends on the Western Motor Preferred Shares presented a difficulty.

[163] The Western Motor Financial Report did not show the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares. This caused a dispute: ***Fairhall*** at para 8.

[164] The question underlying the dispute was whether the cumulative undeclared and unpaid dividends on the Western Motor Preferred Shares constituted a liability that should have been disclosed in the Western Motor Financial Report. The Supreme Court of Canada recognized that until a dividend is declared, no action is available to a shareholder to enforce payment: ***Fairhall*** at para 19. As such, the Court also acknowledged that a company incurs no liability until a dividend is declared by it: ***Fairhall*** at para 19.

[165] Notwithstanding the above recognition by the Supreme Court of Canada that no enforcement action was available in these circumstances, the Court in ***Fairhall*** went on to state "...that within the meaning of the contract, as understood by the parties, the undeclared dividends on preference shares were a liability which should have been disclosed [*sic*] in the report of the appellant's auditors": ***Fairhall*** at para 18. That is, the contractual framework in the form of the terms and conditions associated with the Western Motor Preferred Shares establishes an accruing liability in law because it is referable to an existing and accumulating obligation. The Court took this position, in part, because no dividend would be payable on the common shares of Western Motor until all of the accrued dividends were paid on the Western Motor Preferred Shares: ***Fairhall*** at para 19.

[166] In ***Redwater***, the Supreme Court of Canada addressed the ARO liability allegation from a different viewpoint. Rather than being a form of liability, the Supreme Court held that the "...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": ***Redwater*** at para 157. In making this determination, the Supreme Court of Canada relied on ***Daishowa-Marubeni International Ltd v Canada***, 2013 SCC 29 [***Daishowa***] at para 29.

[167] While courts should be cautious in relying too heavily on ***Daishowa*** because it approached the issue from an income tax perspective, it does touch on the very issue that was being argued in ***Redwater***. In ***Daishowa***, the Supreme Court found that statutory reforestation obligations of persons that held forest tenures in Alberta were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure's value at the time of sale: ***Daishowa*** at para 31.

[168] While those regulatory parameters depressed the value of the assets, the Supreme Court of Canada in ***Daishowa*** held that those "...reforestation obligations were not a distinct existing debt": ***Daishowa*** at para 35. That is, those future obligations did not equate to a current monetary claim.

[169] The Trustee equates an ARO obligation to that of a liability. That position is not supportable for at least four reasons.

[170] First, concerning the ARO associated with the Goodyear Assets, there is no creditor. That was confirmed by ***Redwater***. Absent a creditor, there can be neither a debtor nor a corresponding liability.

[171] Second, concerning the ARO associated with the Good year Assets, there is neither a liability nor any amount referable to an existing obligation. In contrast to ***Laurance***, there is no legislative framework that established a present liability in respect of the Goodyear Assets at the time of the Asset Transaction. Similarly, in contrast to ***Fairhall***, there was no contractual framework that established an existing and accumulating obligation in respect of the Goodyear Assets at the time of the Asset Transaction.

[172] Third, to the extent that there is an ARO associated with the Goodyear Assets, it is a notional and contingent obligation. That is not sufficient to constitute a liability that needs to be considered for purposes of the Asset Transaction.

[173] Fourth, the alleged ARO obligation in the Asset Transaction is one step further removed from being a liability than was the case in ***Redwater***. In ***Redwater***, Abandonment Notices had been issued. In contrast, in this matter there is no evidence that Abandonment Notices were issued in respect of the Goodyear Assets on or before the date of the Asset Transaction.

3. The Application of the Law to the Facts

[174] Before I commence my analysis, a few preliminary comments are warranted.

[175] First, the Defendants are effectively challenging the Oppression Claim by contesting the standing of the Trustee to bring such a claim. 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 not be allowed where the resolution of the issue requires them to explore the merits of the application: ***Jabaco Inc v Real Corporate Group Ltd***, [1989] OJ No 68, 13 ACWS (3d) 352.

[176] Second, there are exceptions to the position that standing should not be addressed in preliminary motions courts. Courts have struck actions for want of standing as a preliminary matter where the nature of the claim strained the boundaries because the person seeking the oppression remedy was too far outside recognized parameters: ***Hordo*** at paras 14 and 15. Another exception is where the resisting party would not be held to be a "proper person" because they did not satisfy the Court "...that there was some evidence of oppression or unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer": ***First Edmonton Place Ltd v 315888 Alta Ltd*** (1988), 40 BLR 28 at 50-51 (Alta QB), 60 Alta LR (2d) 122, reversed on other grounds 1989 ABCA 274. This judicial comment suggests that there is a *prima facie* test, and that standing may be determined on a preliminary motion.

[177] Third, deciding whether the Trustee is an eligible complainant is a threshold issue. Given that the underlying application is a preliminary motion that challenges standing, disputed facts generally should be decided in favour of the resisting party, unless it is clear on the face of the

record that such an assumption is unfounded: ***Levy-Russell Ltd v Shieldings Inc*** (1998), 41 OR (3d) 54 at para 21 (Ont Ct J(Gen Div)), 165 DLR (4th) 183, leave to appeal refused 42 OR (3d) 215, 41 BLR (2d) 142.

[178] Assuming that the Oppression Claim of the Trustee is a collective and representative claim on behalf of all creditors, the inquiry turns to whether the Court should exercise its discretion to grant standing to the Trustee as a "complainant".

[179] Returning to the particulars of this case, I will: (i) consider whether the record makes it possible to strike the Oppression Claim; and (ii) touch on the issue of summary judgment. Depending on my conclusions in respect of those three matters, the Oppression Claim may need to proceed to a trial.

[180] Before I turn to the analysis, an overview of some context is useful. First, in cross-examination, Mr. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction. That positions the Oppression Claim into a relatively narrow framework. Second, but for the alleged ARO and property taxes, the Trustee SOC provides no further particulars or allegations regarding the amounts or nature of the alleged liabilities. Amongst other issues, I will need to consider whether the approach taken by the Trustee is a selective action, and whether it violates a principle of bankruptcy law that all actions should be focused on the collective. Third, the Trustee SOC contains no allegation that any creditor had an actionable reasonable expectations of any kind. I raise this point because when considering whether there has been an oppression of a complainant, I must determine what the reasonable expectations of that person were according to the arrangements which existed between that alleged complainant and the body corporate: see ***Mennillo v Intramodal inc***, 2016 SCC 51 at para 9. Fourth, the Trustee asserts that Sequoia Resources was "set up to fail". The Trustee further asserts that this, in and of itself, constitutes oppression. With this background in mind, I turn to analyze the Oppression Claim.

a. Can the Oppression Claim be struck?

[181] I turn to whether the record makes it possible to strike the Oppression Claim under Rule 3.68(2)(b). A decision to strike must be based only on (i) the facts alleged in the commencement document, which must be assumed to be true for the purpose of disposing of the application, and (ii) the applicable statutory and common law.

[182] The facts to which I can refer for purposes of Rules 3.68(2)(b) and 3.68(3) are limited. In particular, and as mentioned above, the facts to which I can refer are limited to what is in the Trustee SOC. The relevant particulars in that commencement document are as follows:

a. The Goodyear Assets had significant associated ARO when PEOC acquired that property in the context of the Asset Transaction.

b. The Asset Purchase Agreement is referenced, and the Trustee SOC reiterates that the amount and scope of the ARO associated with the Goodyear Assets was not capable of being quantified.

c. The Goodyear Assets had significant net liability at the time of the Asset Transaction. The Trustee SOC further states that the liabilities assumed by PEOC when it acquired the Goodyear Assets were at least $223,241,000.

d. The value of the Goodyear Assets acquired in the Asset Transaction were at most $5,670,200.

e. The Goodyear Assets were high liability assets.

f. PEOC was unable to meet the obligations associated with the Goodyear Assets: para 16.3.2 of the Trustee SOC.

g. PEOC will suffer costs incurred: (i) until the Goodyear Assets are returned to POT, including the costs to address safety, environmental, other issues relating to the Goodyear Assets; and (ii) to investigate the Aggregate Transactions: paras 17.3.2 and 17.3.3 of the Trustee SOC.

h. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242.

i. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets: para 20.3 of the Trustee SOC.

[183] In considering the application to strike the Oppression Claim, there are three grounds that warrant review under Rule 3.68(2)(b). The first ground involves the factors that emanate from ***Hordo***. The second ground involves the question as to whether this Oppression Claim is a collective action or a selective action. The third ground involves the impact of ***Redwater***.

[184] Before I address Rule 3.68, an overview of the law associated with creditors in the context of an oppression action is warranted. The entitlement of a creditor to seek the oppression remedy is not automatic. The statutory framework requires a Court to exercise discretion: ss 239(b)(iii) and (iv) of the *ABCA*. A similar statutory framework applies to a proposed complainant who is "...any other person...: s 239(b)(iv) of the *ABCA*.

[185] There is a policy reason for not allowing a creditor automatic access to the oppression remedy in the *ABCA*. Importantly, a broad interpretation of the "proper person" phrase would open the oppression remedy to abuse from creditors. The policy concern is that if the oppression remedy is applied too broadly, creditor protection will impose a punishment on debtors when a business risk fails. That would allow creditors to "escape the consequences of their debtor's bad decisions...": Douglas G Baird & Thomas H Jackson, "Fraudulent Conveyance Law and Its Proper Domain," (1985) 38: 4 *Vanderbilt LR* 829 at 834.

[186] To address the concern that creditors might abuse the oppression remedy mechanism, the Courts have developed a series of factors to assist in determining which creditors will be granted standing (the "**Factor-Based Approach**"). The case most frequently cited for this Factor-Based Approach is ***Hordo***.

[187] The ***Hordo*** case gathered and summarized factors from a number of different decisions. Under the Factor-Based Approach, an alleged creditor is typically denied standing where: (i) the plaintiff was not a creditor when the oppression occurred, but was merely a contingent creditor; (ii) the creditor's interest in the affairs of the Corporation are too remote; (iii) the complaints of

the creditor have nothing to do with the circumstances giving rise to the debt; (iv) the creditor is not in a position analogous to that of a minority shareholder; or (v) the creditor had no particular legitimate interest in the manner in which the affairs of the company are managed (collectively, the "**Hordo Factors**").

[188] The Hordo Factors have been framed to ensure that the boundaries of what constitutes a "proper person" are not pushed beyond what is reasonable in the circumstances. The reason for the boundaries is because the oppression remedy is not intended to be a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a Court to accord with an assessment of a third-party as to what is just and equitable, especially on an *ex pose facto* basis. In this regard, it is not the function of the Court rewrite contracts: ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***, 2008 ONCA 183 at para 60. Further, and as stated above, it is not the function of the Court to fix legislative or regulatory regimes. The need to reform regulatory regimes is the domain of the legislature. Courts should not participate in that process, except in a traditional adjudicative manner.

i. The Hordo Factors – Rule 3.68(2)(b)

[189] A creditor of a corporation may sue the corporation or its officers/directors for oppression only if the Court exercises its discretion in determining that the creditor qualifies as a "complainant": see sections 239(b)(iii)(B) and 239(b)(iv)of the *ABCA*. Any other person may make an application to be granted "complainant" status, subject always to the discretion of the Court: section 239(b)(iv) of the *ABCA*. In both a "creditor" or "any other person" circumstance, the Court will exercise its discretion to grant a person standing as a complainant only if the applicant is a "proper person".

[190] The Courts have restricted the application of the oppression remedy to creditors. As noted above, the Court in ***Hordo*** at para 14 commented that debt actions normally should not be turned into oppression actions.

[191] The Court in ***Hordo*** also stated that "complainant" status should be refused unless the creditor was "in a position analogous to a minority shareholder" with some "particular legitimate interest in the manner in which the affairs of the company are managed": ***Hordo*** at para 14. This has been interpreted to mean having "a direct financial interest in how the company is being managed" but having "no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interests": ***PRW*** at paras 17-19, citing ***Re Dawn Development Corporation*** (1984), 54 BCLR 235 at 13, 10 DLR (4th) 216.

[192] The reason the Courts have been hesitant to grant "complainant" status to creditors is because the connection of a creditor is typically viewed as being too remote to the affairs of the subject corporation: ***Hordo*** at para 14. If the interest of a creditor in the affairs of a corporation is too remote, then the creditor is typically not a "proper person" for purposes of being designated as a "complainant". Similarly, where the creditor has nothing to do with the circumstances giving rise to the debt, "proper person" standing is typically denied.

[193] When a trustee in bankruptcy is involved, additional factors must be considered. A trustee is neither automatically barred from being a complainant nor automatically entitled to that status: ***PriceWaterhouseCoopers Inc v Olympia & York Realty Corp*** (2003), 68 OR 3d 544 at

para 45, [2003] OJ No 5242 (CA) [***Olympia***]. The judge at first instance is the one tasked to determine whether the trustee is a "proper person" to be accorded standing as a "complainant". It will be an exercise of discretion, based on the circumstances of the particular case.

[194] I acknowledge that the Trustee SOC states that the Trustee is a "proper complainant" within the meaning of Part 19 of the *ABCA*, including sections 239 and 242 of that statute. As an aside, I assume that the Plaintiff intended to say that the Trustee was a "proper person" to be accorded standing as a "complainant". For purposes of the analysis below, I will construe the phrase "proper complainant" in that manner.

[195] While I acknowledge the statement in that commencement document, I do not accept assertion therein that the Trustee is a "proper person" as a "fact" for purposes of Rule 3.68(2)(b). The assertion that the Trustee is a "proper person" to be accorded standing as a "complainant" is a legal conclusion. Whether the Trustee is a "proper person" is a question of law. Questions of law are not determined by a trustee. Such questions are the domain of the Court, and they must be left to the determination of the Court.

[196] As stipulated in section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*, only the Court is granted the right to exercise discretion to determine that threshold issue. In argument, the Trustee stated that it was seeking an Order pursuant to Part 19 of the Rules, which I construe to mean a determination under section 239(b)(iii)(B) and section 239(b)(iv) of the *ABCA*. Until I exercise my discretion to decide, any assertion as to whether the Trustee is a "proper person" that is to be accorded standing as a "complainant" is mere speculation. Further, any conclusion to be drawn from the facts is solely a function of the Court.

[197] This distinction between pleading a legal conclusion and pleading facts is not new. A commencement document "...must plead the necessary facts, and a mere legal conclusion is not enough": ***Fullowka v Whitford***, (1996) 147 DLR (4th) 531 at 14, [1996] NWTJ No 95 (CA), leave to appeal to SCC refused [1997] SCCA No 58. Further, "...there is a big difference between pleading a mere conclusion of law and pleading a fact": ***Fullowka*** at para 15.

[198] Courts are critical when conclusions are plead without the facts to support the conclusion: ***Shiels v TELUS Communications Inc***, 2003 ABQB 53 at para 17. It is not enough for a commencement document to plead a legal conclusion without the necessary facts: ***Stevenson & Côté 2019*** at page 13-24. Absent the necessary facts, a legal conclusion cannot be drawn.

[199] This not to say that points of law cannot be stated in a commencement document. However, if a statement about a point of law is plead, then the facts that make the point of law applicable must also be plead: r 13.8(1)(b).

[200] Given my analysis above, I find that the allegation in the Trustee SOC that the Trustee is a "proper person" to be accorded standing as a "complainant" is an assumption (or speculation) that I am not required to treat as true for the purpose of an application under Rule 3.68: ***Operation Dismantle*** at para 27; ***PR Construction*** at para 29; and ***McGregor*** at para 10.

[201] I now turn to whether the Trustee SOC allows me to find that the Trustee is a "proper person" to be accorded standing as a "complainant" in the circumstances. This takes me to the Hordo Factors.

[202] To address the Hordo Factors, the Trustee SOC would need to include particulars that would allow me to be satisfied that the alleged creditors that it represents: (i) were closely connected with PEOC at the time of the alleged oppression; (ii) were in a position analogous to that of a minority shareholder at the time of the alleged oppression; and (iii) had a particular legitimate interest in the manner in which the corporation was managed at the time of the alleged oppression. I find that none of those prerequisites were addressed the Trustee SOC.

[203] Given the absence of particulars in the Trustee SOC to properly address the Hordo Factors, I find that the Trustee has not satisfied me that it is the "proper person" to be accorded standing as a "complainant" for purposes of the Oppression Claim. In making this finding, I emphasize that I am not permitted to look for evidence outside the four corners of the Trustee SOC (except in very limited circumstances): ***HOOPP Realty*** at para 25, Wakeling JA, concurring; ***Operation Dismantle*** at para 27; and ***Borzoni*** at para 30. That restriction prevents me from looking outside of the Trustee SOC for evidence that would assist the Trustee in establishing the necessary facts to support its "proper person" assertion, just as it prevents me from looking outside of the Trustee SOC for evidence that would assist the Defendants in respect of points that it would want to make.

ii. Collective Action – A Prerequisite

[204] An important bankruptcy principle is that the regime is a collective action to pursue claims of creditors: ***Husky Oil Operations Ltd v Minister of National Revenue***, [1995] 3 SCR 453, at para 7; ***Olympia*** at para 46.

[205] The Trustee SOC advances the Oppression Claim by reference to the "interests of the creditors of PEOC, including its contingent creditors". The Trustee SOC then frames the "interests of the creditors of PEOC, including its contingent creditors" by reference to only the ARO and unidentified municipalities.

[206] While the Trustee SOC provides some particulars in respect of the alleged ARO, it provides no further particulars or allegations concerning the amounts or the nature of other liabilities. Further, the scope of the alleged creditors is restricted to the ARO (and by inference, the AER) and the unidentified municipalities. That commencement document contains no allegation that any other creditor has any actionable reasonable expectation of any kind.

[207] In any oppression action pursued by a trustee in bankruptcy, it is important that it be framed to include all persons to whom the bankrupt is liable. That is a necessary prerequisite because a fundamental principle in bankruptcy is that the regime is a collective action: ***Husky Oil*** at para 7; and ***Olympia*** at para 46. That is, the bankruptcy regime pursues claims for all creditors. It must be a collective pursuit, and not a selective pursuit. Bankruptcy achieves this objective by replacing a regime that allows individual actions with a framework that is focused on a collective action: see Aleck Dadson, "Comment" (1986), 64 *Can. Bar Rev.* 755, at p. 755.

[208] In this case, we know that there are other creditors because they are referred to in the Trustee SOC in the context of alleged damages that PEOC has suffered. Those other creditors are described in the Trustee SOC as being persons who provide safety, environmental, and investigative services to PEOC in respect of the Goodyear Assets.

[209] Notwithstanding that the commencement document includes a claim for damages in respect of the costs associated with those other creditors, the Oppression Claim has not included them in the scope of creditors for purposes of the oppression allegation. Instead, the Trustee SOC focuses on just two creditor groups, being the AER (by inference, because the commencement document refers to ARO) and municipalities (which are not identified).

[210] If the Oppression Claim were framed to cover all creditors, that would satisfy the collective requirement. By framing the Oppression Claim to focus only on the AER and municipalities, the Trustee has breached a fundamental principle that is inherent in the collective approach that the Trustee must always follow in the execution of its duties. In my view, a trustee in bankruptcy cannot be permitted to pursue matters for a selective class, which would be a subset of the collective group to which it is responsible.

[211] Given the above analysis, I find that the Oppression Claim is framed too narrowly in the Trustee SOC because it only focuses on a selective class of alleged creditors. As a result, I will not exercise my discretion to find the Trustee to be a "proper person" in order to accord it standing as a "complainant" for purposes of the Oppression Claim. To reiterate, the reason for this finding is that I view a collective approach by the Trustee to be a prerequisite to the exercise of my discretion to find it to be a "proper person" entitled to seek standing as a "complainant".

iii. The *Redwater* Ground – Rule 3.68(2)(b)

[212] The substantive focus of the Trustee SOC is on the ARO. It emphasizes that the ARO is significant, and that the Goodyear Assets were high liability assets. I infer that the "high liability" comment in the Trustee SOC is an indirect reference to the ARO.

[213] While the only facts to which I can refer are those included in the Trustee SOC (and anything which that commencement document references), I am permitted to refer to the common law, including the impact of ***Redwater***. My authority to do so in the context of Rule 3.68 is threefold.

[214] First, the limitation in Rule 3.68(3) is only in respect of evidence. Decisions by a Court are not evidence; they are law. Also, the text set out in the Trustee SOC is not evidence.

[215] Second, the Alberta Court of Appeal has stated that a decision in respect of Rule 3.68(2)(b) must be based only on: (i) the facts alleged in the commencement document (which must be assumed to be true for the purpose of disposing of the application); and (ii) the applicable statutory and common law: ***HOOPP Realty*** at para 25, Wakeling JA, concurring. ***Redwater*** is a component of the common law.

[216] Third, in considering the application of Rule 3.68(2)(b), a member of the Alberta Court of Appeal suggests that it is appropriate to "...ask whether the assumed facts and the state of the existing law or potential changes in the law considered together lead to the conclusion that the plaintiff's prospects of success are extremely low": ***HOOPP Realty*** at footnote 8, Wakeling JA, concurring (emphasis added). This point is relevant because ***Redwater*** is now part of the existing law.

[217] Based on the above authority, I turn to consider ***Redwater***, and its relevance to Rule 3.68 in the context of the Oppression Claim.

[218] In this case, the Trustee relies on the argument that the AER had a contingent claim against PEOC at the time of the Asset Transaction, and has a contingent claim provable in the bankruptcy of Sequoia Resources (formerly PEOC). Given the findings by the majority of the Supreme Court in ***Redwater***, I find that position is not supportable.

[219] I make this finding for the following five reasons. As required under Rule 3.68, I only consider the facts as stated in the Trustee SOC, excluding any assumptions or speculation that are in that commencement document.

[220] First, there is nothing in the Trustee SOC that suggests that the regulatory obligations of PEOC were "intrinsically financial" that the time of the Asset Transaction: ***Redwater*** at para 121. In particular, there is nothing in that commencement document to suggest that AER had even issued an abandonment order in respect of the Goodyear Assets. In any event, the majority in ***Redwater*** disagreed with "intrinsically financial" test, calling it "an erroneous interpretation of the third step of the ***Abitibi*** test": ***Redwater*** at para 146; see also para 156.

[221] Second, in ***Redwater*** the AER advanced the position that it acted in the public interest and for the public good. The Supreme Court of Canada accepted that assertion, and went on to state that it is the public that is the beneficiary of those environmental obligations, and that the province does not stand to gain financially from them: ***Redwater*** at para 122.

[222] Third, on the facts in ***Redwater*** the Supreme Court of Canada at para 154 found that the Chambers judge erred in finding that there was sufficient certainty that the AER would ultimately perform the environmental work and assert a claim for reimbursement. In contrast, after a careful review of the Trustee SOC, I see nothing in that commencement document to support an assertion that AER would perform any environmental work on the Goodyear Assets or assert a claim to PEOC for reimbursement.

[223] Fourth, in ***Redwater*** the Supreme Court of Canada effectively held that the "creditor" test cannot be circumvented on the basis of a contingency. It reinforced this point by stating that a contingent claim provable in bankruptcy is relevant only to the sufficient certainty test: ***Redwater*** at para 130.

[224] Fifth, in ***Redwater*** the Supreme Court of Canada stated that in order to be a provable claim, a contingent claim must be capable of valuation. It cannot be too remote or speculative: ***Redwater*** at para 138. In my view, being capable of valuation is also a prerequisite for a liability. If the alleged obligation is not capable of valuation, it is too remote or speculative to be characterized as a liability. In the case of PEOC, the Trustee SOC effectively reiterates that the amount of the ARO associated with the Goodyear Assets was not capable of being quantified: see para 6.1 of the Trustee SOC. Given that acknowledgment and on the authority of ***Redwater***, I find that the ARO is not a liability.

[225] Given the above analysis, all of which pivots on the content of the Trustee SOC, I find that the ARO is not a liability for purposes of the Oppression Claim. I see no reason why the character of the future obligation (the ARO) should be different as between a bankrupt context

and an oppression remedy context. The Supreme Court of Canada in ***Redwater*** at para 135 held that the AER had no status as a creditor in relation to the ARO of a licensee. If the AER is not a creditor in respect of the ARO associated with the Goodyear Assets, it follows that PEOC could not have assumed a liability in respect of the ARO in conjunction with the Asset Transaction. In effect, ***Redwater*** holds that the AER is not a creditor.

[226] As stated by the Supreme Court, "[t]he fact that regulatory requirements may cost money does not transform them into debt collection schemes": ***Redwater*** at para 158. As a result of the ***Redwater*** decision, the ARO referenced in the Trustee SOC is not a liability. Instead, it is a mere assumption, which can be disregarded for purposes of considering whether to strike or dismiss the Oppression Claim. Restated, I find that ***Redwater*** has nullified the Oppression Claim.

[227] This finding is consistent with the findings by the Alberta Court of Appeal in ***Northern Badger***. In that case, the Alberta Court of Appeal acknowledged that the steps taken by the regulator were "...simply in the course of enforcing observance of a part of the general law of Alberta": ***Northern Badger*** at para 34. The Alberta Court of Appeal went on to state that the regulator was not a creditor recovering money. Instead, the regulator in that case was enforcing the laws of general application: ***Northern Badger*** at paras 33 and 35.

[228] While I acknowledge that the Alberta Court of Appeal did comment that Northern Badger had a liability, it described that liability as being "inchoate": ***Northern Badger*** at para 32. Given the use of the term "inchoate", it was effectively characterizing the future obligation as being a burden that had not crystalized into a liability. Since the obligation was imperfectly formed, the Alberta Court of Appeal found that the regulator was not a creditor in respect of the abandonment costs: ***Northern Badger*** at paras 32 and 36.

[229] I also note that in ***Daishowa*** the Supreme Court found that statutory reforestation obligations were a future cost. That Court went on to comment that such future costs were embedded in the forest tenure, which serves to depress the tenure's value at the time of sale: ***Daishowa*** at para 31. The Supreme Court of Canada further stated that those "...reforestation obligations were not a distinct existing debt": ***Daishowa*** at para 35. That is, those future obligations did not equate to a current monetary claim. Based on what is stated in the Trustee SOC, I find that the same result applies to the ARO associated with the Goodyear Assets at the time of the Asset Transaction.

[230] In this case, the Trustee SOC refers to the fact that the ARO was significant when the Goodyear Assets were acquired by PEOC in the Asset Transaction. It refers to no other "significant" liability.

[231] I infer from the content of the Trustee SOC that the only significant liability in PEOC is the ARO associated with the Goodyear Assets. This inference is reinforced by the additional statement in the Trustee SOC which reiterated that the Goodyear Assets were "high liability" assets.

[232] Given that the ARO is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact, I need not consider the ARO as a true fact for purposes of Rule 3.68(2)(b). While I will detail matters out below under the "5. Conclusion",

based on the above analysis I strike the Oppression Claim because it discloses no reasonable claim: Rule 3.68(1)(a) and Rule 3.68(2)(b).

b. Can the Oppression Claim be determined on a summary judgment basis?

[233] Given my finding in respect of the application of Rule 3.68(2)(b) and the consequential striking of the Oppression Claim, there is no need to address the application of Rule 7.3 and whether to resolve the Oppression Claim on a summary judgment basis. That said, a few comments are warranted.

[234] I initially paused on the issue of whether summary dismissal was appropriate in this case because of an overarching directive from the Alberta Court of Appeal cautioning that a summary dismissal may not be appropriate if there a dispute on material facts: ***Weir-Jones*** at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor for purposes of an oppression action. Hence, this is the reason that I stated in my oral decision that I was not satisfied that summary dismissal was appropriate in respect of the Oppression Claim.

[235] While I need not consider summary dismissal because I have struck the Oppression Claim on the basis that there is no cause of action, I note in my conclusion below that the ***Redwater*** decision nullifies the Oppression Claim. That is, given the ***Redwater*** decision, what was initially the basis for a dispute on the material fact as it is framed in the commencement document has been eliminated. For the above noted reasons, the ARO is not a liability for purposes of the Oppression Remedy.

4. Conclusion

[236] Given the above analysis and findings, I strike the Oppression Claim under Rule 3.68(2)(b) on the basis that the claim does not constitute a cause of action. In summary, my reasons for this decision is threefold.

[237] First, I will not exercise my discretion to find that the Trustee is a "proper person" to be accorded standing as a "complainant" because the Trustee SOC does not include the particulars necessary for me to address the prerequisites that are embedded in the Hordo Factors.

[238] Second, I will not exercise my discretion to find that the Trustee is a "proper person" to be accorded standing as a "complainant" because the Oppression Claim is framed too narrowly in the Trustee SOC. In particular, the Trustee SOC frames the Oppression Claim in respect of two classes of alleged creditors (which is a selective focus), and not all creditors (which would be a collective focus).

[239] Third, I will not exercise my discretion to find that the Trustee is a "proper person" to be accorded standing as a "complainant" because the impact of the ***Redwater*** decision is to nullify the Oppression Claim. I exercise my discretion in this manner because, on the authority of ***Redwater***, the very foundation underlying the Oppression Claim, the ARO, is not a liability. Instead, it is a future burden that has not crystallized into a liability.

[240] As a final comment on this matter, a member of the Alberta Court of Appeal has stated in a concurring decision that when a Chambers Judge is considering the striking of a claim under Rule 3.68(2)(b), it is necessary to ask whether the assumed facts and the state of the existing law,

or potential changes in the law considered together, lead to the conclusion that the plaintiff's prospects of success are extremely low: ***HOOPP Realty*** at footnote 8. In considering that important question in the context of the Oppression Claim, I find that the Trustee's prospect of success is extremely remote. I make this finding because of the impact of ***Redwater***, and, based on the text within the commencement document, there is nothing to suggest that any of the creditors meet the oppression remedy prerequisites that the Courts have established over the last three or so decades.

[241] In summary, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I make this determination on two foundations. First, given the analysis above, I find that the Trustee is not a "proper person" that would accord it standing as a "complainant". Second, given the impact of ***Redwater***, the Trustee has no cause of action in respect of the Oppression Claim because that decision of the Supreme Court of Canada has nullified that claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

1. Incremental Facts and Context

[242] The Public Policy Claim is referred to in a single paragraph of the Trustee SOC under the heading "Public Policy, Statutory Illegality and Equitable Rescission": para 24 of the Trustee SOC. The only claim is that the "Transactions" are "void", for one or more of three reasons. (I equate the term "Transactions" in the Trustee SOC to "Aggregate Transactions" for purposes of this section.) The reasons the Trustee alleges that the Aggregate Transactions are void are as follows.

1. The Trustee SOC asserts that the Aggregate Transactions are contrary to public policy because they are "reflected" in a statute, a regulation and three directives (collectively referred to as, the "**Regulatory Regime**"). There are no further particulars given regarding the alleged public policy (the "**Policy Claim**").
2. The Trustee SOC asserts that the Transactions are a statutory illegality because they are "expressly or impliedly" prohibited by the Regulatory Regime (the "**Illegality Claim**"). There are no particulars as to what aspects of, for example, the Share Purchase Agreement or the Asset Purchase Agreement are prohibited.
3. The narrative in the Trustee SOC makes a claim based on "equitable grounds" (the "**Equitable Claim**"). There is only a reference to the "reasons" and "circumstances" set out in the Trustee SOC. No further particulars are provided.

[243] The remedy section of the Trustee SOC seeks an Order setting aside the Asset Transaction, and declaring that transaction void as against the Trustee. The narrative in the Trustee SOC makes no claim for "Equitable Rescission". That phrase only appears in a heading, and not in the body of the Trustee SOC.

2. The Law

a. Cause of Action – The Prerequisites

[244] A pleading requires facts, not conclusions: ***JO v Alberta***, 2012 ABQB 599 at para 137. A pleading need only include salient facts: ***Klemke Mining Corporation v Shell Canada Limited***, 2008 ABCA 257 at para 30; see also ***677960 Alberta Ltd v Petrokazakhstan Inc***, 2013 ABQB 47 at para 46. It need not name the cause of action: ***Barclay v Kodiak Heating & Air Conditioning Ltd***, 2019 ABQB 850 at para 28; ***Petrokazakhstan*** at para 48; see also ***MDI Industrial Sale Ltd v McLean***, 2000 ABQB 521 at para 7. While the difference between facts and evidence is sometimes a question of degree, the general rule is that evidence is not to be pleaded: ***Wenzel v Nenshi***, 2015 ABQB 788 at para 12.

[245] While pleadings need not name a cause of action, they do govern (*i.e.*, regulate) the evidence to be led at trial: ***WAR v AG Alta***, 2006 ABCA 219 at para 26. However, in order to have a cause of action, a pleading must include every fact necessary for the plaintiff to prove in order to support his or her right to a judgment: ***Barclay*** at para 29; see also ***Read v Brown*** (1888), 22 QBD at 128, Lord Esher M.

[246] The classical definition of a cause of action is simply a factual situation, the existence of which entitles one person to obtain from a judicial forum a remedy against another person: see ***Letang v Cooper***, [1964] 2 All ER 929 at 934, 1 QB 232 (HL), Diplock LJ; and ***Consumers Glass Co Ltd v Foundation Co of Canada Ltd*** (1985), 1985 CanLII 159 (ON CA), 51 OR (2d) 385 at 8, 20 DLR (4th) 126 (CA). If the pleadings do not include the facts necessary to establish an entitlement to a remedy (*i.e.*, negligence), then no cause of action exists.

b. "Public Policy" Breaches and "Statutory Illegality"

[247] Neither an illegal contract nor a contract contrary to public policy is a cause of action: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, Ont: Thomson Reuters Canada Limited, 2011) (***"Fridman Textbook"***) at 338. Further, the doctrine of illegality is a defence, not a cause of action: ***Brooks v Canadian Pacific Railway***, 2007 SKQB 247 [***Brooks***] at paras 116 to 118. Finally, the breach of a statutory duty is not a cause of action: ***R v Saskatchewan Wheat Pool***, [1983] 1 SCR 205 at 225.

[248] With respect to breach of a statutory duty, Justice Dickson of the Supreme Court of Canada commented that "[a] duty to all the public (ratepayers, for example) does not give rise to a private cause of action whereas a duty to an individual (an injured worker, for example) may": ***Saskatchewan Wheat Pool***. At the conclusion of that case, Justice Dickson held that the "[c]ivil consequences of breach of statute should be subsumed in the law of negligence": ***Saskatchewan Wheat Pool*** at 227.

[249] An allegation that a contract is contrary to public policy cannot "...be used to establish a cause of action, but rather to refuse to grant relief on policy grounds": ***Brooks*** at para 122.

[250] Concerning the consequences of illegality, a claim cannot be made on such a foundation. A legal scholar has commented as follows: ***Fridman Textbook*** at 406 and 407.

> A contract which is illegal either at common law or under statute is void and unenforceable by either party.
>
> ...
>
> This major consequence of such a contract is often expressed in one of two ways. The first is, *ex turpi causa non oritur action.* This means that a claim cannot be founded upon a base cause, namely, the breach of a statute or a contract that is against public policy. The second is, *in pari delicto potior est conditio defendentis.* This means that where the parties are equally at fault in their participation in illegality, the position of the defendant is the superior. It may be seen that these are two ways of saying the same thing, that rights or claims may not be founded upon illegality.

[251] Other legal scholars have also asserted that neither an illegal agreement nor the contravention of public policy is a ground for a cause of action in damages: see Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", *Annual Review of Civil Litigation 2007* (***"Kain and Yoshida Paper"***) at note 183.

[252] There is a judicial aversion to concluding that a contract is prohibited by statute or to interfering with the rights and entitlements provide under the law of contract. This aversion is evident in the following judicial comment from this Court.

> A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or "necessary inference", as Parke, B., put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent...: ***Alberta Turkey Producers v Leth Farms Ltd***, 1998 ABQB 887 at para 17, citing ***St John Shipping Corporation v Joseph Rank Ltd***, [1956] 3 All E.R. 683 at 690.

[253] Extending the doctrine of public policy beyond well-established categories would push the courts into the realm of the legislature. The "...courts have shown an awareness that in declaring new grounds of public policy they are really making law and they have rightly been hesitant in extending the doctrine beyond well-established grounds": ***LE Shaw Ltd v Berube-Madawaska Contractors Ltd*** (1982), 40 NBR (20) 374 at para 8, [1982] NBJ No 210 (CA).

c. "Equitable Rescission" or "Equitable Grounds"

[254] Equitable rescission is "a remedy, not a cause of action": ***Fridman Textbook*** at 761. That remedy is predicated on a plaintiff alleging that the contract:

a. resulted from some fraud (and, as a result, the plaintiff mistakenly entered into the contract) or was mistakenly entered into on the basis of a misrepresentation; or

b. was obtained by some unconscionable act: ***Swan City Taekwon-Do Club v Podolchyk***, 2017 ABPC 244 at paras 143-144.

[255] The facts included in pleadings are critically important. Lawsuits must be determined within the boundaries of the underlying pleadings: ***Bablitz*** at para 9; ***460635 Ontario Limited v 1002953 Ontario Inc***, [1999] OJ No 4071 at para 9, 1999 CanLII 789 (CA). If the statement of claim does not include the necessary alleged facts, a Court will not know the plaintiff's contentions.

[256] To obtain equitable rescission, generally "it must be possible to restore the parties substantially to their pre-contract position": ***Kingu v Walmer Ventures Ltd (1986)***, 10 BCLR (2d) 15 (CA) at para 18(g), [1986] BCJ No 597. Although the Court always has discretion to grant the equitable remedy of rescission, it must consider matters carefully. Judicial scholars have framed the parameters as follows.

> This is the possibility of being able to effect a true *restitutio in integrum* between the parties. Since the purpose or aim of the equitable remedy of rescission is to return the plaintiff to the position in which he was before the contract was made, and since one of the essential features of an equitable remedy is *mutuality*, that is, the potential availability of the remedy to both parties equally, it follows that unless *both* parties can be restored to their respective original situations, it should not be open to a court to rescind the contract: ***Fridman Textbook*** at 771.

3. Application of the Law to the Facts

a. The Pleadings and Argument – Preliminary Comments

[257] The Trustee SOC asserts that the Aggregate Transaction was effected in circumstances where PEOC acquired the Goodyear Assets with a significant net liability. The particular allegation in the commencement document is that PEOC acquired the Goodyear Assets at "undervalue".

[258] The Trustee SOC states that the Aggregate Transactions are void, presumably premised on the alleged undervalued transactions: see para 24 of the Trustee SOC. The Trustee has attempted to frame this "void" point as a fact. I find that it is not a fact. It is a legal conclusion.

[259] A legal conclusion is a determination for the Court, and not the Trustee. In particular, whether one or more components of the Aggregate Transaction are void will be determined by the Court, based on the evidence before it. By itself, there is no cause of action for the allegation that the "...[t]ransactions are void".

[260] Among other relief, the remedy section of the Trustee SOC seeks an order setting aside the Asset Transaction, and declaring the Asset Transaction void as against the Trustee. Consistent with that particular remedy sought, the Defendants acknowledged in argument that if it is ultimately determined on the evidence, first, that there was a transfer at undervalue; second, that the parties were not dealing at arm's length; third, that the debtor was insolvent at the time of the transfer or rendered insolvent by the transfer; and, fourth, that the transfer occurred within the five-year period before bankruptcy, the Trustee is entitled to an order declaring the Asset

Transaction void as against the Trustee. That result would arise from an application of section 96 of the *BIA*.

[261] During argument, the Trustee addressed this point, albeit indirectly. The Trustee first alleged that all of the transactions are void because of the "scheme." Specifically, the Trustee alleges that POT, POC and PEOC entered into an agreement, in part by which PEOC would retain a 1% legal interest in certain highly productive gas assets as bare trustee in trust for POT, and POT would retain the beneficial interest (the "**Retained Interests Agreement**"). The Trustee claims the objective of the transaction contemplated by the Retained Interests Agreement was to support PEOC's License Liability Rating to allow the Aggregate Transaction to be completed without regulatory intervention by the AER. When it made this argument, the Trustee referred to the Retained Interest Agreement and the Licensee Liability Rating for PEOC. The Trustee then narrowed its focus to the Asset Transaction. In particular, the Trustee submitted that it was only "...seeking [an] order setting aside the asset transaction and declaring the asset transaction void as against the trustee. That's the only transfer. Nothing else" (emphasis added).

[262] The question is whether the various components within the Public Policy Claim are causes of action.

b. Are Alleged "Public Policy" Breaches and "Statutory Illegality" Causes of Action?

[263] Concerning the alleged breaches of "public policy" and the alleged "statutory illegality", there is nothing in the Trustee SOC that provides any particulars concerning the allegation that the Aggregate Transaction:

a. is prohibited by the Regulatory Regime;

b. is expressly or by necessary implication illegal; or

c. could conceivably bring an agreement to transfer corporate shares (or viewed in isolation, an agreement to combine the beneficial and legal interest in assets [*i.e.*, the Asset Transaction]) within any of the recognized categories of agreements that are contrary to public policy.

[264] I acknowledge that there are categories of agreements that are contrary to public policy. These include contracts that (i) are injurious to the state; (ii) are injurious to the system of justice; (iii) encourage immorality; (iv) affect marriage; (v) are in restraint of trade; and (vi) are restrictive of personal liberties: ***Kain and Yoshida Paper*** at section III.2 to 6. Given the scope of these categories as currently defined, I find that no component of the Aggregate Transaction falls into any of these classes.

[265] If what is intended to be illegal or contrary to public policy is the alleged objective of the Retained Interests Agreement to support the Licensee Liability Rating for PEOC to allow the Transaction to be completed without regulatory intervention, the Trustee has not provided any basis that would make that objective expressly, nor by necessary inference, prohibited. In my view, the Trustee is fishing but it has neither a hook nor a net.

[266] Public policy considerations may be relevant to the question of whether a particular contract should be enforced. Similarly, public policy considerations may be relevant in

considering the consequences that should apply if a finding of the illegality is made: ***Still v MNR*** (1997), [1998] 1 FC 549 at para 48, [1997] FCJ No 1622 (FCA). However, neither of those points assume an independent legal force: ***Kain and Yoshida Paper*** at section III.1. That is, being contrary to public policy is not a cause of action.

[267] The doctrine of illegality is a defence, and not a cause of action: ***Brooks*** at 116. Similarly, an allegation that a contract is contrary to public policy does not establish a cause of action: ***Brooks*** at paras 117, 122.

[268] The key case on which the Trustee relied is ***Sidmay Ltd v Wehttam Investments Ltd***, 1967 CarswellOnt 235, [1967] 1 OR 508 (ONCA). I find that case is of no assistance to the Trustee in this matter for three reasons.

[269] First, the Trustee is relying on *obiter* in the decision. In contrast, ***Brooks*** is on point, and I need not rely on *obiter* from ***Sidmay***.

[270] Second, there are no particulars in the Trustee SOC that show that anything in the Aggregate Transactions was illegal. Pursuant to Rule 13.6(3)(e), grounds for pleading illegality of a contract must be provided. The Defendants should not need to guess what component of the Aggregate Transaction allegedly broke what law. The mere reference to the Regulatory Regime is not sufficient.

[271] Third, ***Sidmay*** was focused on an exception. The plaintiff in that case fell within the class of persons for whom the legislation was designed to protect. In contrast, I see nothing in the Trustee SOC that leads me to conclude that the Trustee falls within an exception.

[272] The Trustee also advanced ***Chapman v Michaelson***, [1908] 2 Ch.612; aff'd [1909] 1 Ch. 238 as authority for it to apply to the Court for a declaration as to the illegality of the transaction. The Ontario Court of Appeal commented on that case in ***Sidmay***. For the purposes of this case, the relevant comment was that "[d]ue to the peculiar facts of this case I consider that no principle of general application supporting the proposition of counsel for the respondents can be extracted from it and that it should be considered only as an authority to be followed when the identical situation comes before the Court": ***Sidmay*** at para 54. This is a persuasive statement by an appellate Court, which cause me not to follow ***Chapman***.

c. Is Either "Equitable Rescission" or "Equitable Grounds" a Cause of Action?

[273] As noted above, the facts included in a pleading are of critical importance: ***Bablitz*** at para 9. In this case, the phrase "equitable rescission" is only stated in the heading. That phrase is not stated in the body of the pleading. Most importantly, no particulars are included in the pleading. That is not sufficient to ground a cause of action. Appropriate facts must be plead. If pleadings do not include the facts necessary to establish an entitlement to a remedy, then no cause of action exists: ***Barclay*** at para 9.

[274] Concerning the claims based on "equitable rescission" and "equitable grounds", I find that there is no cause of action because the necessary facts to support the remedy are not included in the Trustee SOC.

[275] Even if "equitable rescission" were pleaded, the claim would still fail because it is "a remedy, not a cause of action": ***Fridman Textbook*** at 761. Further, it is an all or nothing remedy: ***Fridman Textbook*** at 761.

[276] The remedy of equitable rescission is predicated on (i) the plaintiff alleging the contract resulted from some fraud (and as a result, the plaintiff mistakenly entered into the contract); (ii) was mistakenly entered into on the basis of a misrepresentation; or (iii) was obtained by some unconscionable act: ***Swan City Taekwon-Do*** at paras 143,144. In this case, the Trustee SOC has neither included any of those claims nor stated any facts that would support such claims.

[277] Further, to obtain equitable rescission, "it must be possible to restore the parties substantially to their pre-contract position": ***Kingu*** at para 18(g). Notwithstanding that the Trustee stated that it was only challenging the Asset Transaction (see paragraph 261 of this decision, above), its proposed application of "equitable rescission" would have to apply to the Aggregate Transaction, including the shares of PEOC. In this case, that is not possible. The Trustee does not have the shares of PEOC. 198Co owns them. Further, PEOC (now Sequoia Resources) is a bankrupt corporation. The ***Sidmay*** case is supportive of this conclusion.

[278] It is not possible to return the beneficial interest in the Goodyear Assets to POT some years after the Asset Transaction. To do so would be an attempt at partial rescission, which is not possible under the current framework of the law. No such remedy is known at common law or equity: ***Kingu*** at para 18.

[279] Finally, rescission is only available between parties to a contract: ***Topgro Greenhouses Ltd v Houweling***, 2006 BCCA 183 at para 81 leave to appeal to SCC refused 31508 (14 September 2006). In this case, the Trustee is standing in the shoes of Sequoia Resources (formerly known as PEOC). Sequoia Resources was not a party to the Share Purchase Agreement. This is a fatal bar to the Trustee seeking rescission of the Share Purchase Agreement.

[280] 198Co was a party to the Share Purchase Agreement, but it is not a party to this action. If the Trustee intended to claim relief that would affect 198Co, it would be necessary for 198Co to be a party to this action: ***Topgro*** at paras 82 and 92.

4. Conclusion

[281] Given the lack of facts in the Trustee SOC and my analysis of the law, I strike the Public Policy Claim under Rule 3.68 on the basis that it discloses no reasonable claim, and, in particular, no cause of action in respect of the Public Policy Claim. In summary: (i) an allegation that a contract is contrary to public policy is not a cause of action: ***Brooks*** at para 122; (ii) neither a breach of statutory duty nor illegality is a cause of action: ***Brooks*** at paras 116 to 117; and (iii) equitable rescission is not a cause of action: ***Fridman Textbook*** at 761. Further, the decision in ***Redwater*** extinguishes the Public Policy Claim because the ARO is not a liability, and the AER is not a creditor of PEOC.

[282] Notwithstanding my striking of the Public Policy Claim, the Trustee is not precluded from seeking an order setting aside the Asset Transaction and declaring the Asset Transaction void as against the Trustee. That is a remedy sought by the Trustee, and it was framed properly

in the Trustee SOC. As stated above, the entitlement of the Trustee to seek an order to void the Asset Transaction is available in section 96 of the *BIA*.

[283] In making this decision, I recognize that there is no more important an arena for cooperative federalism than the environment: ***Redwater*** at para 60, describing dissenting reasons from 2017 ABCA 124 at para 107. That said, a cause of action premised on an overriding policy must be based on a contextual and purposive interpretation of a specific provision in a statute. To search for an overriding policy not based on such a foundation is incompatible with my role as a judge.

[284] As a final comment on this point, searching for some overarching and unarticulated policy and using such an inferred policy to override the Asset Transaction would inappropriately place the formulation of a contract in the hands of the judiciary. Absent a specific legislative framework that requires me to execute such task, it is inappropriate for me to do so: see ***Canada Trustco Mortgage Co v Canada***, 2005 SCC 54 at paras 41, 42. I also note that absent a specific legislative framework directing such an undertaking, the execution of such a task would be of general concern because of the indeterminate effect it would have on the business community. While I concede that such challenges are available under the ITA, that is only because section 245 of the statute introduced the general anti-avoidance rule in 1988. I am not aware of any similar legislative frameworks in other statutes that could be applied to challenge the Asset Transaction, and none have been plead.

D. Is the Release a complete bar to claims against Ms. Rose?

[285] The decision in ***Redwater*** nullifies the Trustee's assertions concerning the Release. Further, ***Redwater*** extinguishes any suggestion that Ms. Rose breached her duties, including her fiduciary duty and duty of care, because that case determine that ARO is not liability. As a consequence, the Director Claim embodies no reasonable cause of action. I make further comments on the "Director Claim" below: see part VI. E., below.

[286] Notwithstanding the impact of ***Redwater***, I provide the following comments in respect of the Release.

1. Incremental Facts and Context

[287] The Share Purchase Agreement was negotiated between sophisticated parties. Each of those parties was represented by experience legal counsel.

[288] The Trustee does not challenge or seek to set aside the Share Purchase Agreement. Given that context, I find that the terms and conditions in the Share Purchase Agreement continue to stand.

[289] The Share Purchase Agreement stipulated the closing deliverables for Perpetual Energy, in its capacity as the vendor, including the following for the benefit of PEOC:

> 8.1(a)(xviii) resignations of all directors and officers of [PEOC] and a release from such directors and officers pursuant to which they release all Claims against [PEOC];....

[290] The Share Purchase Agreement also stipulated the closing deliverables of 198Co, in its capacity as the purchaser. These deliverables included the following reciprocal release in favour of Ms. Rose:

> 8.2(a)(xiii) releases signed by the new signing authorities of [PEOC] as appointed by the Purchaser releasing the directors and officers of [PEOC] from any Claims related to such directors and officers acting as a director or officer of [PEOC];....

[291] The term "Claim" is defined broadly in the Share Purchase Agreement as "any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing".

[292] As provided for in the Share Purchase Agreement, the new directors of PEOC signed the Release on behalf of PEOC. Those new PEOC directors did so under the new ownership of 198Co.

[293] PEOC and Perpetual Energy released Ms. Rose from any claims relating to her having acted as a director and officer of PEOC. The Release provides as follows:

> Corporate Release
>
> 3. PEI and PEOC do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement), which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or in connection with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any Claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose.

[294] As is evident from the above text in clause 3 of the Release, it includes an exclusion that provides that the Release does not apply if the Claim is based on the fraud, criminal conduct or deceit. None of the claims or particulars in the Trustee SOC allege fraud, criminal conduct or deceitful conduct in respect of Ms. Rose.

[295] The Release further provides:

> Understanding & General
>
> 4. The parties acknowledge and declare that they have been provided with sufficient time and opportunity to consider all factors related to the execution of this Mutual Release and acknowledge a full awareness of its consequences and its voluntary execution. The parties acknowledge having received independent legal advice regarding the execution of this Mutual Release, or have voluntarily chosen not to receive such advice.
>
> ...
>
> 6. This Mutual Release shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.

2. The Law

[296] Releases are common in a variety of circumstances, including in purchase and sale agreements and where the parties have no previous relationship. The purpose of a release is typically to deal with events that are, or may be, yet to come.

[297] A release is an agreement. Its effectiveness is judged on the basis of ordinary contractual principles: ***Fotini's Restaurant Corp v White Spot Ltd*** (1998), 38 BLR (2d) 251 at para 8, [1998] BCJ No 598 (SC).

[298] The wording of a release typically suggests an intent to wipe the slate clean. The parties may look to make that fresh start when, for example, they wish to end a particular relationship or one party may be seeking to sever a connection with a prior relationship: ***Bank of Credit and Commerce International SA (in Liquidation) v Ali***, [2001] 1 All ER 961 (HL) [***Ali***] at 970.

[299] A release is the abandonment, in whole or in part, of a right or claim: ***Covia Canada Partnership Corp v PWA Corp*** (1993), 105 DLR (4th) 60 at 75, [1993] OJ No 1757 (Ont Ct (Gen Div)), aff'd (1993), 106 DLR (4th) 608 (ONCA); ***Keats v Arditti*** (2000), 233 NBR (2d) 291 at para 104,[2000] NBJ No 498, (NBQB), aff'd 2001 NBCA 88, leave to appeal to SCC refused 28982 (20 June 2002); and ***Re Donnell***, [1930] 4 DLR 1037 at 1037, [1930] OJ No 433 (Surr Ct). The essence of a release is that one party discharges the other party from an action: ***Abouchar v Ottawa-Carleton (conseil scolaire de langue francaise section publique)*** (2002), 58 OR (3d) 675 at 678, [2002] OJ No 1249 (SC).

[300] The intent of a release is to unchain a party from any liability or obligation to another party arising out of particular circumstances, and to do so once and for all: ***Abundance Marketing Inc v Integrity Marketing Inc***, 2002 CanLII 23605 (ONSC) at para 22, 117 ACWS (3d) 227, [2002] OJ No 3796. That is, a release extinguishes the underlying liability. As a consequence, a release can be held up as a bar to a claim.

[301] The person requesting a release typically seeks to obtain a relinquishment of rights, which can be used as a bar against a future claim. Even where a release is not effective to bar a particular proceeding, it may still be relevant to bar the merits of the issues in that proceeding or in relation to the remedies that otherwise may be available: ***Keewatin (Regional Health Board) v Peterkin*** [1997] NWTR 93 at paras 7, 27, 29 CCEL (2d) 190 (NWTSC), at 198. Under long-standing common law principles, a release serves this purpose because it can be raised as a bar to an action on a debt or claim that has been discharged: ***Brown v Owen***, [1939] OWN 522, 4 DLR 732 (SC); ***Carey v Freeman***, [1938] 4 DLR 678 (Ont CA) at 681, [1938] OR 713; ***Heitman Financial Services Ltd v Towncliff Properties Ltd*** (1981), 35 OR (2d) 189 at 192-193, 12 ACWSC (2d) 294 (HCJ).

[302] A valid and enforceable release affords a complete defence to an action because its effect extinguishes the underlying cause of action. There is no need for the party relying on the release to make out a case that the commencement of the action constitutes a breach of contract. There is no necessity for pleading a counterclaim: ***Carey*** at 681.

[303] The effect of a release is to extinguish a cause of action in a manner similar to the expiry of a limitation period: ***British Columbia Electric Railway Co v Turner*** (1914), 49 SCR 470 at

496. The Judicial Committee of the Privy Council accepted this proposition as being correct: ***British Columbia Electric Railway Co v Gentile,*** [1914] AC 1034 (PC) at 1042.

[304] When a release is signed, the releasee is typically seeking to achieve finality. In this regard, authoritative courts have recognized that finality is an objective of both parties, and that the parties to a release do not confine the scope of the document to known claims: ***Ali*** at 970-71.

[305] The finality associated with judgments of a court are recognized as an important feature of the justice system in Canada, both for the parties involved in any specific litigation and for the community at large: ***Tsaoussis (Litigation Guardian of) v Baetz*** (1998), 41 OR (3d) 257 at 275, 165 DLR (4th) 268 (CA) [***Tsaoussis***], leave to appeal to SCC refused, 26945 (28 January 1999).

[306] In ***Tsaoussis***, the Ontario Court of Appeal considered a motion to set aside a judgment approving an infant settlement. For the parties, the Court noted that finality is an economic and psychological necessity: ***Tsaoussis*** at 275. The appellate Court in that case commented that finality "places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation": ***Tsaoussis*** at 275. While the context in that case was not commercial, the premise remains the same. Courts emphasize the high value placed upon finality by our justice system.

[307] It is important that there be a point in time when parties can proceed on a basis that matters have been decided, and rights and obligations finally determined. Parties need to be secure in their knowledge that issues have been concluded on a final basis: ***Tsaoussis*** at 276. The common law recognizes this contractual entitlement in the form of a release.

3. Application of the Law to the Facts

[308] It is standard industry practice to release outgoing directors when there is a change of control. It would be highly unusual for a director not to seek protection in the form of a release.

[309] As I understand the Trustee's argument, it seeks monetary damages from Ms. Rose on the theory that Ms. Rose caused Perpetual Energy to require 198Co to agree to the Release. On the balance of probabilities, I find that this allegation is without merit for the following reasons.

[310] First, there is no evidence that Ms. Rose caused Perpetual Energy to do anything. Indeed, the evidence is to the contrary. Perpetual Energy is a public company. It has its own board of directors. Further, there is no evidence that Ms. Rose controlled Perpetual Energy. Given that context, I find that Ms. Rose did not control Perpetual Energy.

[311] Second, the Release confirmed that Ms. Rose acted as a director and officer of PEOC at the request of Perpetual Energy.

[312] Third, counsel for the Trustee conceded in court that "[t]his was Perpetual Energy doing this transaction through a subsidiary."

[313] Fourth, PEOC was a special purpose corporation that was a wholly owned subsidiary of Perpetual Energy. That being the case, legal control flowed from the parent corporation, which was Perpetual Energy, to the subsidiary, which was PEOC.

[314] Fifth, 198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate Transaction with the assistance of experienced legal counsel. There is no evidence that 198Co was forced or "required" to agree to anything in respect of the Release.

[315] Sixth, the terms of the Release acknowledge that the parties have been provided with sufficient opportunity to consider all factors related to the execution of that document. Also, the parties specifically acknowledged a full awareness of its consequences, and its voluntary execution.

[316] The Trustee also alleges that Ms. Rose breached her duties to PEOC by acting contrary to section 122(3) of the *ABCA*. Section 122(3) of the *ABCA* provides as follows.

> (3) Subject to section 146(7) [unanimous shareholder agreements], no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director from any liability for a breach of that duty.

[317] Section 122(3) of the *ABCA* embodies the principle that officers and directors may not contract out of existing duties owed to the corporation. The object of that statutory provision is to ensure that existing directors of the corporation comply with their duties to the corporation while they are in office.

[318] I struggle with the argument advanced by the Trustee. If the Trustee's position is that section 122(3) of the *ABCA* precludes a corporation from entering into a mutual release with a former director, that would be extraordinary for the following five reasons.

[319] First, the use of a mutual release by business people in transactions is common practice. If I accepted the position advanced by the Trustee, it would displace decades of business convention.

[320] Second, the implication inherent in the position of the Trustee is that directors can never be released in transactions that involve an acquisition of control. If that was the law, directors would be exposed to liability for an indeterminant length of time.

[321] Third, there are books written on the use of releases. My review of that literature does not support the proposition advanced by the Trustee.

[322] Fourth, there is a need for finality: ***Tsaoussis*** at 275. But for releases, a director may never achieve finality. As a matter of contract, the proposition advanced by the Trustee would be ironic in that it was PEOC (now Sequoia Resources) that negotiated and signed the Release. The implication of the Trustee's apparent position would be that Sequoia Resources could walk away from the very bargain that it negotiated.

[323] Fifth, the evidence is that Ms. Rose took her responsibilities as a director and officer of PEOC seriously, considered the best interests of PEOC, its stakeholders, and then exercised her business judgment to the best of her ability. Importantly, her evidence was to the effect that the ultimate decision to enter into the Aggregate Transaction was that of Perpetual Energy and its board of directors.

[324] The evidence before me is that the Release was negotiated at arm's length between Perpetual Energy and 198Co, and that the Release was signed on behalf of PEOC by the new directors, who were appointed by 198Co.

[325] As noted above, the parties to the Release acknowledged and declared that they were provided with sufficient time and opportunity to consider all factors related to the execution of the Release, and they acknowledged a full awareness of its consequences and its voluntary execution. The parties also acknowledged having received independent legal advice regarding the execution of the Release, or voluntarily chose not to receive such advice.

[326] These acknowledgments distinguish the circumstances of this Release from the one referred to in ***Tongue v Vencap Equities Alberta Ltd*** (1994), 148 AR 321, 17 Alta LR (3d) 103 (QB), aff'd 1996 ABCA 208. In ***Tongue*** at paras 139 and 141, the Court stated that the Release did not allow the directors to contract out of their duties. The decision in that case turned on disclosure, and the Court stated that the Releases did not contemplate liability for certain breaches because certain confidential information was not disclosed during the transaction: ***Tongue*** at paras 135-136. In contrast to ***Tongue***, there is no suggestion in this case that there was not full disclosure. Further, the evidence is that both parties to the Release had experienced legal counsel advising them.

[327] Given the above facts and analysis, I find that the Release provides a complete defence to Ms. Rose in respect of all of the Trustee's claims against her. Significantly, the Trustee does not seek to set aside the Release. If the Release is not set aside, I find that there can be no damages against Ms. Rose and she is shielded from financial exposure.

4. Conclusion

[328] The Trustee's claims against Ms. Rose are solely in relation to her having acted as a director of PEOC. I find this to be directly contrary to the express terms of the Release.

[329] The Trustee's segregation of the Asset Transaction from the Aggregate Transaction puts it in the unusual position of conceding that the Release was part of the negotiated transaction, but somehow disconnected from the Asset Transaction. This inconsistency cannot be reconciled.

[330] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

1. Incremental Facts and Context

[331] For convenience, I include key facts here notwithstanding that they may have been included above.

[332] The value of the Goodyear Assets received by PEOC on the Asset Transaction was alleged in the Trustee SOC to be no more than $5,670,200. This amount does not include any value attributed to the Gas Marketing Contract, which the evidence indicates was $12.9 million. Further, this amount does not include additional information from the models that the Trustee compiled.

[333] The evidence provided by the Trustee estimated the liabilities assumed by PEOC in the Asset Transaction to be as follows: (i) ARO abandonment costs of $98,855,218; (ii) ARO reclamation costs of $93,272,056; and (iii) ARO facility costs of $26,831,000. These ARO liabilities aggregate to a total of $218,958,274.

[334] The evidence provided by the Trustee alleged municipal property taxes in the amount of $10,047,744. Based on my review of the evidence, I note that those municipal property taxes were from a 2015 listing. Since the Asset Transaction was effected in 2016, I focused on the municipal property taxes associated with that calendar year. Based on my review of the evidence, I find the relevant outstanding municipal property tax to be in the amount of $1,560,890.

[335] During my review of the evidence, I did not see any record of the municipalities issuing notices of default in respect of the property taxes that are associated with the Goodyear Assets.

[336] The Trustee asserted that Asset Transaction resulted in a net deficit of $217,580,800. In my review of that calculation, in conjunction with a detailed review of the evidence, I identified an amount of "value" that was deducted twice ($5,765,000).[3] There also were some minor rounding adjustments ($18, being a net amount).

[337] The Trustee SOC alleges that Ms. Rose determined that the Goodyear Assets were high liability assets. It further asserts that Ms. Rose failed as a director of PEOC to consider the implications of ARO as a liability of PEOC.

[338] Ms. Rose filed the application before me, amended twice, for summary dismissal and striking pleadings. She asked that this action against her be summarily dismissed pursuant to Rule 7.3, or in the alternative to be struck pursuant to Rule 3.68.

[3] See Exhibit N to the Darby Affidavit. The alleged net deficit of $223,241,000 already reflects a reduction of $5,765,000. When the $223,241,000 is reduced again by the amount of $5,670,200, the net result of $217,570,800 is recorded. That matches the amount claimed, but the double deduction of value was required to come to that "net amount".

2. The Law

[339] ***Redwater*** has a significant impact on the Director Claim. I have already commented on ***Redwater*** extensively above. To the extent it is relevant, I incorporate by reference my above comments on ***Redwater***.

[340] In addition, ***Daishowa*** touches on the alleged liability issue from a different perspective. The comments of the Supreme Court of Canada in ***Daishowa*** on the alleged liability issue are instructive, including at paras 3, 29, 37 and 40:

> [3] The issue in this case is whether [Daishowa-Marubeni International Ltd. ("DMI")] was required to include in its "proceeds of disposition" for each sale an estimate of the cost of the reforestation obligations that the purchasers assumed. In my view, DMI was not required to do so. The obligation to reforest areas harvested in accordance with a forest tenure in Alberta is a future expense that is embedded in the tenure. As such, the obligation serves to depress the value of the forest tenure. It is not a separate existing debt of the vendor that is assumed by the purchaser as part of the sale price of the forest tenure.
>
> ...
>
> [29] I agree with Mainville J.A., DMI and the industry interveners that the assumed reforestation obligations are not appropriately characterized as the assumption of an existing debt of the vendor that forms part of the sale price of the property. The obligations — much like needed repairs to property — are a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale.
>
> ...
>
> [37] In sum, the reforestation obligations imposed by Alberta law on DMI's forest tenures are embedded in those tenures and, as such, are future expenses tied to ownership of the property. They are not a liability that can be separated from the forest tenure, the assumption of which would form part of the sale price of the tenure.
>
> ...
>
> [40] However, DMI's argument that the reforestation obligations should not be included in its proceeds of disposition because they are a "contingent liability" is misplaced and appears to have caused some confusion in the courts below. The argument is problematic because, in focusing on whether the reforestation obligations are contingent or absolute, it implicitly accepts that the cost of reforestation is a liability of the vendor that is not embedded in the forest tenure and would constitute proceeds of disposition but for the contingent nature of the liability; see Frankovic, at p. 4. This implicit assumption is incorrect. As I have explained above, the cost of reforestation is not a distinct existing liability of the vendor. The assumption of the cost of reforestation would thus be excluded from proceeds of disposition independent of whether the cost is absolute or contingent.

3. Analysis

[341] I have already indicated that the Director Claim embodies no reasonable cause of action when the Trustee SOC is read as a whole in the context of what fiduciary duty and duty of care mean: see paragraph 285 of this decision, above. That is fatal to the Director Claim. I make this comment because ***Redwater*** held that ARO is not a liability, which nullifies the Trustee's arguments concerning fiduciary duty and duty of care.

[342] While ***Redwater*** and the consequential lack of a cause of action are sufficient to strike the Director Claim, Ms. Rose also sought summary dismissal of this matter. For completeness, I will address the question of summary dismissal of the Director Claim.

a. Summary Dismissal

[343] I am required to assess whether it is possible to resolve the Director Claim on a summary basis, based on the record before me. I find that there is sufficient evidence for me to do so.

[344] For purposes of this analysis, I will use the Trustee's alleged value of consideration received, being the amount of $5,670,200. Concerning the liabilities associated with the ARO and municipal property taxes, the alleged liabilities will be examined through the lens of the law as it currently stands.

[345] In considering summary dismissal, I must assess whether Ms. Rose has demonstrated on a balance of probabilities that, on the facts as proven, there is no merit to the Director Claim.

[346] The Alberta Court of Appeal has cautioned that a summary dismissal should not be considered if there a dispute on material facts: ***Weir-Jones*** at paras 21 and 35-36. A material fact in this case is whether the AER was a creditor. I considered that issue above. That is a question of law, and ***Redwater*** is relevant. To the extent the parties dispute the application of ***Redwater***, I find that the Trustee's position is without merit. That being the case, ***Redwater*** should be considered in Ms. Rose's summary dismissal application.

[347] The Trustee alleges that Ms. Rose had determined that the Goodyear Assets were high liability assets. The Trustee also alleges that Ms. Rose was aware that PEOC was unable to meet the obligations associated with Goodyear Assets.

[348] In contrast, Ms. Rose argues that the above allegation has no relevance to her duties to PEOC, and that she acted in accordance with her statutory duties under the *ABCA*.

[349] Notwithstanding Ms. Rose's arguments, I will address the liability issue because that is the foundation of the Trustee's argument. To do this, it is necessary to consider the Asset Transaction in the context of the liability issue.

[350] The Perpetual Energy Defendants assert that the ARO is not a liability. They take this position on the authority of ***Redwater***.

[351] In contrast, the Trustee asserts that the Supreme Court of Canada in ***Redwater*** did not address the broader question of whether the AER was a creditor for any purpose. The Trustee also argued that ***Redwater*** would have no effect on its standing to advance various claims, and

that the concept of a "provable claim" was not relevant to the oppression analysis that the Court needed to address.

[352] PWC asserted in the Trustee's June 2019 Submission that the "provable claim" issue was a red herring. It advanced this argument apparently because it is of the view that ***Redwater*** impacts a definition in the *BIA* that is not relevant to the analysis that the Court must undertake on other fronts. I disagree.

[353] The Trustee also submits that the Defendants' assertions that ***Redwater*** holds that the ARO is not a liability are without merit based on the facts in ***Redwater*** and ***Daishowa***. To support its position, the Trustee refers to the following:

a. All licenses held by Redwater were received by it, subject to the end-of-life obligations that would one day arise: ***Redwater*** at para 157.
b. The issue in ***Daishowa*** was whether the reforestation obligations assumed by the purchaser depressed the value of the tenures sold or were separate liabilities to be included in the seller's proceeds of disposition for tax purposes: ***Daishowa*** at paras 6, 7 and 25, 26. The Trustee argues that, as in ***Redwater***, there is no dispute in ***Daishowa*** that the reforestation obligations were a form of liability: see Trustee's June 2019 Submission at para 12.
c. The ARO associated with the assets transferred to PEOC had a present effect on the fair market value of those assets, the same as if the associated costs had been paid upfront: ***Redwater*** at para 157.

[354] To properly consider the nature of Trustee's assertions, I need to review the definition of "liability". The nature of the "liability" issue is important to the Director Claim because it will assist in determining whether there is any merit to that claim, as framed by the Trustee.

[355] Based on my review of the evidence in the context of the law as it currently reads, the record allows me to make a finding on this liability issue. Indeed, the Trustee, by its own admission, asserted that "...facts are not complex or disputed".[4] The Trustee also states that "...there is no reason why complex *legal* issues require a trial and cannot be determined on an application" (emphasis in the original).[5]

[356] Based on the evidence before me, I find that the ARO does not represent a liability for the following four reasons.

[357] First, the Trustee asserts that the ARO is a liability because ***Redwater*** referred to that regulatory responsibility as an end-of-life obligation that would one day arise: ***Redwater*** at para 157. Contrary to the Trustee's position, I find that judicial comment supports the position that ARO is not a liability. In particular, that judicial comment in ***Redwater*** recognizes that an

[4] See paragraph 28 of the Trustee's Brief. See also the Trustee's statement in paragraph 11 of it Brief were it asserts that "[t]he relevant facts are simple." The Trustee also states that "[t]he complexity of a transaction or the amount involved does not, on its own, preclude the Trustee from proceeding by way of a summary application": see paragraph 27 of the Trustee's Brief. Given that statement, I am of the view that the argument goes both ways to permit applications to be brought against the Trustee as well.
[5] See paragraph 29 of the Trustee's Brief.

obligation will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability.

[358] Concerning this point, the issue of whether a current liability exists is binary. There is no middle ground. A liability either exists or it does not. Further, a liability is quite different from a future obligation, particularly one that can be quantified only by reference to broad assumptions. While financial statements may record an accounting provision for various obligations, such accounting provisions do not, in and of themselves, create a liability that is recognized in Canada under the laws of general application.

[359] Second, the Trustee relies on ***Daishowa*** to assert that there is no dispute that the reforestation obligations were a form of liability: ***Daishowa*** at paras 25, 26. As I understand the Trustee's position, it asserts that a "form of liability" is therefore a liability.

[360] I find that assumption to be in error because a "form of liability" is, at best, a contingent liability. A contingent liability is not a liability in law. This very point has been made by the Supreme Court of Canada: ***Daishowa*** at para 40 (which is stated above at paragraph 340 of this decision).

[361] Third, the Courts have stated that a person with a contingent interest in an uncertain claim for unliquidated damages is not a creditor: ***Hordo*** at para 15. Absent a creditor, there cannot be a liability. One goes with the other because they are linked inextricably.

[362] Fourth, during the hearing of this matter, the Trustee made an unqualified admission to the effect that ARO associated with the Goodyear Assets was not a PEOC liability. While the Trustee's June 2019 Submission suggests that the Trustee is retreating from that admission, that concession during argument highlights the weak ground on which the Trustee stands.

[363] Based on the evidence before me, the current state of the law and my analysis above, I find that the AER, on the balance of probabilities, was not a creditor of PEOC at the time of the Asset Transfer and that PEOC was not subject to a current or enforceable liability in respect of the ARO that was allegedly associated with the Goodyear Assets. As a result, I also find that Ms. Rose has demonstrated, on the balance of probabilities, that, on the facts proven, there is no merit to the Director Claim. Restated, if the AER is not a creditor, the foundation of the Trustee's argument concerning the Director Claim is nullified.

[364] I am able to make these findings based on the nature and quality of the evidence before me. The record was sufficient to consider this "liability" issue on a summary application, and there was no "credibility" issue that had to be tested (in contrast to my finding above in respect of the *BIA* Claim).

[365] Having found that there is no merit to the Director Claim, I find that Ms. Rose discharged her burden. That said, I need to assess whether the Trustee has established that there is a genuine issue requiring a trial in respect of the Director Claim: ***Weir-Jones*** at para 30, 47. This latter assessment will be based on the nature of the issues and their merits.

[366] Undoubtedly, the Trustee is of the view that there is a genuine issue requiring a trial. As I noted above, the Trustee asserts that the Supreme Court of Canada in ***Redwater*** did not address

the broader question of whether the AER was a creditor for any purpose. The Trustee also asserted that ***Redwater*** has not determined the liability issue. In particular, the Trustee takes the position that the argument that the ARO is not a liability is without merit.

[367] Before Supreme Court of Canada decision in ***Redwater***, I may have considered the argument advanced by the Trustee. However, on the authority of ***Redwater***, I find that the AER is not a creditor in respect of the ARO associated with the Goodyear Assets. Consistent with that finding, I also conclude that the ARO associated with the Goodyear Assets was not a liability of PEOC (Sequoia Resources) at the time that the Asset Transfer was effected.

b. Financial Review – *Redwater* Impact

[368] My conclusion is supported by the financial component of the "Value and Consideration" in respect of the Asset Transaction. That financial result is as follows (see the "**Post-*Redwater***" column):

	Trustee SOC	**Post-*Redwater***
Alleged Value of Consideration Received	$5,670,200	$5,670,200
Trustee Estimate of Liabilities Assumed:		
• ARO abandonment costs	98,855,218	NIL
• ARO reclamation costs	93,272,056	NIL
• ARO Facilities	26,831,000	NIL
Alleged Aggregate ARO	218,958,274	NIL
Alleged Aggregate Property Taxes	10,047,744	1,560,809
Sub-Total	229,006,018	1,560,809
Reconciling Adjustment[6]	(5,765,018)	NIL
Alleged Aggregate Liabilities	223,241,000	1,560,809
Net Asset (Deficit)	($217,570,800)	$4,109,391

[369] In effect, the decision in ***Redwater*** extinguishes the Trustee's assertion that the Asset Transaction resulted in a significant net deficit. This "**Post-*Redwater***" determination further demonstrates that there is no merit to the Director Claim insofar as it was premised on the ARO being a liability. Accordingly, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

[6] This adjustment is included in order to reconcile with the figure that the Trustee used. See footnote 3, above.

[370] Given the above facts and analysis, I find that the Trustee has not established that there is a genuine issue requiring a trial in respect of the Director Claim because the Trustee's foundation for the Director Claim was premised on the ARO being a liability. That position has been nullified by ***Redwater***.

[371] Given this determination, the guidelines in ***Weir-Jones*** require that I take one last step. That is, I must determine whether I am sufficiently confident in the state of the record to exercise my discretion to summarily dismiss the Director Claim: ***Weir-Jones*** at para 47(d); see also ***Geophysical Service*** at para 40. Based on my review, I am satisfied that the state of the records permits me to exercise discretion to summarily dismiss the Director Claim.

4. Conclusion

[372] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3(1)(b).

VII. Summary of Conclusions

[373] For convenience, I summarize my above conclusions as follows.

A. *BIA* Claim – Was the Asset Transaction an arm's length transfer for purposes of section 96(1) of the *BIA*?

[374] Given the above facts and analysis, I will not summarily dismiss the *BIA* Claim.

[375] Given the above facts and analysis, I will not strike the *BIA* Claim.

B. Oppression Claim – Is the Trustee a "complainant" that is entitled to bring an oppression claim under section 242 of the *ABCA*?

[376] Given the above facts and analysis, I strike the Oppression Claim under Rule 3.68 because the Trustee SOC discloses no reasonable claim. I do so on the basis that the Trustee is not a "proper person" that would accord it standing as a "complainant", and, alternatively, because the Trustee has no cause of action in respect of the Oppression Claim.

C. Public Policy Claim – Should the Claim by the Trustee for Relief on the Grounds of Public Policy, Statutory Illegality, and Equitable Rescission be struck?

[377] Given the above facts and analysis, I strike the Public Policy Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

D. Is the Release a complete bar to claims against Ms. Rose?

[378] Given the above facts and analysis, I find that the Release is a complete bar to the claims against Ms. Rose.

E. Director Claim – Did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction?

[379] Given the above facts and analysis, I strike the Director Claim under Rule 3.68 on the basis that the Trustee SOC discloses no reasonable claim, and, in particular, it discloses no cause of action.

[380] Given the above facts and analysis, I summarily dismiss the Director Claim under Rule 7.3.

VIII. Costs

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

Heard on the 08th and 09th day of November, 2018 and the 17th day of December, 2018.
The parties provided further written submissions on June 4, 2019, June 11, 2019 and June 14, 2019.
Oral Reasons for Judgment given on 15th day of August, 2019.
Written Reasons for Judgment dated at Calgary, Alberta this 13th day of January, 2020.

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

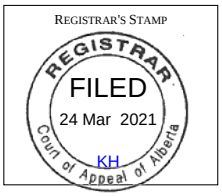
Appearances:

Mr. Rinus de Waal and Mr. Luke Rasmussen
for the Plaintiff

Mr. Daniel McDonald Q.C. and Mr. Paul Chiswell
for Perpetual Energy Inc.

Mr. Steven Leitl and Mr. Aditya Badami
for Susan Riddell Rose

REGISTRAR'S STAMP



COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1901-0255AC
TRIAL COURT FILE NUMBER:	1801-06097
REGISTRY OFFICE:	CALGARY
PLAINTIFF:	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
STATUS ON APPEAL:	APPPELLANT
DEFENDANTS:	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. and SUSAN RIDDELL ROSE
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**JUDGMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	DE WAAL LAW 1460, 530 – 8th Avenue SW Calgary, AB T2P 3E6 Phone: (403) 266-0012 Attention: Rinus de Waal/Luke Rasmussen Direct: (403) 266-0014 Facsimile: (403) 266-2632 E-mail: lrasmussen@dewaallaw.com

DATE ON WHICH JUDGMENT WAS PRONOUNCED:	**January 25, 2021**
LOCATION OF HEARING:	**Calgary, Alberta**
NAMES OF JUDGES WHO GRANTED THIS JUDGMENT:	**Madam Justice M. Paperny** **Mr. Justice J. Watson** **Mr. Justice F. Slatter**

{00039338-2/283.001}

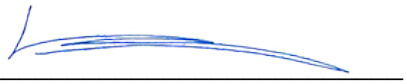
UPON THE HEARING on December 10, 2020 of an appeal by the Appellant PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (the "**Trustee in Bankruptcy**") from the Order of the Honourable Mr. Justice D.B. Nixon granted on August 15, 2019; AND UPON HEARING submissions from counsel for the Trustee in Bankruptcy and counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose;

IT IS ORDERED AND ADJUDGED THAT:

1. The appeal is allowed, paragraphs 2, 3, 4 and 5 of the order of the Court of Queen's Bench pronounced on August 15, 2019 are set aside, and the action is returned to the trial court.

2. The appellant Trustee in Bankruptcy is granted status as a complainant under Part 19 of the Alberta *Business Corporations Act* to pursue a claim under s. 242(2) of that Act as it may be advised.

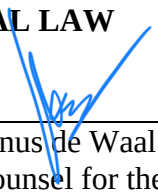
3. The appellant Trustee in Bankruptcy, if so advised, is granted permission in accordance with R. 3.65 of the Alberta *Rules of Court* to circulate a proposed amended statement of claim to clarify the claims being advanced. Any disputes about the nature and form of the proposed amendments are referred back to the trial court.



Registrar, Court of Appeal

Approved as to form and content this 18th day of March, 2021

DE WAAL LAW



Per: Rinus de Waal / Luke Rasmussen
Counsel for the Appellant

Approved as to form and content this ___day of March, 2021

BURNET, DUCKWORTH & PALMER LLP

Per: Paul G. Chiswell, counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

Approved as to form and content this ___day of March, 2021

NORTON ROSE FULBRIGHT (CANADA) LLP

Per: Steven H. Leitl, Q.C. / Gunnar Benediktsson, counsel for the Respondent Susan Riddell Rose

Approved as to form and content this ___day of March, 2021

D.J. McDonald, Q.C., counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

UPON THE HEARING on December 10, 2020 of an appeal by the Appellant PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (the "**Trustee in Bankruptcy**") from the Order of the Honourable Mr. Justice D.B. Nixon granted on August 15, 2019; AND UPON HEARING submissions from counsel for the Trustee in Bankruptcy and counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose;

IT IS ORDERED AND ADJUDGED THAT:

1. The appeal is allowed, paragraphs 2, 3, 4 and 5 of the order of the Court of Queen's Bench pronounced on August 15, 2019 are set aside, and the action is returned to the trial court.

2. The appellant Trustee in Bankruptcy is granted status as a complainant under Part 19 of the Alberta *Business Corporations Act* to pursue a claim under s. 242(2) of that Act as it may be advised.

3. The appellant Trustee in Bankruptcy, if so advised, is granted permission in accordance with R. 3.65 of the Alberta *Rules of Court* to circulate a proposed amended statement of claim to clarify the claims being advanced. Any disputes about the nature and form of the proposed amendments are referred back to the trial court.

Registrar, Court of Appeal

Approved as to form and content this____day of March, 2021
DE WAAL LAW

Per: Rinus de Waal / Luke Rasmussen
Counsel for the Appellant

Approved as to form and content this 18th day of March, 2021
BURNET, DUCKWORTH & PALMER LLP

Per: Paul G. Chiswell, counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

Approved as to form and content this 18th day of March, 2021
NORTON ROSE FULBRIGHT CANADA LLP

Steven Leitl remotely signed

Per: Steven H. Leitl, Q.C. / Gunnar Benediktsson, counsel for the Respondent Susan Riddell Rose

Approved as to form and content this 22nd day of March, 2021

D.J. McDonald, Q.C., counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

{00039338-2/283.001}

UPON THE HEARING on December 10, 2020 of an appeal by the Appellant PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (the "**Trustee in Bankruptcy**") from the Order of the Honourable Mr. Justice D.B. Nixon granted on August 15, 2019; AND UPON HEARING submissions from counsel for the Trustee in Bankruptcy and counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose;

IT IS ORDERED AND ADJUDGED THAT:

1. The appeal is allowed, paragraphs 2, 3, 4 and 5 of the order of the Court of Queen's Bench pronounced on August 15, 2019 are set aside, and the action is returned to the trial court.

2. The appellant Trustee in Bankruptcy is granted status as a complainant under Part 19 of the Alberta *Business Corporations Act* to pursue a claim under s. 242(2) of that Act as it may be advised.

3. The appellant Trustee in Bankruptcy, if so advised, is granted permission in accordance with R. 3.65 of the Alberta *Rules of Court* to circulate a proposed amended statement of claim to clarify the claims being advanced. Any disputes about the nature and form of the proposed amendments are referred back to the trial court.

_____
Registrar, Court of Appeal

Approved as to form and content this____day of March, 2021
DE WAAL LAW

Per: _____
Rinus de Waal / Luke Rasmussen
Counsel for the Appellant

Approved as to form and content this ___day of March, 2021
BURNET, DUCKWORTH & PALMER LLP

Per: _____
Paul G. Chiswell, counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

Approved as to form and content this 18th day of March, 2021
NORTON ROSE FULBRIGHT CANADA LLP

Steven Leitl remotely signed

Per: _____
Steven H. Leitl, Q.C. / Gunnar Benediktsson, counsel for the Respondent Susan Riddell Rose

Approved as to form and content this ___day of March, 2021

Per: _____
D.J. McDonald, Q.C., counsel for the Respondents Perpetual Energy Inc., Perpetual Operating Trust and Perpetual Operating Corp.

In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16

Date: 20210125
Docket:1901-0255-AC;
1901-0262-AC;
2001-0174-AC
Registry: Calgary

1901-0255-AC

Between:

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

Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

- and -

Orphan Well Association

Intervenor

- and -

Canadian Natural Resources Limited

Intervenor

- and -

Cenovus Energy Inc.

Intervenor

- and -

Torxen Energy Ltd.

Intervenor

1901-0262-AC

And Between:

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

Respondent
(Plaintiff)

- and -

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

Appellants
(Defendants)

2001-0174-AC

And Between:

PricewaterhouseCoopers Inc., in its personal capacity

Appellant
(Not Party to Application)

- and -

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

Respondent
(Plaintiff)

- and -

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

Respondents
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.B. Nixon
Dated the 15th day of August, 2019
(2020 ABQB 6, Docket: 1801 10960)

Appeal from the Decision by
The Honourable Mr. Justice D.B. Nixon
Dated the 26th day of August, 2020
Filed the 9th day of September, 2020
(2020 ABQB 513, Docket: 1801 10960)

Memorandum of Judgment

The Court:

[1] These appeals involve a challenge by the Trustee in Bankruptcy, PricewaterhouseCoopers Inc., to one step in a pre-bankruptcy, multi-step corporate reorganization and sale of assets, called the Aggregate Transaction. The Trustee in Bankruptcy challenges a component of the Aggregate Transaction, called the Asset Transaction, on the basis that it was at an undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The transaction is also challenged under the statutory corporate oppression provisions, as well as on public policy grounds. There is a related claim against the respondent Susan Riddell Rose for breach of her duties as a director.

[2] The Trustee in Bankruptcy appeals the striking or summary dismissal of large parts of the claim: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 6. The respondents cross-appeal with respect to portions of the claim that were not struck out or dismissed. There is also an appeal of the subsequent ruling on costs: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 513.

Facts

[3] The challenged transaction was a part of the disposition of some of the oil and gas assets owned by the Perpetual Energy group of companies. The parent of the group is a public company, Perpetual Energy Inc. (the "Perpetual Energy Parent"). The respondent Ms. Rose was the president and Chief Executive Officer of Perpetual Energy Parent.

[4] The assets of the group were actually held in the Perpetual Operating Trust. In general terms, there were three categories of asset in the Trust:

(i) The "KeepCo Assets" that were not a part of the challenged transaction, and were to be retained by the Perpetual Energy group,

(ii) A subset of the KeepCo Assets called the "Retained Interests", and

(iii) The Goodyear Assets, which were the subject of the challenged transaction, and which form the basis of this litigation.

The Perpetual Operating Trust held the beneficial interest in the assets, the sole beneficiary of the Trust being Perpetual Energy Parent. The legal title to the assets, and the regulatory licences to them, were held by Perpetual Energy Operating Corp. Prior to the Aggregate Transaction, Perpetual Energy Operating Corp. had no other business interests, and it only existed to be the

trustee of the Perpetual Operating Trust. Ms. Rose was the sole director of Perpetual Energy Operating Corp. until the closing of the transactions. Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp. during the Aggregate Transaction, so it can conveniently be referred to as Perpetual/Sequoia. Perpetual/Sequoia subsequently assigned itself into bankruptcy, and therefore plays the central role in this litigation.

[5] The assets in the Perpetual Operating Trust included the "Goodyear Assets", which were shallow natural gas assets, described as "mature legacy assets". They had been operating with a negative cash flow for some time, were subject to high fixed operating costs, and were associated with significant future Abandonment and Reclamation Obligations, being the costs relating to the anticipated expenses of reclaiming oil and gas properties at the end of their productive life: see *infra*, paras. 85-89. The Goodyear Assets were perceived as having negative net value.

[6] Perpetual Energy Parent negotiated with Kailas Capital Corp. to sell the Goodyear Assets for $1. Perpetual Energy Parent announced that the transfer of these assets would improve the Perpetual group's Licensee Liability Rating with the Alberta Energy Regulator: see *infra*, para. 9. There would be a 71% reduction in forecast corporate liabilities, and a significant reduction in its Abandonment and Reclamation Obligations. Perpetual Energy Parent would be relieved of the ongoing negative cash flow associated with the Goodyear Assets. Perpetual Energy Parent expressed to public markets its opinion that the transaction would be in its best interests, because of these advantages.

[7] The sale of the Goodyear Assets was accomplished in October 2016 by a multi-step transaction, described collectively as the Aggregate Transaction:

a) The Perpetual Operating Trust transferred the beneficial interest in the Goodyear Assets to its trustee Perpetual/Sequoia for $10 (plus some expense adjustments), through the "Asset Transaction". The legal and the beneficial interests in the Goodyear Assets, together with the related regulatory licences, were therefore combined in Perpetual/Sequoia. The Perpetual Operating Trust continued to hold the beneficial interest in the KeepCo Assets that were to be retained by the Perpetual Energy group.

b) Perpetual Operating Corporation was created to be the "New Trustee" for the Perpetual Operating Trust. Perpetual/Sequoia then transferred to the New Trustee the legal title to the KeepCo Assets held in the Trust, other than the Retained Interests, separating them from the Goodyear Assets.

c) In the "Share Transaction", Perpetual Energy Parent sold all of the shares of Perpetual/Sequoia for $1 to a numbered company ("198Co"), incorporated for that purpose by Kailas Capital Corp. It was at this point that Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp.

d) Ms. Rose resigned as the sole director of Perpetual/Sequoia. The parties signed a Resignation & Mutual Release.

e) New Trustee then demanded the transfer to it of the Retained Interests, which had been beneficially owned by Perpetual/Sequoia for mere minutes. The legal title and licences to all of the KeepCo Assets thereafter rested in New Trustee.

The various steps in the Aggregate Transaction were closed in sequence, separated only by minutes: reasons at para. 92.

[8] The result of the Aggregate Transaction was that Kailas Capital Corp., through its subsidiary 198Co, became the new ultimate parent corporation of Perpetual/Sequoia, which owned the legal and beneficial interests in the Goodyear Assets. Perpetual Energy Parent continued to be the beneficiary of the Perpetual Operating Trust. The Trust held the beneficial interest in the KeepCo Assets that were not included in the transaction, with the legal title and regulatory licences to those assets being held by the New Trustee.

[9] The Retained Interests, a 1% interest in certain producing wells, were treated separately. The Trustee in Bankruptcy alleges that they were dealt with in this way as a method of artificially increasing the Licensee Liability Rating of Perpetual/Sequoia until the transaction closed. The Licensee Liability Rating is the regulatory mechanism used by the Alberta Energy Regulator to control the transfer of oil and gas assets. The concept is described in the ***Redwater*** decision at paras. 18-20, 28-29 (reported as ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5, [2019] 1 SCR 150). Leaving the Retained Interests in Perpetual/Sequoia allegedly enabled the transaction to proceed without regulatory scrutiny. The Perpetual Energy defendants plead that the Retained Interests were dealt with separately to accelerate recovery of legacy Alberta Crown royalty credits. Alternatively, they argue that they were entitled to structure their affairs in order to ensure regulatory compliance.

[10] A part of the Aggregate Transaction was a Gas Marketing Agreement, backed by a put/call agreement with a third party, that protected Perpetual/Sequoia against natural gas price fluctuations for 23 months.

[11] The asserted advantages of the transaction to Perpetual Energy Parent were outlined, *supra*, para. 6. The Trustee in Bankruptcy alleges that as a result of the Asset Transaction Perpetual/Sequoia obtained only $5.67 million in assets, but assumed over $223 million in obligations: reasons at para. 182. The Asset Agreement acknowledged that Perpetual/Sequoia would assume the Abandonment and Reclamation Obligations:

> 2.06(b) under Applicable Law, the Abandonment and Reclamation Obligations and the Environmental Liabilities associated with the [Goodyear] Assets are inextricably linked with such Assets so that Purchaser will be liable for

> Abandonment and Reclamation Obligations and Environmental Liabilities associated with the Assets in the absence of the specific assumption of such obligations by Purchaser in this Agreement or otherwise;

The Trustee in Bankruptcy further alleges that the transaction resulted in a drop of Perpetual/Sequoia's Licensee Liability Rating with the Alberta Energy Regulator. Perpetual/Sequoia became responsible for $87 million of Abandonment and Reclamation Obligations. Approximately 71% of the corporate liabilities related to the Goodyear Assets were transferred to Perpetual/Sequoia.

[12] After the closing of the transaction, Perpetual/Sequoia operated the Goodyear Assets. It reported some initial success, but on March 23, 2018, approximately 18 months after the Aggregate Transaction, Perpetual/Sequoia assigned itself into bankruptcy. The appellant PricewaterhouseCoopers was appointed the Trustee in Bankruptcy.

[13] The appellant Trustee in Bankruptcy asserts that, from the perspective of the bankrupt Perpetual/Sequoia, the Asset Transaction was at an undervalue by over $217 million. It commenced this action seeking remedies against Perpetual Energy Parent, Ms. Rose, and other branches of the Perpetual Energy group, pleading the following claims:

> a) The Asset Transaction relating to the Goodyear Assets was not at arm's-length, it was within five years the bankruptcy, and it was at an undervalue, making it void under s. 96(1)(b) of the *Bankruptcy and Insolvency Act*;
>
> b) The business of the corporation had been operated in an oppressive manner, contrary to the provisions of the Alberta *Business Corporations Act*, RSA 2000, c. B-9;
>
> c) The Aggregate Transaction was contrary to public policy, was illegal, or otherwise was in violation of equitable principles;
>
> d) The respondent Ms. Rose had breached her duties as the sole director of Perpetual/Sequoia; she denied the allegations but responded, in defence, that the Resignation & Mutual Release insulated her from liability.

The Trustee in Bankruptcy applied for summary judgment, and the defendants responded with applications to summarily dismiss or strike the claims. It was agreed that the applications to summarily dismiss and to strike would be addressed first.

The Summary Disposition Reasons of the Case Management Judge

[14] The case management judge originally issued oral reasons for his decision, but later substituted extensive written decisions. The written reasons commenced by identifying the participants in the Aggregate Transaction, and by outlining the nature of that transaction. The reasons summarized the principles applicable to an application to strike out a pleading, and those applicable to an application for summary dismissal. A number of the claims were struck out as not disclosing a cause of action, or were summarily dismissed, or (in the alternative) were both struck and dismissed.

The Section 96 Claim

[15] The Trustee in Bankruptcy argued that the Asset Transaction was at an undervalue, in breach of s. 96(1)(b) of the *Bankruptcy and Insolvency Act*:

> 2. In this Act, . . .
>
> > *transfer at undervalue* means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;
>
> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against . . . the trustee, . . . - or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor - if . . .
>
> > (b) the party was not dealing at arm's length with the debtor and
> >
> > ...
> >
> > > (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
> > >
> > > > (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it . . .

> (3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

The respondents brought an application to summarily dismiss this claim, on the basis that the Perpetual Energy group (on the one hand) and the Kailas Capital group (on the other hand) were always dealing at arm's length. The application to dismiss proceeded solely on that issue; the other preconditions in the section were not addressed: reasons at paras. 60, 87-90, 102, 107.

[16] Underlying this application were two issues. First of all, in applying s. 96, should the court look at the entire Aggregate Transaction, or should it just look at the challenged step, being the Asset Transaction? Secondly, as a matter of fact, was the relevant transaction negotiated at arm's length?

[17] The case management judge noted that whether parties are dealing at arm's length is a question of fact. Guidance could be found in the income tax cases. While there was a presumption in s. 4(5) of the *Bankruptcy and Insolvency Act* that related parties did not deal at arm's length, that presumption could be rebutted by "evidence to the contrary".

[18] The Perpetual group argued that they could rebut the presumption that they were not dealing at arm's length, because the Trustee in Bankruptcy conceded that the Kailas Capital group exercised "influence" with respect to the Asset Purchase Agreement, and had an "interest" in knowing what assets were in Perpetual/Sequoia: reasons at paras. 59, 93. The case management judge concluded that this claim could not be summarily dismissed, because he was "not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily", and that the issue would turn on the credibility of witnesses: reasons at paras. 97-98. It was not possible to determine if the "degree of influence" shown demonstrated sufficient control to rebut the presumption the Perpetual Energy group was not dealing at arm's length: reasons at paras. 98-101.

[19] Since this claim, as pleaded, disclosed a recognized cause of action, it could not be struck under R. 3.68: reasons at paras. 105-106.

The Alternative Section 96 Claim

[20] The Trustee in Bankruptcy pleaded a related claim, which the parties described as the "alternative *BIA* claim". That claim was based on the provision that a "person privy to the transaction" could be liable in damages for an undervalue transaction, if, as set out in s. 96(3), the privy was not dealing at arm's-length, and "receives a benefit or causes a benefit to be received by another person". Paragraph 22.2.5 of the statement of claim reads:

> 22.2.5 PEI [Perpetual Energy Parent], POC [New Trustee] and Rose benefited from and were privy to the Asset Transaction within the meaning of s. 96 of the *BIA*.

There are no pleaded particulars of the benefit alleged to have been received by each of the defendants, or the role that any of them might have played in conferring a benefit on another. The case management judge did not dispose of this issue in the summary disposition reasons. As discussed, *infra* paras. 112-15, this claim should be regarded as still being outstanding and unresolved.

Corporate Oppression

[21] The Trustee in Bankruptcy pleaded that the affairs of Perpetual/Sequoia had been conducted in a way that was oppressive or unfairly prejudicial to the interests of the creditors of Perpetual/Sequoia, contrary to s. 242 of the *Business Corporations Act*: reasons at paras. 117-18. The particular oppressive act pleaded was the entry into the Aggregate Transaction, although it was conceded in argument that it was the Asset Transaction which was alleged to have disregarded the interests of the creditors of Perpetual/Sequoia: reasons at paras. 119, 180.

[22] The *Business Corporations Act* allows a "complainant" to seek an oppression remedy. The first issue was whether the Trustee in Bankruptcy qualified as a complainant. Section 239(b) recognizes that a creditor could be a complainant if, in the court's discretion, the creditor was found to be a "proper person" to make an oppression application. The case management judge considered the status of the Trustee in Bankruptcy as a complainant, concurrently with the merits of the oppression claim as pleaded: reasons at para. 241. Considered together, he concluded this claim should be struck out under R. 3.68 as not disclosing a reasonable claim: reasons at paras. 232, 241.

[23] While the reasoning overlaps, the threshold issue of the Trustee in Bankruptcy's standing as a "complainant" was resolved against the Trustee. Relying in particular on ***Royal Trust Corp of Canada v Hordo*** (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)), the case management judge concluded that the Trustee in Bankruptcy was not a "proper person" to be a complainant, for a number of reasons:

> (a) The statement of claim did not contain the particulars necessary to tell if the Trustee in Bankruptcy could meet the ***Hordo*** factors: reasons at paras. 202-203, 237:
>
> > (i) Debt actions should not be turned into oppression actions: reasons at para. 190.

(ii) To be a complainant, a creditor should be in a situation analogous to that of a minority shareholder. The creditor should have an interest in how the company is being managed, without having any control: reasons at para. 191.

(iii) The creditor should not be "too remote to the affairs of the corporation", in the sense that the debt owed to the creditor should be related to the oppression: reasons at para. 192.

(b) The claim was focused too narrowly, because it only focused on two classes of creditors, not all creditors: reasons at para. 238.

(c) The effect of the ***Redwater*** decision was to "nullify the Oppression Claim", making recognition of a complainant pointless: reasons at para. 239.

(d) The Trustee in Bankruptcy's prospect of success was "extremely low": reasons at para. 240.

The case management judge struck out the application for complainant status, but he also would not have exercised his discretion to grant the Trustee in Bankruptcy that status: reasons at paras. 237-39.

[24] The case management judge also concluded that the oppression claim was not sustainable on its merits, and should be struck for that reason as well:

(a) The oppressive conduct was said to disregard the interests of "creditors", but as stated in the ***Redwater*** decision there was no "creditor" associated with the Abandonment and Reclamation Obligations, which dominated the obligations of Perpetual/Sequoia: reasons at paras. 138, 143, 170, 225.

(b) Abandonment and Reclamation Obligations were "inchoate", and because of their contingent nature they were too remote or speculative to be included in the insolvency process: reasons at paras. 147-50, 218, 223-224, 228. They were actually a component of the value of the asset, not a "liability": reasons at paras. 166, 171-72. The case management judge concluded "on the authority of ***Redwater***, I find that the [Abandonment and Reclamation Obligation] is not a liability" and "***Redwater*** has nullified the Oppression Claim": reasons at paras. 224-226. The oppression claim could not succeed to the extent that it was based on the Abandonment and Reclamation Obligations, because "the [Abandonment and Reclamation Obligation] is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact": reasons at para. 232.

(c) The oppression remedy should not be turned into a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a court to accord with what is perceived as being "just and equitable": reasons at para. 188.

(d) While the Trustee in Bankruptcy framed the claim as being on behalf of all creditors, there was only specific reference to (a) unpaid municipal taxes and (b) the Abandonment and Reclamation Obligations: reasons at para. 206. Bankruptcy must be "a collective pursuit, and not a selective pursuit": reasons at paras. 207, 210-211.

Even though Perpetual/Sequoia had some obligations other than the Abandonment and Reclamation Obligations, for a combination of these reasons the oppression claim was struck out.

[25] Since the case management judge concluded the oppression claim should be struck out, it was not necessary to consider whether it should also be summarily dismissed: reasons at para. 233. Although the case management judge had initially concluded in his oral reasons that there were material facts in dispute that precluded summary dismissal, on reflection he concluded that the "***Redwater*** decision nullifies the Oppression Claim" making summary dismissal possible: reasons at paras. 234-35.

The Public Policy Claim

[26] One paragraph of the statement of claim alleged that the Transactions were void for public policy reasons:

> Public Policy, Statutory Illegality and Equitable Rescission
>
> 24. The Transactions are void:
>
> > 24.1. on grounds of public policy, for being contrary to the public policy reflected in Alberta's oil and gas regulatory regime, including the *Oil and Gas Conservation Act*, RSA 2000, ch. 0-6, the *Oil and Gas Conservation Rules*, AR 151/71 and the AER's Directive 001, Directive 006, Directive 011 (the "**Regulatory Regime**");
> >
> > 24.2. on the basis of statutory illegality, as they were expressly or impliedly prohibited by the Regulatory Regime; and
> >
> > 24.3. on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim.

In this pleading the "Transactions" refers to the Asset Transaction, the Share Transaction, and the Retained Interests Transaction.

[27] The case management judge concluded that "public policy" is not a cause of action, although it could be a basis to refuse relief: reasons at paras. 249, 267, 281. The courts should be cautious about extending public policy beyond established categories, as that infringes on the realm of the legislature: reasons at para. 253. An illegal contract is not enforceable by either party; it follows that illegality is not a cause of action, although it could be a defence: reasons at paras. 250-51, 267, 281. Equitable rescission is a remedy, not a cause of action, and it was only mentioned in one heading in the statement of claim, not in the text of the pleading: reasons at paras. 243, 254, 273-75, 281. Further, at this stage it would be impossible to rescind the agreements and return the parties to their original positions: reasons at paras. 256, 277-78.

[28] The case management judge concluded that the ultimate remedy sought by the Trustee in Bankruptcy was a declaration that the Asset Agreement was "void": reasons at paras. 258, 261. In addition to the issues under s. 96 of the *Bankruptcy and Insolvency Act*, the Trustee's overall argument was that the agreements had been structured in such a way as to allow the Asset Transaction to proceed without regulatory scrutiny by the Alberta Energy Regulator: reasons at para. 261. The Trustee in Bankruptcy, however, had not provided any particulars as to how the Asset Transaction was in violation of any statute or public policy; ". . . the Trustee is fishing but it has neither a hook nor a net": reasons at paras. 263-65. Alternatively, "the decision in ***Redwater*** extinguishes the public policy claim because the [Abandonment and Reclamation Obligation] is not a liability, and the [Alberta Energy Regulator] is not a creditor of [Perpetual/Sequoia]": reasons at para. 281.

[29] The case management judge concluded that the Trustee in Bankruptcy could still argue that the Asset Transaction was void under the *Bankruptcy and Insolvency Act*, but the public policy and illegality claims should be struck: reasons at paras. 281-82. Absent a specific legislative framework, the courts should not search for "some overarching and unarticulated policy" and use it to set aside the Asset Transaction: reasons at paras. 283-84.

The Director's Duties Claim

[30] The Trustee in Bankruptcy made specific allegations against the defendant Ms. Rose. Ms. Rose was the sole director of Perpetual/Sequoia at the time of the Asset Transaction, and the Trustee in Bankruptcy pleaded that Ms. Rose breached her duties as a director in approving that transaction.

[31] The essence of the Trustee in Bankruptcy's claim was that the consideration received by Perpetual/Sequoia in the Asset Transaction was significantly lower than the obligations it assumed. The most significant obligation was alleged to be the Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimated the deficiency in the consideration as being over $217

million: reasons at paras. 332-336. The case management judge concluded, as a threshold matter, that "***Redwater*** extinguishes any suggestion that Ms. Rose breached her duties": reasons at para. 285. The case management judge, however, went on to further analyse the alleged breach of duty.

[32] The case management judge concluded that because "***Redwater*** held that the [Abandonment and Reclamation Obligation] is not a liability", that nullified any suggestion of breach of fiduciary duty or duty of care. The claim against Ms. Rose for breach of director's duty should accordingly be struck out as not disclosing a cause of action: reasons at para. 341. In addition, and in the alternative, the Director's duty claim against Ms. Rose should be summarily dismissed.

[33] The case management judge concluded that the record was sufficient to summarily dismiss the director's liability claim: reasons at paras. 343, 355, 364, 371. The Trustee in Bankruptcy's Claim rested on the allegation that in the Asset Transaction Perpetual/Sequoia received only $5.6 million of assets, yet incurred obligations of over $223 million. However, ***Redwater*** confirmed that the Abandonment and Reclamation Obligations were not a liability, and they should accordingly be valued at "nil" for the purposes of the analysis. On that basis, there was no shortfall in consideration: reasons at paras. 350-51, 357, 363, 368-69. The defendant Ms. Rose had established on a balance of probabilities that there was no merit to the claim against her, and the Trustee in Bankruptcy had failed to demonstrate an issue that genuinely required a trial: reasons at paras. 365-67, 370.

The Resignation & Mutual Release

[34] The defendant Ms. Rose argued that the Resignation & Mutual Release was an answer to any alleged breach of her director's duty. The case management judge concluded, that "***Redwater*** nullifies the Trustee's assertions concerning the Release": reasons at para. 285. The case management judge, however, went on to further analyze the effect of the Resignation & Mutual Release.

[35] The case management judge noted that execution of the Resignation & Mutual Release was one of the closing conditions of the Share Transaction, which was negotiated at arm's length by Perpetual Energy Parent on the one hand, and Kailas Capital on the other: reasons at paras. 287, 289-90, 314, 324. The Resignation & Mutual Release was accordingly signed by the new directors of Perpetual/Sequoia, after the Asset Transaction had closed, and after Ms. Rose had resigned as a director of Perpetual/Sequoia: reasons at paras. 292, 324. The Resignation & Mutual Release recited that the parties had had an opportunity to consider the consequences of the release; the purpose of a release was to "wipe the slate clean". A valid and enforceable release is a complete defence: reasons at paras. 298, 302.

[36] The case management judge concluded that releasing outgoing directors after a change of control was standard industry practice: reasons at paras. 308, 319. Perpetual/Sequoia was a "special purpose corporation", and a wholly owned subsidiary of Perpetual Energy Parent, and Ms. Rose acted as its director at the request of Perpetual Energy Parent. It was Perpetual Energy Parent that negotiated for the Resignation & Mutual Release, and there was no evidence that Ms. Rose had any control over that decision: reasons at paras. 309-13.

[37] The case management judge concluded that the Resignation & Mutual Release was not contrary to s. 122(3) of the *Business Corporations Act*, which precludes contracts relieving a director of her duties during her tenure. That provision was designed to prevent persons becoming directors under an agreement that they would not be subject to the responsibilities of a director during their tenure. It did not preclude releases of past potential liability on a change of control, as that was needed to create finality: reasons at paras. 316-23.

[38] In summary, the case management judge found that the Resignation & Mutual Release provided Ms. Rose with a complete defence to the Trustee in Bankruptcy's claims: reasons at paras. 327, 330.

Summary of the Summary Dismissal Reasons

[39] In summary:

(a) The claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed.

(b) The oppression claim was struck for failure to disclose a cause of action, because the Trustee in Bankruptcy was not a "proper person" to be a complainant, or alternatively because the oppression claim lacked merit.

(c) The pleading respecting the public policy claim was struck for failure to disclose a cause of action.

(d) The claim against the director Ms. Rose was struck for failure to disclose a cause of action, and it was also summarily dismissed on the merits, and, in any event, because the Resignation & Mutual Release was a complete defence.

The Costs Reasons of the Case Management Judge

[40] The case management judge heard a subsequent application by the respondent Ms. Rose for enhanced costs. He concluded that the Trustee in Bankruptcy should pay 85% of Ms. Rose's

solicitor and client costs, and that the Trustee should be personally liable for those costs: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 513[1].

[41] The case management judge summarized the transactions that had been the subject of the summary disposition application. The specific allegations against Ms. Rose were that (a) she benefitted personally from the Asset Transaction; (b) that the Asset Transaction was clearly not in the best interests of Perpetual/Sequoia, thus amounting to oppression or prejudice; and (c) that Ms. Rose caused 198Co to agree to the Resignation and Mutual Release: costs reasons at para. 13.

[42] The case management judge noted that, under the Alberta *Rules of Court*, Ms. Rose was presumptively entitled to costs as the successful party. The judge has a wide discretion over costs, and can award solicitor and client costs, or costs assessed based on Schedule C to the *Rules*. Solicitor and client costs are only awarded in cases of blameworthy conduct during the litigation: costs reasons at paras. 25, 31. The Trustee in Bankruptcy conceded that Ms. Rose was entitled to costs calculated with reference to Schedule C, which concession "sets the floor amount": costs reasons at para. 34.

[43] The Court also has the ability to award costs against a non-party, when that party is the "real promoter of the litigation". That principle applies to insolvency litigation: costs reasons at paras. 35-38. PricewaterhouseCoopers was acting in a representative capacity as Perpetual/Sequoia's trustee, but that did not preclude the possibility of it being personally liable for costs: costs reasons at para. 42. A trustee in bankruptcy will be personally liable for costs if the estate of the bankrupt does not have sufficient assets to indemnify the trustee: costs reasons at paras. 43-44. With respect to bankruptcy proceedings, that possibility is confirmed by s. 197(3) of the *Bankruptcy and Insolvency Act*: costs reasons at paras. 46-47. This litigation, however, was ordinary civil litigation covered by the *Rules of Court*, which provide no special protection for trustees in bankruptcy: costs reasons at paras. 50-51.

[44] A trustee in bankruptcy may only commence litigation with the permission of the inspectors: costs reasons at paras. 55-63. In this case ". . . despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose": costs reasons at para. 64.

[45] A trustee should only engage in litigation that relates to all the creditors, not just selected creditors: costs reasons at para. 65. A trustee should make proper investigations before suing, and must otherwise act responsibly when litigating: costs reasons at para. 66. A trustee in bankruptcy may be held personally responsible for costs in cases of misconduct, and in appropriate cases costs in bankruptcy proceedings can be awarded on an escalated scale: costs reasons at paras. 67-69. As

[1] References to paragraph numbers in the costs reasons are to the Canlii version.

officers of the court, trustees in bankruptcy are held to higher standards, including when they litigate: costs reasons at paras. 70-75.

[46] Trustees should be careful in presenting the facts to the court, and should not include opinions, arguments, or conclusions of law in affidavits: costs reasons at paras. 76-77. In this case, the trustee in bankruptcy inappropriately:

(a) asserted that "the Asset Transaction was not in the best interests of [Perpetual/Sequoia]"; that was a determination to be made by the Court: costs reasons at para. 78;

(b) provided an opinion that Ms. Rose had "personally benefited" from the transactions, which was also something to be determined by the Court: costs reasons at paras. 79-81.

[47] When investigating the conduct of a director, or suing the director of a public corporation, a trustee in bankruptcy has an obligation to act fairly, which includes conducting "an appropriate investigation", which includes "appropriate participation" of the director: costs reasons at paras. 83-86. When conducting an investigation, the trustee "has an obligation to follow a procedure that is in compliance with the principles of procedural fairness": costs reasons at paras. 89, 93, 113, 114. Disclosure should be made, and the director should be given an opportunity to respond: costs reasons at paras. 90-91. A trustee in bankruptcy who proposes to sue a director must conduct "an appropriate investigation", which includes seeking out relevant and material evidence: costs reasons at paras. 97, 99-100.

[48] The case management judge concluded that duties imposed by the courts of equity on trustees in general (that is, not trustees in bankruptcy) were applicable: costs reasons at paras. 103-110. He also concluded that "I have an ongoing responsibility to expand the common law, where appropriate". If there was no precedent for requiring a trustee in bankruptcy to carry out an appropriate investigation, then one needed to be set: costs reasons at para. 112.

[49] The case management judge then applied these principles to the conduct of the Trustee in Bankruptcy with respect to this particular litigation. Between June 2018 and August 2018 (when the statement of claim was issued) there was a dialogue between the Trustee in Bankruptcy, and the Perpetual group and Ms. Rose. On June 26, 2018 the Trustee in Bankruptcy invited Ms. Rose to provide further comments, and she responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27. The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply; the statement of claim was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

The case management judge criticized the trustee in bankruptcy for failing to wait for further information, failing to follow up, and failing to set a deadline: costs reasons at paras. 167-174, 194-99, 231-32.

[50] The Trustee in Bankruptcy alleged in the statement of claim that Ms. Rose "would benefit personally from the Asset Transaction". (This is the "alternative *BIA* claim", see *supra*, para. 20.) The case management judge concluded that this allegation was made without asking "Ms. Rose a single question concerning the alleged benefit": costs reasons at paras. 134-39. In addition, the allegations about corporate oppression were made without asking Ms. Rose any questions about the exercise of her business judgment. Further, the Trustee in Bankruptcy did not ask the Kailas Capital principals any questions about the transactions: costs reasons at paras. 141-45. Further, no questions were asked about the circumstances leading up to the Resignation & Mutual Release: costs reasons at paras. 146-52.

[51] Based on these considerations, the case management judge found that the Trustee in Bankruptcy failed to undertake the type of investigation required of him, and as a result proceeded on certain erroneous assumptions: costs reasons at paras. 154-57. Overall, the Trustee in Bankruptcy suffered from "tunnel vision", which was a "single-minded and overly narrow focus" of an investigation: costs reasons at paras. 158-164. This was exacerbated by the failure of the Trustee in Bankruptcy to follow up respecting the further information Ms. Rose said was forthcoming, and the failure to make inquiries of the Kailas Capital principals: costs reasons at paras. 167-181.

[52] The failure to ask Ms. Rose any questions about the alleged "benefit" was an "important flaw in the conduct of the Trustee": costs reasons at para. 183. This was another manifestation of "tunnel vision". On the merits, the case management judge was not satisfied that the dealings with the Abandonment and Reclamation Obligations accrued to the benefit of Perpetual Energy Parent, precluding any benefit to Ms. Rose as a shareholder: costs reasons at paras. 188-90. Notice should have been given to Ms. Rose before public allegations of breach of duty were made against her, and she should have been provided an opportunity to respond: costs reasons at paras. 194-200.

[53] The case management judge summarized his conclusions:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the

> conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

The allegations about the Resignation & Mutual Release were also made without adequate investigation: costs reasons at paras. 203-210. Specifically, there was "no basis whatsoever to justify the allegation that Ms. Rose caused PEI to cause 198Co to agree to the Release": Costs reasons at para. 215.

[54] The case management judge concluded that the record showed that the Trustee in Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 228. That conduct was a) a failure to conduct a neutral and thorough investigation, b) a failure to provide Ms. Rose with advance notice of the claim, c) a failure to provide Ms. Rose with a further opportunity to submit information and d) a failure to give Ms. Rose sufficient time to address the issues: costs reasons at paras. 229-32. He concluded that Ms. Rose was entitled to an award of solicitor and client costs, as this was "a circumstance where justice can only be done by a substantial indemnification for costs": costs reasons at paras. 221, 238. The ultimate award was 85% of the bill of costs presented by Ms. Rose: costs reasons at para. 228.

[55] The case management judge also concluded that the Trustee in Bankruptcy was the true "promoter" of the litigation. Since the estate of Perpetual/Sequoia would be unable to pay the costs, the Trustee in Bankruptcy should be directly liable for costs: costs reasons at paras. 234-37.

Issues on Appeal

[56] Three appeals were commenced, and argued together:

(a) Appeal 1901-0255AC, commenced by the Trustee in Bankruptcy, challenging those portions of the decision that struck out or summarily dismissed various parts of the claim.

(b) Appeal 1901-0262AC, in effect a cross-appeal, commenced by the Perpetual Energy group, seeking summary dismissal of the claim under s. 196 of the *Bankruptcy and Insolvency Act*.

(c) Appeal 2001-0174AC, commenced by the Trustee in Bankruptcy, challenging the costs award made in favour of the respondent Ms. Rose.

[57] Interventions were permitted by the Orphan Well Association and jointly by three prominent oil and gas companies: Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABCA 417. The nature and mandate of the Orphan Well Association is described in the ***Redwater*** decision at paras. 22-23. The industry intervenors could provide an industry perspective on the nature and

consequences of abandoned wells, and the way that abandonment and reclamation obligations are dealt with by the industry.

[58] There are three general issues that have an impact on the specific issues raised in the three appeals:

(a) The Reasons for Decision: *infra* paras. 60-67.

(b) The principles governing the summary disposition of claims: *infra* paras. 68-81.

(c) The legal nature of abandonment and reclamation obligations and the ***Redwater*** decision: *infra* paras. 82-97.

[59] The specific issues that require analysis are:

(a) The summary disposition of the s. 196 claim, including whether the proper analysis is at the level of the Aggregate Transaction, or at the level of the Asset Transaction: *infra* paras. 98-111.

(b) The alternative section 96 claim: *infra* paras. 112-115.

(c) The oppression claim, including a) the "complainant" status of the Trustee in Bankruptcy, and b) the merits of the oppression claim: *infra* paras. 116-44.

(d) the public policy claim: *infra* paras. 145-52.

(e) the scope of director's duties: *infra* paras. 153-59.

(f) the legal effect and interpretation of the Resignation & Mutual Release: *infra* paras. 160-75.

(g) the costs decision, including:

(i) Costs in bankruptcy proceedings: *infra* paras. 183-93.

(ii) Approval of the inspectors: *infra* paras. 194-98.

(iii) Trustees as officers of the court: *infra* paras. 199-206.

(iv) The failure to investigate: *infra* paras. 207-219.

(v) Allegations against the respondent Ms. Rose: *infra* paras. 220-25.

The Reasons for Decision

[60] The case management judge gave oral reasons for his decision on the summary disposition application on August 15, 2019. He retained the right to "to review the transcript, and to add in case names and citations", and stated:

> Notwithstanding this is Oral Judgment, I do intend to issue written reasons. I do have a lengthy judgment. I just need to do some refinement and, most importantly, I have certain things like citations checked.

Since the appeal period runs from the pronouncement of the decision, the Trustee in Bankruptcy commenced appeal 1901-0255AC on August 23, 2019, and the Perpetual Energy group appellants commenced appeal 1901-0262AC on August 26, 2019. The case management judge had indicated that the written reasons would be available "in a couple of weeks", but they were not issued until January 13, 2020; they are reported as 2020 ABQB 6. The written reasons are almost twice as long as the oral reasons. They state that in the case of discrepancies "this written decision takes precedence": reasons at para. 1.

[61] A trial judge who pronounces a decision orally undoubtedly has the right to edit any subsequent written version of the decision. That right to edit exists whether or not the right is "reserved" in the oral decision, but there are limits to it: ***Wilde v Archean Energy Ltd***., 2007 ABCA 385 at para. 24, 82 Alta LR (4th) 203, 422 AR 41. In this case the written reasons involved a substantial rewriting and expansion of the analysis, and extended far beyond "editing".

[62] To give one specific example, in the oral reasons the case management judge concluded that the state of the record did not permit summary dismissal of the oppression claim. In the written reasons, he indicated that he had reconsidered the issue, and he had concluded that the dispute on the material facts he identified did not exist: reasons at paras. 233-35. Reversing a decision made in the oral reasons goes far beyond editing.

[63] Further, given that appeal periods are deliberately kept short to promote finality, if a judge proposes to issue written reasons, that must be done promptly, preferably well before the appeal period expires. The reversal of any line of analysis in the oral reasons, or the addition of whole new lines of analysis, are highly undesirable. If the judge's thinking has developed to the point that he or she is able to give oral reasons, it should not be necessary to embellish those reasons when they are reduced to writing.

[64] There are cases where the matter is urgent, and the parties need a decision immediately. In those cases, trial judges will sometimes pronounce the result, in cursory fashion, and issue written reasons at the earliest opportunity: ***Law Society of Alberta v Beaver***, 2016 ABCA 290 at para. 11, 44 Alta LR (6th) 16; ***Liu v Huang***, 2020 ONCA 450 at para. 10. That, however, was not the situation here. The transactions challenged in this litigation occurred in October 2016.

Perpetual/Sequoia assigned itself into bankruptcy in March 2018. There was no urgency, and the effect of the decision was to finally terminate significant portions of the claim. Likewise, there was no urgency in pronouncing the costs consequences of the merits application.

[65] When reasons are issued long after the result is pronounced, there can be a perception of result-driven analysis: ***R. v Teskey***, 2007 SCC 25 at para. 18, [2007] 2 SCR 267. While the problem is more acute in criminal cases, and in cases that are heavily dependent on the trial evidence, it also applies to civil matters like the ones at issue in these appeals. As the court noted in ***Jacobs Catalytic Ltd. v International Brotherhood of Electrical Workers, Local 353***, 2009 ONCA 749 at para. 52, 255 OAC 201:

> 52. While *Teskey* is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

Where the analysis in the written reasons differs from that given in the oral reasons, an appellate court is entitled to review the decision based on the original rationale: ***Nova Scotia (Minister of Community Services) v C.K.Z.***, 2016 NSCA 61 at paras. 61-63, 376 NSR (2d) 113.

[66] In this case, it would have been preferable if the case management judge had simply reserved his decision on the dismissal application, and issued only one set of reasons. On appeal, this Court is entitled to refer to both sets of reasons, and the differences between them, or disregard the later written reasons.

[67] A similar problem arose with the costs reasons, which were first rendered orally on August 26, 2020. Written reasons followed on September 24, 2020: 2020 ABQB 513. The written reasons were not, however, just an edited version of the oral reasons. For example, they included a new section on the case management judge's "responsibility to expand the common law": see the costs reasons at paras. 103-114.

<u>The Principles Governing the Summary Disposition of Claims</u>

[68] Claims can be struck out under R. 3.68 if they disclose "no reasonable claim", or if they are otherwise improper. Claims can also be summarily dismissed under R. 7.3 if there is "no merit" to the claim. While these rules set out distinct procedures, they are both methods of dealing with claims before trial in a proportionate, but fair manner, by weeding out unmeritorious claims at an early stage: ***Hryniak v Mauldin***, 2014 SCC 7 at paras. 27-28, 36, [2014] 1 SCR 87.

[69] Summary dismissal applications are generally brought after pleadings are closed, and are based on affidavit evidence demonstrating that there is no merit to the claim. Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is "no merit" to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 47, 86 Alta LR (6th) 240.

[70] On the other hand, an application to strike out a pleading under R. 3.68(2)(b) for failure to disclose a cause of action is dealt with based on the pleadings. The facts as pled are assumed to be true, and no evidence is permitted on the motion. A claim will be read "generously", and will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts pled are true: ***R. v Imperial Tobacco Canada Ltd***., 2011 SCC 42 at para. 21, [2011] 3 SCR 45. In order to avoid overly restraining the evolution of the common law, a claim will not be struck out merely because it is novel, but a claim will not be allowed to proceed just because it is novel: ***Atlantic Lottery Corp. Inc. v Babstock***, 2020 SCC 19 at para. 19.

[71] As this summary reveals, there are significant differences between an application to strike pleadings, and an application for summary dismissal, even though they both serve the same broader purpose of weeding out unmeritorious claims at an early stage. The analysis underlying the two remedies, in particular, is significantly different; summary dismissal depends on the evidence, whereas striking out precludes the use of evidence. It is for this reason that a "blended" striking/dismissal analysis is unhelpful. The reasons under appeal concluded that some of the claims could be both struck out and summarily dismissed. While the ultimate conclusion may be correct, attempting to analyze the two branches together tends to allow the evidence to colour the assessment of the pleadings, which is to be done without reference to the evidence.

[72] While there are some narrow exceptions to the assumption in an application to strike that the facts as pled are true, that exception should not be allowed to overtake the rule. For example, in ***Operation Dismantle v. The Queen***, [1985] 1 SCR 441 the pleadings alleged that allowing the testing of cruise missiles in Canada would increase the likelihood of nuclear war. The Supreme Court observed that that was an allegation incapable of proof, and it need not be accepted as true. In ***Young v Borzoni***, 2007 BCCA 16 at paras. 30-32, 64 BCLR (4th) 157 unparticularized allegations of misconduct that could "only be viewed as wild speculation" were not accepted at face value. These cases, however, do not contemplate a generalized merit-based assessment of the allegations on an application to strike out a pleading. Contrary to what is implied at paras. 32-36 of the reasons under appeal, there are no wide exceptions to the "no evidence" rule. The "no evidence" rule cannot accommodate assessing permissible evidence on a case-by-case basis.

[73] Some of the cases relied on in the reasons under appeal are on allowing "novel claims" to proceed, a related but different issue: ***HOOPP Realty Inc v Guarantee Co of North America***, 2015 ABCA 336 at para. 19, 607 AR 377; and ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140 at para. 16, 95 Alta LR (5th) 264, 572 AR 354. Deciding whether a claim should be allowed to proceed, even though novel, must still be based on the claim as pleaded, not on evidence. This is a collateral issue that only arises if the pleading does not assert a known claim. However, assessing whether a novel claim should be allowed to proceed depends in part on whether it has a "reasonable prospect" of succeeding. ***HOOPP Realty*** and ***O'Connor Associates*** discuss how to assess "reasonable prospect", and do not create a general exception to the "no evidence" rule on an application to strike pleadings.

[74] There are two subsidiary principles in play on an application to strike pleadings. Firstly, as noted, the pleadings are read generously: ***Fullowka v Whitford***, [1997] NWTR 1, 147 DLR (4th) 531 at pp. 537-38 (CA). If, on an initial reading, the pleading is capable of several interpretations, it should be given the interpretation that will support the pleading. Courts should not artificially read pleadings in a way that leads to a fatal deficiency. Further, a poorly drafted pleading should be amended, not struck out: ***C.H.S. v Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 15 at paras. 44-6, 21 Alta LR (5th) 7, 469 AR 359; ***United Petroleum Distributors (Calgary) Ltd v 548311 Alberta Ltd (cob Southern Fuel)***, 1998 ABCA 121 at para. 5, 19, 65 Alta LR (3d) 346, 216 AR 116.

[75] Secondly, pleadings are to allege facts, but not the evidence to be relied on: R. 13.6(2)(a). If a pleading is deficient because it lacks particulars, the remedy is to order production of particulars, not to strike the claim: R. 3.68(1)(b); ***Hughes (Estate) v Brody***, 2007 ABCA 277 at para. 41, 78 Alta LR (4th) 203, 417 AR 52; ***Elbow River Marketing v Canada Clean Fuels Inc***, 2011 ABCA 258 at paras. 2-3, 513 AR 315, 56 Alta LR (5th) 222.

[76] To illustrate the first principle, the case management judge criticized the pleadings because the Trustee in Bankruptcy had pleaded that it was a "proper person" to be a complainant, that it was entitled to equitable rescission, and that there had been "oppressive conduct". The case management judge noted that these were ultimately questions for the trial judge. It was, however, unreasonable to read the pleadings as suggesting they were not. For example, it was unreasonable to read these pleadings as a suggestion by the Trustee in Bankruptcy that it was entitled to "self-appoint" as a complainant in the oppression action. One purpose of pleadings is to avoid taking the other party by surprise, and it is expected that the plaintiff will provide particulars of the allegations and the relief requested: R. 13.6(3). There was nothing inappropriate about this form of pleading that could not have been cured by amendment.

[77] Similarly, there was no basis for criticizing the pleading that the "Asset Transaction was not in the best interests of [Perpetual/Sequoia]": reasons at para. 78. This is a legitimate allegation, forming part of the cause of action, and not any attempt to usurp the role of the court. It is no

different from Ms. Rose's allegation that she exercised sound business judgment in her decisions as a director of Perpetual/Sequoia.

[78] Another example related to the Trustee in Bankruptcy's allegation that Ms. Rose had "caused" Perpetual Energy Parent or Kailas Capital to enter into the Resignation & Mutual Release. It was unreasonable to read this pleading as a suggestion that Ms. Rose had "forced" any of the parties to do anything, or execute documents "against their will": compare costs reasons at paras. 203, 214, 216. Ms. Rose obviously could not force anybody to do anything, and that was never suggested. This allegation clearly meant that Ms. Rose had included the provision of a release among the items to be discussed during the negotiations. On any reasonable reading, these pleadings do not allege any form of duress.

[79] The Perpetual Energy group, in fact, used the same type of wording when they argued that Kailas Capital had influenced the structure of the Asset Transaction and the transfer of the Goodyear Assets. This meant no more than that this was another issue that had to be resolved during the negotiations. Similarly, Ms. Rose pleaded that she acted "in full satisfaction of her fiduciary duties and duty of care" in approving the transaction. Ms. Rose also pleaded that the Trustee in Bankruptcy was not entitled to complainant status for the purpose of pursuing the oppression claim. The pleadings by the Trustee in Bankruptcy as well as by the defendants served one of the main purposes of the pleadings: they identified the issues that had to be resolved. It was unreasonable to read any of these pleadings as usurping the court's authority.

[80] As noted, the second and related principle is that if a pleading lacks particulars, the remedy is to direct the provision of particulars, not to strike out the pleading. In several instances the case management judge relied in part on the absence of particulars to strike out the claim, for example: (a) an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237; and (b) an absence of particulars respecting the public policy claim: reasons at paras. 242, 244, 255, 263, 270, 284. If and to the extent that particulars were actually necessary and missing, it was an error of principle to strike out the claim without giving the Trustee in Bankruptcy an opportunity to amend.

[81] In summary, when considering whether any of the pleadings in this litigation should have been struck, consideration should have been given to whether any perceived flaws in the pleadings could be cured by amendment or by the provision of particulars.

The Legal Nature of Abandonment and Reclamation Obligations and the ***Redwater*** Decision

[82] The summary disposition decision under appeal was heavily influenced by the case management judge's interpretation and application of the ***Redwater*** decision. The case management judge held that ***Redwater*** decided that Abandonment and Reclamation Obligations are "neither a liability nor any amount referable to an existing obligation"'; they are "not sufficient to constitute a liability that needs to be considered"; and are "too remote or speculative to be

characterized as a liability"; they are merely "a future burden that has not crystallized into a liability"; they are "an obligation that will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability": reasons at paras. 170, 171, 172, 224, 239, 357, 366.

[83] The case management judge concluded that the effect of ***Redwater*** was that Abandonment and Reclamation Obligations were "not a liability for purposes of the Oppression Claim"; and since the Alberta Energy Regulator was not a creditor with respect to them, Perpetual/Sequoia "could not have assumed liability in respect of the ARO in conjunction with the Asset Transaction"; and accordingly, ***Redwater*** "nullified the Oppression Claim"; it also "nullifies the Trustee's assertions concerning the Release"; it "extinguished any suggestion" that Ms. Rose breached her duties as a director; it "nullifies the Trustee's arguments concerning fiduciary duty and duty of care"; and justified summary dismissal of the director's liability claim: reasons at paras. 224, 225, 239, 285, 366-69. Because of ***Redwater***, Abandonment and Reclamation Obligations were "more properly characterized as an allegation that is based on assumptions and speculations", and therefore they were not a "true fact for the purposes of R. 3.68(2)(b)"; on an application to strike, they need not be assumed to be true: reasons at para. 232. The overall effect of ***Redwater*** was to "extinguish" any assertion that the Asset Transaction resulted in a net deficit to Perpetual/Sequoia, because the Abandonment and Reclamation Obligations should be valued at "nil": reasons at paras. 365-66.

[84] This part of the reasoning reflects, at best, a significant overreading of the effect of the ***Redwater*** decision. It is therefore necessary to analyze in detail that decision, and the nature of Abandonment and Reclamation Obligations.

Abandonment and Reclamation Obligations

[85] When oil and gas wells are producing, they are valuable assets. However, after they cease to be productive they can quickly turn into significant liabilities. The Alberta Energy Regulator has specific "end-of-life" rules on how a spent well must be rendered environmentally safe by being shut-in and "abandoned". In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to "cap" the well, and to restore the surface to its original condition: Alberta Energy Regulator Directive 020: *Well Abandonment*; ***Redwater*** at para. 16. Compliance with those Abandonment and Reclamation Obligations can be expensive.

[86] Abandonment and Reclamation Obligations (or "end-of-life", or "asset retirement" obligations) are inherent in any oil well, from the moment it is drilled and comes into production. At that point in time the Abandonment and Reclamation Obligations can be said to be "contingent", but only in the sense that the moment when the well will cease production is unknown. However, they are not "contingent" in the sense that they will only come into existence if, and only if, a condition precedent comes to pass: ***Redwater*** at para. 36; ***Canada v McLarty***, 2008 SCC 26 at paras. 14-18, [2008] 2 SCR 79. The only issue is <u>when</u> they will come into existence. A well may

produce for decades. However, while the Abandonment and Reclamation Obligations may not crystallize for some time, they are inevitable; no well produces forever.

[87] The time at which the Abandonment and Reclamation Obligations with respect to any particular well must be performed is variable:

(a) With respect to a newly drilled well the Abandonment and Reclamation Obligations may only manifest themselves decades in the future.

(b) Once the production of a well has peaked, and its most productive years are behind it, it may be possible to predict with some degree of certainty when the Abandonment and Reclamation Obligations will have to be performed. The closer one gets to the end of production, the more precise the date of reclamation will become.

(c) But once a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations have crystallized. The Abandonment and Reclamation Obligations may be unperformed, but they are no longer "contingent" in either sense. The owner of the well is under a public duty to shut in the well and reclaim the surface.

The further reclamation is in the future, the more difficult it will be to quantify the Abandonment and Reclamation Obligations. Even if Abandonment and Reclamation Obligations can be said to be "contingent" liabilities, that is sufficient in law for some purposes: ***Tannis Trading Inc v Coldmatic Refrigeration of Canada Ltd***, 2010 ONSC 5747 at paras. 24-25, 85 BLR (4th) 77; ***Manufacturers Life Insurance Co v AFG Industries Ltd***, 2008 CanLII 873 at para. 30, 44 BLR (4th) 277 (ONSC). Further, the present value of the Abandonment and Reclamation Obligations will directly depend on how far into the future they will arise. Abandonment and Reclamation Obligations are unliquidated, some of them may be more immediate than others, and their quantum is uncertain, but they are still inevitable. They exist whether or not abandonment notices have been issued by the Alberta Energy Regulator. Abandonment and Reclamation Obligations may not be entirely a current liability or obligation, but they are a real liability or obligation. They are routinely reported on the balance sheets of oil and gas companies, including those of Perpetual Energy Parent.

[88] The evidence on this record is that prior to the Aggregate Transaction, the Perpetual Operating Trust held oil and gas properties in all these categories. The KeepCo Assets and the Retained Interests were still producing; they did not carry immediate Abandonment and Reclamation Obligations. The Goodyear Assets, on the other hand, were all "mature", and their Abandonment and Reclamation Obligations were more immediate. Further, by the time of the Asset Transaction, the record suggests the Goodyear Assets included 910 shut in wells and 727 abandoned wells, meaning that some portion of the obligation to reclaim was due to be performed

or was imminent. The exact cost of reclamation may have been unknown and unquantified, but the obligation was no longer "contingent"; the obligation was merely unperformed.

[89] The extent of the Abandonment and Reclamation Obligations associated with the Goodyear Assets is not clear at this stage of the proceedings. When Perpetual Energy Parent publicly announced the pending Aggregate Transaction, it advised the market that it expected to relieve itself of $87 million of Abandonment and Reclamation Obligations. Perpetual/Sequoia reported them on its balance sheet at $131 million, and after the transaction closed, Perpetual Energy Parent announced it had shed $131 million of Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimates that the Abandonment and Reclamation Obligations were actually $218.9 million, comprising $98.8 million of abandonment costs, $93.2 million in reclamation costs, and $26.8 million related to other facilities: reasons at para. 368. For the purposes of these appeals the exact quantum is not material; it is sufficient to note that the amount involved is potentially substantial.

*The Effect of the **Redwater** Decision*

[90] Redwater Energy Corporation was a bankrupt oil and gas company. It had about 20 producing wells that were of value, but it had over 100 other wells that were either depleted or shut in, and had no value. In fact, there was a significant liability associated with the depleted wells, because they had to be reclaimed. In effect, these wells had "negative value": ***Redwater*** at para. 2.

[91] Redwater Energy's trustee in bankruptcy proposed to sell off the valuable wells, and use the proceeds to pay the secured creditor. That would leave the bankrupt shell of Redwater Energy with the depleted wells, and no funds to pay for reclamation. The trustee in bankruptcy needed permission from the Alberta Energy Regulator to transfer the licences for the valuable wells to the third party purchaser. The Alberta Energy Regulator refused to approve the transfers, unless the proceeds were used to reclaim the abandoned wells; those proceeds could not be paid to the secured creditor. The trustee in bankruptcy responded that it did not intend to comply with the environmental remediation orders that had been issued, and that the obligation to reclaim the wells was a "claim provable in bankruptcy": ***Redwater*** at paras. 50-52. As such, the reclamation obligations had to be dealt with within the bankruptcy process, and they would be treated like the claims of all other unsecured creditors. The reclamation obligations would effectively be extinguished by operation of the bankruptcy: ***Redwater*** at paras. 114, 117.

[92] ***Redwater*** held that there was no constitutional conflict between the applicable federal and provincial legislation. The non-constitutional issue in ***Redwater*** was focused: were the reclamation obligations a "claim provable in bankruptcy" under s. 121 of the *Bankruptcy and Insolvency Act*? If they were, those obligations would be extinguished in the bankruptcy. If not, what was the trustee in bankruptcy's obligation with respect to them?

[93] ***Redwater*** at para.119 confirmed the test for determining whether an environmental liability is a "claim provable in bankruptcy", previously set in ***Newfoundland and Labrador v AbitibiBowater Inc***., 2012 SCC 67, [2012] 3 SCR 443. First, there must be an obligation owed to a "creditor". Second, the obligation must be incurred before the bankruptcy. Third, it must be possible to attach a monetary value to the obligation. The end-of-life obligations did not fit the test, because there was no "creditor". Neither the Alberta Energy Regulator nor the Orphan Well Association was owed any debt; the environmental obligation was owed to the public: ***Redwater*** at paras. 122, 134-35. Further, there was insufficient certainty in the quantum of the Abandonment and Reclamation Obligations to make them a "claim provable in bankruptcy", because there was no certainty that the Alberta Energy Regulator would perform the remediation work: ***Redwater*** at paras. 145, 149, 154.

[94] ***Redwater*** does not stand for the proposition that Abandonment and Reclamation Obligations are not a liability or obligation of the bankrupt corporation. The *Bankruptcy and Insolvency Act* provides that in some circumstances the trustee in bankruptcy is "not personally liable" for environmental obligations. The Supreme Court ruled that these provisions protect the trustee, "while the ongoing liability of the bankrupt estate is unaffected": ***Redwater*** at paras. 74-75. A trustee who "disclaims" assets is protected from personal liability, but "the liability of the bankrupt estate is unaffected": ***Redwater*** at paras. 93, 98. Claims that are "not provable in bankruptcy" remained an obligation that the bankrupt had to discharge to the extent it has assets: ***Redwater*** at para. 118. Having received the benefit of the oil wells, the bankrupt corporation "cannot now avoid the associated liabilities": ***Redwater*** at para. 157. Trustees in bankruptcy must comply with non-monetary obligations that cannot be reduced to "provable claims": ***Redwater*** at para. 160. Accordingly, an order was given that the proceeds of the sale of Redwater's assets could not be paid to its secured creditor, but had to be used to address its "end-of-life" obligations: ***Redwater*** at para. 163.

[95] The case management judge focused on the fact that ***Redwater*** confirmed that the Alberta Energy Regulator is not a "creditor" with respect to the Abandonment and Reclamation Obligations, and accordingly the Abandonment and Reclamation Obligations cannot be a "claim provable in bankruptcy". That much is an accurate reading of ***Redwater***, but it does not mean that Abandonment and Reclamation Obligations are "assumptions and speculations" that do not exist, that they are not an obligation or liability of Perpetual/Sequoia, or that they should be valued at "nil". The Abandonment and Reclamation Obligations are an obligation of Perpetual/Sequoia, owed "to the public" and the surface landowners, but which are nevertheless obligations which the trustee of a bankrupt corporation cannot ignore. Not only did ***Redwater*** confirm that Abandonment and Reclamation Obligations are a continuing obligation of a bankrupt corporation, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors.

[96] The case management judge held that Perpetual/Sequoia "could not have assumed liability" for the Abandonment and Reclamation Obligations, even though the Asset Transaction specifically

confirmed that it had: *supra*, para 11. The Perpetual defendants admitted in their defence that Abandonment and Reclamation Obligations were liabilities of Perpetual/Sequoia:

> 44(c) 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 the other producing assets, and were considered in the value of the Goodyear Assets;

This pleading is consistent with the statement in ***Redwater*** at para. 157, that Abandonment and Reclamation Obligations serve "to depress the tenure's value at the time of sale". The case management judge overlooked this admission, and instead relied on concessions that had been made by the Trustee's counsel in court before the ***Redwater*** decision was released.

[97] Section 96 of the *Bankruptcy and Insolvency Act* addresses "transfers at an undervalue". The extent to which the assumption of obligations, specifically environmental obligations, can "depress the tenure's value", resulting in an "undervalue" as defined in s. 2, is something that can be explored at trial. Abandonment and Reclamation Obligations may not be a conventional "debt", but rather operate by depressing the value of the assets; whichever side of the equation they be on, they could impact whether there is "undervalue" in a transaction. Likewise, the extent to which a director owes a duty to ensure that the corporation discharges environmental obligations owed to the public is unclear. However, none of the claims pleaded in this action can be struck out or dismissed for "failing to disclose a cause of action", or because they "lacked merit" on the basis that ***Redwater*** "nullifies" or "extinguishes" Abandonment and Reclamation Obligations.

The Section 96 Claim

[98] The case management judge concluded that the claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed. This is the claim that the Asset Transaction was void because it was at an undervalue, and not at arm's length. In appeal 1901-0262AC, the Perpetual Energy group challenges this portion of the decision in two steps. First of all, they argue that the proper focus of the analysis should be on the Aggregate Transaction, not on the Asset Transaction. At that level, they argue that the Aggregate Transaction was at arm's-length. Secondly, they argue that there were no issues of fact or credibility that raised a genuine issue for trial, and the case management judge erred in concluding that the record did not permit summary disposition.

[99] It was not disputed that the Perpetual Energy group and their officers and directors (on the one hand), and the Kailas Capital group, 198Co and their officers and directors (on the other hand) were dealing at arm's length: reasons at para. 57. The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length. The issue was that the Asset Transaction concerned only Perpetual Energy Operating Corp.

(later Sequoia), the Perpetual Operating Trust and Perpetual Energy Parent. Those parties were all related, and were presumed not to deal at arm's length under s. 4(5) of the *Bankruptcy and Insolvency Act*.

[100] The Perpetual Energy group argues, however, that whether persons are dealing at arm's length is a question of fact, and that the presumption that related parties do not deal at arm's length only prevails "in the absence of evidence to the contrary": s. 4(4) and (5). They rely on the acknowledgement by the Trustee in Bankruptcy that the Kailas Capital group had an "interest" in knowing what assets were in Perpetual/Sequoia, and that they had "influence" over the Asset Transaction: reasons at paras. 59, 93. Neither factor, however, is sufficient to rebut the presumption that the Perpetual Energy parties were not dealing with each other at arm's length.

[101] The Kailas Capital group undoubtedly had an "interest" in the assets, in the sense that they were buying the Goodyear Assets, and they needed to know what was included in the sale. This was a commercial interest, not a legal interest: reasons at para. 84. They also needed to know that the legal and beneficial interests in the Goodyear Assets were in fact located in the corporate vehicle they were purchasing: Perpetual/Sequoia. Exactly how the Perpetual Energy group rearranged its affairs to move the Goodyear Assets into Perpetual/Sequoia, and specifically the consideration to be paid under that transaction, was not a matter over in which they had any legal interest, or over which they had any legal control. There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetual/Sequoia.

[102] The fact that, in the abstract, the Kailas Capital group had some "influence" over the overall structure of the Aggregate Transaction is also not legally significant. The Kailas Capital group had no legal ability to dictate the consideration in the Asset Transaction. Any party that enters into a transaction that is in breach of s. 96 will have some motivation for doing so. The motivation of the party, however, is not a defence to a claim by a trustee in bankruptcy under that section.

[103] Take as an example a corporation that is having difficulty with its banking relationship. The bank says "we are not happy" and "you need to improve your balance sheet", and we look forward to you "doing something". If the corporation then enters into a transaction that is in violation of section 96, is no defence that they were "influenced" to do so by the bank, or that the bank was "interested" in the outcome.

[104] On this record, there is no legally relevant evidence to rebut the presumption that the related members of the Perpetual Energy group who were engaged in the Asset Transaction were not operating at arm's length. The evidence on the present record is that the structure and pricing of the Asset Agreement were under the control of the directors and officers of the Perpetual Energy group. That transaction was not shown to be negotiated at arm's length. Ms. Rose's conclusory statements to the contrary are inconsistent with the documentary evidence and corporate law.

[105] It is also not relevant that the overall Aggregate Transaction was undoubtedly and admittedly negotiated at arm's length. If a transaction is entered into in violation of s. 96, it is no defence that it was connected to a number of other transactions that did not engage s. 96 at all. It follows that when determining whether the transaction was at arm's-length for the purposes of s. 96, the proper focus is on the Asset Transaction, not the Aggregate Transaction. The problem of transfers at undervalue that is addressed by s. 96 persists no matter how the challenged transaction is structured, and each component of a multi-step transaction must meet the statutory requirements. Section 96 is directed at a "transfer at undervalue", and as held in ***Urbancorp Toronto Management Inc (Re)***, 2019 ONCA 757 at para. 46, ". . . the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer". The argument that non-arm's length, undervalue steps in a multi-step transaction can be disregarded is not consistent with the policy behind s. 96.

[106] It has been held that income tax cases can be helpful in determining what, as a matter of fact, amounts to "arm's-length" dealing, but there is no such factual dispute here: see *supra*, para. 99. In any event, it does not follow that cases about the tax consequences of the structure of multi-step transactions apply to transactions which are challenged under s. 96. It has long been accepted that a taxpayer can structure its affairs to reduce its tax liability; that concept does not apply to s. 96 of the *Bankruptcy and Insolvency Act*.

[107] For example, in ***Canada v McLarty*** the Minister taxed a transaction as if it was not at arm's-length, because initially it was between Compton, in its own right as seller, and Compton, as an agent/purchaser for the beneficial purchasers. The Supreme Court concluded that the trial judge was entitled to conclude that Compton was dealing at arm's length with the beneficial purchasers/taxpayers, such as McLarty. McLarty was the one being taxed, and he was not involved in the original transaction. In these appeals the Asset Transaction occurred entirely within the Perpetual Energy group, and there was no external party with a beneficial interest in it analogous to the one held by McLarty.

[108] The decision in ***Teleglobe Inc v Canada***, 2002 FCA 408, [2003] 1 CTC 255 is also distinguishable. In that case the Government of Canada privatized and sold Teleglobe to Memotec Data. When the tax consequences of the transaction were considered, an issue arose as to whether the relevant transaction was that between "Old Teleglobe" and "New Teleglobe", or the overall one between Canada and Memotec Data. The former transaction was not at arm's-length, but it was driven by policy considerations, specifically the need to maintain a debt to equity ratio that would generate consumer telecommunication rates consistent with those charged by other carriers. The court decided that the Canada/Memotec transaction was the appropriate transaction to consider, because the consideration at that level was negotiated at arm's length. It was Canada/Memotec's "agreement which fixed the values in question": ***Teleglobe*** at para. 30. There was no evidence on this record of any equivalent arms-length negotiation of the consideration that was set in the Asset Transaction for the transfer of the Goodyear Assets; that consideration was apparently set in-house, not at arm's-length. The consideration set in the Aggregate Transaction

was disconnected from the consideration set in the Asset Transaction. Further, there were no policy considerations underlying the Aggregate Transaction that are remotely analogous to those in ***Teleglobe***.

[109] The Perpetual Energy defendants accurately pleaded that the Asset Transaction was "a technical step" required before the Share Transaction could close. Ms. Rose fairly deposed that the Kailas Capital group had an interest in "which assets would comprise the Goodyear Assets". The Trustee in Bankruptcy acknowledged that the Asset Transaction was a preliminary step to the Share Transaction, and that the Kailas Capital group needed to have assurances that "the beneficial interest in the Goodyear Assets" had been transferred to Perpetual/Sequoia. None of that, however, displaces the critical fact that, on this record, the consideration paid in the Asset Transaction was apparently set not-at-arm's-length within the Perpetual Energy group.

[110] Finally, the respondents argue that Perpetual/Sequoia failed due to a fall in natural gas prices, not as a result of any transaction at an undervalue. That is not necessarily relevant, because s. 96 can be engaged if, at the time of transfer, the transferor is insolvent: s. 96(1)(b)(ii)(A). Section 96 assumes that the transferor might already have failed by the time of the transfer, or will fail as a result of it.

[111] It follows that appeal 1901-0262AC, seeking the summary dismissal or striking of the s. 96 claim, is dismissed. That claim will have to be resolved at trial.

The Alternative Section 96 Claim

[112] The case management judge did not deal with the related claim, described as the "alternative *BIA* claim", against Perpetual Energy Parent, New Trustee and Ms. Rose. It was alleged that these defendants were "privies" under s. 96(3), and "by reason of the [Asset Transaction], directly or indirectly, received a benefit or caused a benefit to be received by another person": see *supra*, paras. 15, 20. This portion of the claim may have effectively been dismissed as against the defendant Ms. Rose, because the case management judge concluded that the Resignation & Mutual Release was a complete defence for her.

[113] A "privy" need not actually be a party to the challenged transaction, so long as the privy is not dealing at arm's-length with one of the contracting parties. There can be little doubt in these circumstances that the sole director of a corporation does not deal at arm's length with that corporation. This is not a case like ***Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd***, 2013 ABCA 293, 556 AR 200, 86 Alta LR (5th) 203 where the director was dealing on his own account, with respect to his contract of employment. The decisive issue here is therefore whether there was a "benefit" conferred on any of the named defendants.

[114] The Trustee in Bankruptcy did not plead any direct benefit that was received from the Asset Transaction. The argument presented orally was that the Asset Transaction accrued generally to

the benefit of Perpetual Energy Parent, which would cause its shares to rise in value, and that Ms. Rose, as a shareholder of Perpetual Energy Parent would derive an indirect benefit. The record suggests that the shares of Perpetual Energy Parent actually decreased in value after the Aggregate Transaction. Ms. Rose held approximately 1-2% of the publicly traded shares of Perpetual Energy Parent, which may not constitute a sufficiently proximate "benefit" to engage s. 96(3).

[115] On the present record, it is not possible to identify what benefit may have been received by which defendant, and which defendant might have "caused that benefit" to have been conferred. The case management judge did not deal with the issue, and oral argument in this Court did not properly canvass it. Whether the Resignation & Mutual Release can encompass this claim is also an open issue: see *infra*, para. 166. These reasons accordingly do not deal with the alternative *BIA* claim, which remains before the trial court.

The Oppression Claim

[116] The Trustee in Bankruptcy pleaded that the business of Perpetual/Sequoia and its affiliates had been conducted in a way that was oppressive or unfairly prejudicial to its creditors, within s. 242(2) of the *Business Corporations Act*:

> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

One potential remedy under s. 242(3)(l) is an order compensating an aggrieved person.

[117] The statement of claim alleges:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

> 19.1 Ms. Rose exercised her powers as a director of PEOC and its affiliates in a manner; and
>
> 19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:
>
> oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

Under s. 242, the "corporation" in question was "PEOC", that is Perpetual/Sequoia. Perpetual Energy Parent ("PEI") and the New Trustee ("POC") were "affiliates". Perpetual Operating Trust, not being a corporation, did not fit the definition of "affiliate".

[118] Section 242(1) provides that only a "complainant" can apply for an oppression remedy, so a threshold issue was whether the Trustee in Bankruptcy could qualify as a complainant.

[119] The case management judge found that the claim of complainant status by the Trustee in Bankruptcy should be struck. Alternatively, the case management judge would not have exercised his discretion to grant complainant status. Further, even if the Trustee in Bankruptcy was given complainant status, the oppression claim should be struck or summarily dismissed on the basis that the "***Redwater*** decision nullifies the Oppression Claim".

Complainant Status of the Trustee in Bankruptcy

[120] The *Business Corporations Act* defines the "complainants" entitled to seek an oppression remedy:

> 239 In this Part,
>
> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (iii) a creditor . . .
>
> (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

> or
>
> (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

In short, a creditor has no automatic status as a complainant in an oppression action, but can qualify as a complainant if the court exercises its discretion to recognize it as a "proper person" to seek an oppression remedy.

[121] Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer. Neither "the environment" nor "the public" is listed.

[122] The case management judge considered the threshold issue of complainant status concurrently with the merits of the oppression claim, and appears to have "struck out" the claim for complainant status. This was partly because of an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237. As previously noted, if the problem was an absence of particulars, the remedy was to call for the provision of particulars, not to strike out the claim.

[123] Complainant status is a form of standing granted by the court, which is not properly regarded as a pleading that can be "struck out for failing to disclose a cause of action". Being a "complainant" is a recognized legal concept. In this case the Trustee in Bankruptcy pleaded that it was the trustee of Perpetual/Sequoia, and that as such it was a "proper person" to advance an oppression claim on behalf of the creditors. This was not an allegation of either fact or law, rather it was merely a statement of one component of the remedy that the Trustee in Bankruptcy sought: appointment as a complainant in the discretion of the court. Complainant status was not a "fact" that could be presumed to be "true" under R. 3.68(2)(b), as suggested in the reasons at para. 200. As noted, this pleading also did not amount to an assertion by the Trustee in Bankruptcy that it could self-appoint as a complainant.

[124] Seeking recognition as a "complainant" is a question of evidence, not a matter of pleading that is susceptible to being struck out under R. 3.68. The court may or may not exercise its discretion to recognize the proposed complainant, but making a claim for standing is not a matter of "striking out" a pleading for failure to disclose a cause of action. Complainant status is determined based on affidavit evidence presented by the potential plaintiff/complainant, outlining the nature of the alleged oppression, and the proponent's suitability to seek a remedy for that oppression. It was an error of principle to suggest that no evidence supporting the claim for complainant status could be considered on the application: reasons at para. 203. The statement of claim should undoubtedly plead sufficient facts to make out the oppression claim, but there is no requirement that all of the particulars supporting the appointment of the proponent as a complainant must be pleaded. Pleadings are not to contain evidence: R. 13.6(2)(a).

[125] The issue actually before the case management judge was whether the Trustee in Bankruptcy should be afforded complainant status. The case management judge indicated he would not exercise his discretion to do so for a number of reasons: (a) the oppression claim was "selective", rather than "collective", because it only reflected the interests of two classes of creditors: reasons at para. 238; (b) ***Redwater*** "nullified the oppression claim" because Abandonment and Reclamation Obligations are not a liability: reasons at para. 239; (c) the Trustee in Bankruptcy's prospect of success was "very low": reasons at para. 240; (d) the municipality creditors were not shown to be in a position analogous to a minority shareholder, nor was it shown that they had any legitimate interest in the management of the corporation: reasons at para. 202.

[126] Requiring a creditor to apply for complainant status reflects a policy that oppression claims are not to be used as a method of debt collection. The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression. In this litigation, however, the Trustee in Bankruptcy is not merely asserting the failure to pay a debt. The allegation here is that the corporation has been re-organized in such a way that it has been rendered unable to pay its debts. For example, the Asset Transaction, which resulted in the separation of the Goodyear Assets from the KeepCo assets, was alleged to be unfairly prejudicial to the creditors.

[127] In declining to grant the Trustee in Bankruptcy status as a complainant under the *Business Corporations Act* the case management judge failed to appreciate the collective nature of the role of a trustee in bankruptcy, namely that the oppression action was being brought by the Trustee in Bankruptcy on behalf of the estate of Perpetual/Sequoia, not on behalf of individual creditors. This was largely occasioned by the argument of the Trustee in Bankruptcy, which focused on two liabilities of particular concern, the Abandonment and Reclamation Obligations and the municipal taxes owed. He viewed the oppression claim as articulated by the Trustee in Bankruptcy as directly engaging the issue of whether the Abandonment and Reclamation Obligations were associated with creditors in the sense used both in ***Redwater*** and in the *Business Corporations Act*. He concluded that because ***Redwater*** made clear that there was no creditor associated with the Abandonment and Reclamation Obligations, the oppression action was doomed to fail.

[128] Section 242 contemplates that conduct can be oppressive respecting "any" security holder, creditor, director or officer. In circumstances like this, one creditor could apply for complainant status, effectively on behalf of all creditors, or only on its own behalf. It follows that there is nothing inherently unreasonable about a trustee in bankruptcy applying for complainant status. That could be a legitimate part of the trustee's duties to maximize the value of the bankrupt estate for the benefit of all of the creditors.

[129] The respondents rely on the ***Hordo*** case, which identified four criteria for determining if a creditor (and by analogy a trustee in bankruptcy) qualified as a complainant. The allegations in ***Hordo*** were very unusual, and indeed implausible. While that decision outlines some relevant considerations, it does not set out any binding preconditions to complainant status for a creditor. In order to qualify as a complainant, it is undoubtedly true that a creditor must demonstrate more

than that it is owed a debt. However, the creditors of a corporation do have a legitimate interest in preventing management from conducting the business of the corporation a way that prevents it from satisfying its obligations. The creditors may not have any assurance that their debts will be paid, but they do have a reasonable expectation that the corporation's business and assets will not be unfairly re-structured in such a way that payment of those debts becomes impossible: ***Tannis Trading*** at paras. 25-26; ***Manufacturers Life*** at para. 31; ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***, 2008 ONCA 183 at para. 66, 41 BLR (4th) 51; ***Gestion Trans-Tek Inc v Shipment Systems Strategies Ltd***, [2001] OTC 860 at paras. 30-36, 20 BLR (3d) 156.

[130] There is no hard rule that the creditor must be in a position analogous to that of a minority shareholder to qualify as a complainant, if only because s. 242 identifies "creditor" as a distinct category of complainant. Further, that requirement is somewhat circular, because if the business of the corporation is conducted in a way that unfairly disregards the interests of the creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder.

[131] The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy: see *infra*, paras. 140-41. That narrows, but does not necessarily eliminate, the Trustee in Bankruptcy's claim to complainant status.

[132] The Trustee in Bankruptcy did not provide particulars of the debts of Perpetual/Sequoia existing at the time of the Asset Transaction that remained unpaid on the date of bankruptcy. As a matter of pleading, that level of detail would not be necessary. Further, if the detail was of concern, the answer was to seek particulars, or to cross-examine the Trustee in Bankruptcy on his affidavit, not to strike the pleading.

[133] It is admittedly not clear from the record to what extent Perpetual/Sequoia assumed responsibility for any debts in the Asset Transaction, other than the Abandonment and Reclamation Obligations and municipal taxes. Nevertheless, the collective pursuit of all of those outstanding taxes in an oppression action would be "collective" not "selective". There is no rule that a creditor oppression action can only be launched if there are diverse debts owing to diverse creditors.

[134] If the judge concludes that there is no possible merit to the oppression claim, it would be pointless to grant complainant status to a creditor. That, however, is not the same thing as saying that the proposed complainant is unsuitable. That is one factor to consider, but is not a conclusive consideration in determining his complainant status.

[135] In summary, it was unhelpful to blend the analysis of the "complainant" status of the Trustee in Bankruptcy, with the substance of the oppression claim. The former is not a matter of "striking a pleading". On this record, it was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person".

The Merits of the Oppression Claim

[136] The case management judge concluded that the oppression claim could be struck out because it failed to disclose a cause of action. In his oral reasons he concluded that the oppression claim could not be summarily dismissed, but in the subsequent written reasons he concluded that summary disposition would have been possible as an alternative: reasons at paras. 233-35.

[137] The case management judge concluded that the ***Redwater*** decision was a complete answer to the oppression claim for two reasons. First of all, ***Redwater*** "nullified" the claim because it held that Abandonment and Reclamation Obligations were not a true obligation or liability, but merely "an allegation that is based on assumptions and speculations". Secondly ***Redwater*** concluded that Abandonment and Reclamation Obligations were owed to the public, and not to any "creditor"; neither the Alberta Energy Regulator nor the Orphan Well Association were creditors for that purpose. As previously noted, the first conclusion arises from a misreading of ***Redwater***. However, ***Redwater*** did conclude that there was no "creditor" with respect to Abandonment and Reclamation Obligations, and to that extent ***Redwater*** is relevant to these appeals.

[138] For the reasons previously given, Abandonment and Reclamation Obligations are a real obligation and liability of an oil and gas company: *supra*, paras. 85-89. The outcome of ***Redwater*** was that the proceeds from the sale of Redwater Energy's valuable assets had to be used to discharge those obligations, and could not be paid to the secured creditor. That in itself demonstrates the reality of these obligations. ***Redwater*** did not "nullify" Abandonment and Reclamation Obligations.

[139] What ***Redwater*** did decide, however, was that there was no "creditor" associated with Abandonment and Reclamation Obligations. As a result, Abandonment and Reclamation Obligations could not be "claims provable in bankruptcy". These appeals are concerned with the *Business Corporations Act*, not the *Bankruptcy and Insolvency Act*, but there is no principled basis to distinguish ***Redwater*** on this point, and find that there is a "creditor" associated with Abandonment and Reclamation Obligations for the purposes of s. 242. The definition of "creditor" for oppression purposes may be wider than it is in other contexts, for example by including contingent claims: ***Tannis Trading*** at paras. 24-25; ***Manufacturers Life*** at para. 30. However,

given the finding in ***Redwater*** that Abandonment and Reclamation Obligations are not associated with a creditor, they cannot directly be used to support complainant status in an oppression claim brought by "creditors".

[140] The conclusion that there is no creditor associated with Abandonment and Reclamation Obligations is not fatal to the oppression claim. The oppression claim can still be advanced by the Trustee in Bankruptcy on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy. As previously noted, the quantum of debts of that nature owed to the recognized creditors of Perpetual/Sequoia is unclear on this record. The respondents argue that, with respect to municipal taxes, there are only three municipalities still owed taxes from before 2017, and they have all entered into deferred payment plans.

[141] Further, even though the Abandonment and Reclamation Obligations may not be associated with a "creditor", that does not mean that they are irrelevant to an oppression claim brought on behalf of creditors. As ***Redwater*** confirms, Abandonment and Reclamation Obligations are real liabilities or obligations of oil and gas companies. It is possible that the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors.

[142] The case management judge also concluded that the proposed oppression claim was contrary to the policies of the Alberta Energy Regulator: reasons at paras. 120-25. He concluded "the Trustee asks the Court to frame a legal regime that has been rejected by the legislature": reasons at para. 125. The Trustee in Bankruptcy points to two threshold problems with this analysis: no evidence is permitted in an application under R. 3.68(2)(b), and in any event the evidence relied on by the case management judge was not placed on the record by the parties. It was an error for the case management judge to attempt to resolve this complex issue without a proper evidentiary record, and proper submissions from the parties.

[143] The extent to which the Asset Transaction is consistent with public policy may well be a central issue at trial. Further, the public policy of the Alberta Energy Regulator is not as clear as the case management judge suggested. In ***Redwater***, the Alberta Energy Regulator stated that its policy was to require that all the assets of the corporation be used for reclamation, but that the Regulator would not go outside the corporation to impose liability on others: ***Redwater*** at paras. 104, 107-108. If that policy were applied here, it could mean that the Regulator's policy was that recourse could be had to the KeepCo Assets, but it not would not extend beyond that. It is not obvious that the Trustee in Bankruptcy's claim is inconsistent with any policy.

Summary of the Oppression Claim

[144] In summary, the case management judge erred in his analysis for several reasons including conflating the determination of whether to grant complainant status with the merits of the claim.

There was no principled basis to deny the Trustee in Bankruptcy complainant status to launch an oppression action. It was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person". Further, while the oppression claim may be narrower than the Trustee in Bankruptcy anticipated, the pleadings do disclose a cause of action. The claim cannot be struck out on this record. Further, the state of the record and the complexity of the issues does not permit a fair disposition of this claim on a summary basis.

Public Policy and Illegality

[145] The statement of claim pleaded that "the Transactions are void" on grounds of public policy, on the basis of statutory illegality, and on equitable grounds: see *supra*, para. 26. The case management judge concluded that neither "public policy" nor "illegality" were causes of action, although they might be defences. Equitable rescission was a remedy, not a cause of action, and in any event, rescission would be impossible at this stage of the transactions. The Trustee in Bankruptcy's argument was that the structure of the Asset Transaction was inconsistent with the policy of the Alberta Energy Regulator, but no particulars were provided. Further, the case management judge held that ***Redwater*** extinguished the public policy claim because the Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 27-29.

[146] The case management judge correctly held that neither "public policy" nor "illegality" were causes of action that would support a claim for damages. The Trustee in Bankruptcy, however, never suggested otherwise; the pleading was simply that the challenged transactions were "void", meaning that they could not be relied on by the defendants to justify their actions. This portion of the statement of claim, when read generously, does not advance a cause of action, but was a response to an anticipated defence. This pleading might have been placed in a Reply to the statements of defence, but it was not inappropriate for the Trustee in Bankruptcy to include it in the statement of claim. If further clarification of this pleading is required, the remedy is to amend, not to strike.

[147] A central issue underlying this litigation is whether an oil and gas company can arrange its affairs so as to avoid regulatory scrutiny, in a manner that is analogous to income tax law. For example, does the Alberta Energy Regulator's policy enable a technique such as leaving the Retained 1% Interests in Perpetual/Sequoia for a few minutes in the middle of this transaction in order to bypass regulatory scrutiny? The public policy pleading alleges that this type of strategy is not permissible, and that avoiding regulatory scrutiny is not necessarily equivalent to regulatory compliance. The statement of defence filed by the Perpetual Energy group asserts that the transactions are "fully compliant" with "public policy reflected in the Regulatory Regime and the law". It further pleads that the transactions were not structured "to be completed without regulatory intervention". As noted, it cannot be determined from this record whether the policies of the Alberta Energy Regulator have been violated: *supra*, paras. 142-43.

[148] ***Redwater*** does not provide an answer to this portion of the pleadings. ***Redwater*** does not hold that Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 90-97. The ultimate effect of ***Redwater*** was actually that the attempt, in that case, to separate Redwater Energy's valuable assets from its abandoned wells was ineffective. ***Redwater*** held that the public is the beneficiary of the environmental obligations inherent in the Abandonment and Reclamation Obligations: reasons at para. 221, ***Redwater*** at para. 122. It is in this sense that "public policy" is engaged by this litigation. The exact scope and enforceability of the public interest is uncertain, but that is no reason to strike out pleadings at this stage. These are the type of novel issues that must be tested at trial.

[149] The case management judge concluded that the Trustee in Bankruptcy was attempting to impose liability for environmental claims on directors, contrary to the intentions of the Legislature. That, however, is not the thrust of this litigation. The Trustee does not seek to make directors liable for environmental damage, but rather to hold them to account for allegedly having structured the affairs of the corporation (Perpetual/Sequoia) in such a way that made it impossible for that corporation to discharge its public obligations. This may be a novel position, but it is not one that should be resolved summarily.

[150] The respondent Ms. Rose argues that the assumption by Perpetual/Sequoia of the Abandonment and Reclamation Obligations in the Asset Transaction had no negative effect on it. She argues that, as the holder of the regulatory licences, Perpetual/Sequoia was exposed to the Abandonment and Reclamation Obligations both before and after the Asset Transaction. Exactly where the burden of these obligations lies will have to be resolved at trial. The Trustee's argument, however, is that whatever burdens Perpetual/Sequoia had before the Asset Transaction were set off by the positive value of the KeepCo Assets. It was partly the separation of the Goodyear Assets from the KeepCo Assets that allegedly tainted the transaction.

[151] The case management judge correctly held that rescission is likely unavailable as a remedy, because the parties could not be restored to their original positions. However, where an equitable remedy is blocked, the court might grant an alternative remedy in damages. Directors owe their corporation fiduciary duties, which are equitable in nature. In any event, "equitable rescission" is only mentioned in one of the headings in the statement of claim, and is not asserted as a cause of action.

[152] In summary, the "public policy" pleadings (set out *supra*, para. 26) should not have been struck out. To the extent necessary, they could have been clarified by amendment, or enhanced with particulars. On the whole they set out and engage an important underlying issue in this litigation that can only be resolved at trial.

Breach of Director's Duties

[153] The statement of claim alleges that Ms. Rose, as the sole director of Perpetual/Sequoia at the time the Asset Transaction was approved, was in breach of her duties to Perpetual/Sequoia.

[154] Under the *Business Corporations Act* the management of the affairs of a corporation is placed in the hands of the directors:

> 101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

Some of the duties of a director are set out in the statute:

> 122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties shall
>
> > (a) act honestly and in good faith with a view to the best interests of the corporation, and
> >
> > (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The power to manage, and these director's duties, are universal to all corporations. There is no exception for a "special-purpose corporation that was a wholly owned subsidiary", or because "this was Perpetual Energy doing this transaction through a subsidiary", as suggested in the reasons at paras. 312-13.

[155] A fundamental principle of corporate law is that each corporation is a separate legal person. It owns its own assets, and controls its own affairs. The shareholders may be the ultimate owners, and they may have the power to elect and replace directors, but in the absence of a unanimous shareholders agreement it is the directors who manage the corporation. The statutory duties of directors fall on their shoulders. It was an error of law to conclude that Ms. Rose did not control, and was not the "directing mind" of Perpetual/Sequoia as held in the oral reasons for decision. The director's resolution approving the Asset Transaction, which recited that the director believed it was in the best interest of the corporation, was in fact signed by Ms. Rose; no one else was authorized to do so.

[156] Ms. Rose had an obligation to ensure that the Asset Transaction was in the best interests of Perpetual/Sequoia: *Business Corporations Act*, s. 122(1)(a); ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 at para. 66, [2008] 3 SCR 560. Ms. Rose argues that she had no alternative but to do the bidding of Perpetual Energy Parent. However, if Ms. Rose did not agree that the instructions she was getting were in the best interests of Perpetual/Sequoia, her obligation

was to resign; her replacement would then have been responsible for any decisions made. If Perpetual Energy Parent had executed a unanimous shareholder declaration, it would have been responsible for all management decisions: *Business Corporations Act*, s. 146(7). As matters stood, however, Ms. Rose was responsible for ensuring that the Asset Transaction was in Perpetual/Sequoia's best interests. Ms. Rose's argument that she was only following the orders of Perpetual Energy Parent is merely an admission by Ms. Rose that she had abdicated her responsibility as a director.

[157] Notwithstanding her assertion that she did not control Perpetual/Sequoia's business, and was merely following orders, Ms. Rose inconsistently alleged that she "took her responsibilities as a director and officer of [Perpetual/Sequoia] seriously, considered the best interests of [Perpetual/Sequoia], its stakeholders, and then exercised her business judgment to the best of her ability": reasons at para 323. The "business judgment rule" provides that the courts will defer to the judgment of the directors on difficult business decisions. It does not support the abdication of a director's decision making responsibility. Further, Ms. Rose deposed that the decision to enter into the Asset Transaction was not governed solely by the interests of Perpetual/Sequoia, but also by the interests of Perpetual Energy Parent and the Kailas Capital group.

[158] Finally, for the reasons previously given, ***Redwater*** did not "nullify" the claim for breach of director's duty, as suggested in the reasons at paras. 285, 341.

[159] In summary, it was not, on the face of it, appropriate to either strike out or summarily dismiss the claim alleging breach of director's duties. That conclusion is subject to analyzing the effect of the Resignation & Mutual Release, discussed next.

The Resignation & Mutual Release

[160] One component of the Aggregate Transaction was that after the change of control Ms. Rose would resign as the sole director of Perpetual/Sequoia, and release the corporation from any claims she might have against it. The new directors of Perpetual/Sequoia, effectively elected by the Kailas Capital group, would grant her a corresponding release of any claims that might arise from her decisions as a director, other than claims relating to fraud, criminal conduct or deceit. Ms. Rose asserts that the resulting Resignation & Mutual Release is a complete defence to the claim that she breached her duties as a director.

[161] The Trustee in Bankruptcy argues that the Resignation & Mutual Release is not legally enforceable against it. Alternatively, the Trustee in Bankruptcy argues that the Resignation & Mutual Release, by its terms, does not cover the claims being made against Ms. Rose.

Legal Effectiveness of the Resignation & Mutual Release

[162] In the abstract, a widely worded release could cover the claims made against Ms. Rose in the statement of claim. The Trustee in Bankruptcy, however, argues that the Resignation & Mutual Release is legally ineffective, referring particularly to s. 122(3) of the *Business Corporations Act*:

> (3) Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.

On a proper reading of the statute, this provision does not necessarily render ineffective the type of release at issue in this litigation.

[163] There are a number of different scenarios under which a director might be released from liability:

a. A person might agree to act as a director, but only if the corporation entered into a contract relieving that director of liability for any breaches of duty while in office. Such a release would clearly be an attempt to release the director from "the duty to act in accordance with this Act", and would be ineffective under s. 122(3).

b. At the other end of the spectrum, if a director was sued for breach of duty, the director and the corporation might ultimately enter into a settlement agreement. That settlement might involve the director paying damages, and would likely also include a release. Such a release was not intended to be caught by s. 122(3): see Institute of Law Research and Reform, Report No. 36, Proposals for a New Alberta Business Corporations Act, August, 1980, p. 67.

c. A third common scenario arises where there is a change of control of the corporation, and as a condition of closing the existing directors and officers are released from liability for any past breaches and transgressions. This kind of release is very common, and is not within the contemplation of s. 122(3). Since the outgoing directors have resigned, they will not thereafter be under any "duty to act in accordance with this Act". Releasing a director from liability for past breaches of duty is not the same as relieving the director of the obligation to perform those duties. If the purchaser otherwise "gets what it paid for", it knowingly gives up the opportunity to make claims for earlier breaches only discovered after closing. This prevents a windfall to the purchasers such as the one that arose in the seminal case of ***Regal (Hastings) Ltd. v Gulliver***, [1942] 1 All ER 378, [1967] 2 AC 134 (HL). The interpretation of this type of provision suggested in ***McKay-Cocker Construction Ltd v McMurdo***, [2001] OTC 791 at para. 16 is too narrow.

d. A fourth scenario is where the director is involved in negotiating or approving a contract, and in the course thereof is in breach of his or her duties. For example, if a director negotiated a contract where part of the consideration was diverted from the corporation to the director, that would be a breach of fiduciary duty. If the director arranged to have a release included in the contractual documents, that release might not be enforceable, either at common law, or because of s. 122(3). Enforceability of the release might depend on whether the other directors or the shareholders were aware of the inappropriate aspect of the transaction, and the wording of the release: see ***Temple v Bailey***, 2020 NLCA 3 at para. 33, 443 DLR (4th) 633, discussing ***London and South Western Railway v Blackmore*** (1870), LR 4 HL 610 and other cases.

e. The final scenario involves a combination of the third and fourth scenarios. The tainted transaction and the change of control happen at the same time. The allegation is that the director breached his or her duty during the change of control transaction, and a release was given at that time relieving the former director of liability. However, in this scenario the release of the director is given by the new owners, after the change of control.

The final situation is the one faced by the respondent Ms. Rose. It is alleged that Ms. Rose breached her duties during the adoption of the Asset Transaction. The Resignation & Mutual Release and the Asset Transaction were both part of the Aggregate Transaction. The release, however, was granted by 198Co and Kailas Capital, after the change of control.

[164] Given the particular facts on this record, s. 122(3) should not be interpreted as invalidating the Resignation & Mutual Release, in so far as it releases the claims for breach of director's duties and oppression. Kailas Capital and 198Co purchased Perpetual/Sequoia based on the representation that it contained the beneficial interest in the Goodyear Assets, which had inherent in them some Abandonment and Reclamation Obligations. Kailas Capital and 198Co knew all of the details behind the Asset Transaction and the Share Transaction, and knew of Ms. Rose's involvement. They agreed to purchase the Goodyear Assets; in the Resignation & Mutual Release they disclaimed any future ability to seek damages of any kind from Ms. Rose based on breaches of director's duties or oppression that occurred before they purchased Perpetual/Sequoia. The Trustee in Bankruptcy cannot be in any better position. Subject to the issues discussed in the next section of these reasons surrounding the "claims" covered by the release, and considering the context of the transactions and the wording of the various agreements selected by the parties, there is no basis to completely invalidate the Resignation & Mutual Release: ***London and South Western Railway*** at p. 623.

[165] While the issue may not directly arise in this litigation, a proviso should be added that a generalized release of a director may not cover every duty owed. One example is the potential, but

presently ill-defined, obligation of a director of a corporation to ensure that the corporation complies with its environmental and regulatory responsibilities: see J. Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change*, Commonwealth Climate and Law Initiative, Working Paper Series, October 14, 2017. As noted in ***Redwater***, such obligations would potentially be owed to the public, not necessarily to the corporation exclusively. It may not, therefore, be open to a private party such as 198Co to release a director like Ms. Rose from those obligations. The extent to which there are such duties, and whether or how they can be enforced against Ms. Rose is a matter that cannot, and need not be resolved on this record.

[166] One issue that does arise directly on this record is whether a corporation can a) enter into a transaction in violation of s. 96, b) confer a benefit on a "privy" under that transaction in violation of s. 96(3), and c) immediately grant a release to the privy for any liability. A trustee in bankruptcy who subsequently challenges the transaction has a compelling argument that such a release is legally ineffective. This issue is directly relevant to the alternative *BIA* claim, which, as noted *supra* para. 115, is as yet unresolved. The impact of the Resignation & Mutual Release on the alternative *BIA* claim should also be referred back to the trial court for adjudication.

Interpretation of the Resignation & Mutual Release

[167] The next question is the proper interpretation of the Resignation & Mutual Release. The Trustee in Bankruptcy argues that even if it is legally effective, it does not cover the claims now made. The answer is not obvious because of references to inconsistent definitions of "Claims" in the various documents.

[168] The shares of Perpetual/Sequoia were transferred to 198Co under the Share Purchase Agreement (called the "Share Transaction" by the parties), which was part of the Aggregate Transaction. It defines "Claim":

> 1.1 **Definitions**. In this Agreement . . .
>
> > (m) "Claim" means any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing; (EKE A87)

Article 8 of the Share Purchase Agreement, entitled "Closing and Deliveries", includes:

> 8.1 Deliveries of the Vendor.
>
> > (a) At Closing . . . the Vendor shall deliver . . .

> (xviii) resignations of all directors and officers of the Corporation and a release from such directors and officers pursuant to which they release all Claims against the Corporation
>
> 8.2 Deliveries of the Purchaser.
>
> (a) At Closing . . . the Purchaser shall deliver . . .
>
> (xiii) releases signed by the new signing authorities of the Corporation as appointed by the Purchaser releasing the directors and officers of the Corporation from any Claims related to such directors and officers acting as a director or officer of the corporation. (EKE A122-23)

The "Deliveries" contemplated by these clauses were implemented through the execution and exchange of the Resignation & Mutual Release.

[169] In the Resignation & Mutual Release, Ms. Rose resigned as the director of Perpetual/Sequoia, and released Perpetual/Sequoia and its agents from "any and all Claims (as defined in the Share Purchase Agreement)". It then continued:

> 3. PEI [Perpetual Energy Parent] and PEOC [Perpetual/Sequoia] do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement) which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or connected with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose. (EKE A160)

Clause 4.01 of the Purchase and Sale Agreement (called the "Asset Transaction" by the parties), recited that the "Vendor makes the following representations and warranties", including:

> (l) Claims. As it pertains to the Assets only, no suit, action or other proceeding before any court or governmental agency has been commenced against Vendor, or to the knowledge of Vendor, has been threatened against Vendor or any Third Party, which might result in impairment or loss of the interest of Vendor in and to any of the Assets or which might otherwise adversely affect the Assets other than has been previously disclosed; (EKE A67)

The Trustee in Bankruptcy argues that the narrower definition of "Claims" found in clause 4.01(l) of the Purchase and Sale Agreement does not cover the claims against Ms. Rose asserted in the statement of claim.

[170] To summarize, on the face of it there is a disconnection between the various documents:

(a) Section 8.2(a)(xiii) of the Share Purchase Agreement, which is the "blanket" document, envisions a wide release relating to Ms. Rose's conduct as a director: "any Claims related to such directors and officers acting as a director or officer of the corporation".

(b) Likewise, clause 3 of the Resignation & Mutual Release envisions a wide release relating to Ms. Rose's conduct as a director: "Rose having acted, at the request of PEI, as a director and officer of PEOC".

(c) The covenants in the Share Purchase Agreement refer to the wider definition of "Claims" found in that document: "any claim, demand, lawsuit . . .".

(d) The Resignation & Mutual Release contains inconsistent references. Ms. Rose releases Perpetual/Sequoia from all claims, using the wider definition in the Share Purchase Agreement. However, in clause 3 Perpetual/Sequoia purportedly only releases Ms. Rose with respect to the narrower definition of claims in the Purchase and Sale Agreement, relating to "impairment of the Assets".

(e) The reference to "Claims" in clause 3 of the Resignation & Mutual Release limits the released claims to those relating to "impairment of the Assets" only, which creates a disconnect with (i) the later reference in that very clause to "Rose having acted, at the request of PEI, as a director and officer of PEOC", and (ii) section 8.2(a)(xiii) of the Share Purchase Agreement, which refers to claims arising from "acting as director", not with respect to the "impairment of the Assets".

On his reading of the Resignation & Mutual Release, the Trustee in Bankruptcy argues that none of the claims against Ms. Rose relate to the "impairment of the Assets".

[171] The respondent Ms. Rose notes that this issue was not raised before the case management judge. If the issue had been identified, she argues she would have introduced further evidence about the intention of the parties at the time the transactional documents were drafted. Given these potential gaps in the record, and given that this Court does not have the benefit of the analysis of the issue by the case management judge, it is not appropriate to attempt to resolve it at the appellate level. A release must not be interpreted in a vacuum, but rather according to the context in which it was drafted, having regard to the intention of the parties: ***Hill v Nova Scotia (Attorney General)***, [1997] 1 SCR 69 at paras. 20-21. This issue is referred back to the trial court.

Other Issues

[172] The respondent Ms. Rose argues that the Trustee in Bankruptcy did not adequately plead his position with respect to the Resignation & Mutual Release. For example, the Trustee did not

plead that the Resignation & Mutual Release should be "set aside". The pleadings with respect to this issue adequately advised the respondent that the effectiveness of the Resignation & Mutual Release was being challenged. The Trustee in Bankruptcy was entitled to argue that the Resignation & Mutual Release was legally ineffective against it without seeking to have it "set aside" or declared "void". All concerned are well aware of the issues, and in any event, any shortcomings in the pleadings could easily be cured by amendment.

[173] The Trustee in Bankruptcy argues that the wording of the Resignation & Mutual Release is not wide enough to cover unknown claims, or "future claims". The intent, however, is clear; the new owners of Perpetual/Sequoia were to take the company they were purchasing "as is". The intention was obviously to relieve Ms. Rose of any claims that arose before the closing of the Aggregate Transaction, whether they were known or unknown, excepting claims based on fraud, criminal conduct, or deceitful conduct. The commercial efficacy of the Resignation & Mutual Release required that it cover unknown claims.

[174] Further, there is no issue here as to whether the Resignation & Mutual Release is wide enough to cover "future claims"; there are no such claims. The Trustee in Bankruptcy asserts only claims that relate to the conduct of Ms. Rose before the closing of the Aggregate Transaction, and before she resigned as the director of Perpetual/Sequoia. The Trustee in Bankruptcy obviously did not assert these claims until after the Resignation & Mutual Release was signed, but that does not mean they are "future claims" as that term is applied to releases. There is a distinction between claims that relate to conduct that post-dates the signing of the release, and claims advanced after the signing of the release but relating to conduct before the signing: ***Biancaniello v DMCT LLP***, 2017 ONCA 386 at para. 52, 2017 DTC 5061. Further, as previously noted (*supra*, para. 163(a)) while it is questionable whether a release respecting future performance of director's duties can be effective, no such issues are engaged here.

Summary

[175] In summary, while there was facial merit to the claims of breach of director's duties, most of Ms. Rose's potential liability to Perpetual/Sequioa was released by the Resignation & Mutual Release. While some portions of the claim as against the respondent Ms. Rose were properly summarily dismissed, there was no basis on which the claim could be struck for failing to disclose a cause of action. It was not, however, possible to dispose of the alternative *BIA* claim against Ms. Rose on this record, and that and related issues must be referred back to the trial court as previously indicated in these reasons.

The Costs Appeal

[176] In appeal 2001-0174AC the Trustee in Bankruptcy challenges the award to the respondent Ms. Rose of 85% of her solicitor and client costs. The Trustee in Bankruptcy argues that costs should, at most, have been awarded on Schedule C.

[177] The costs award was made on the assumption that Ms. Rose had been completely successful in defending the action against her. As previously noted in these reasons, there are some aspects of the claim that are as yet unresolved. For that reason alone, the costs award must be set aside, and the costs of the summary judgment and striking application must be returned to the case management judge. Strictly speaking, it is not necessary to discuss the costs award further. The issues, however, were fully argued, and there are a number of important issues that cannot be left unresolved.

[178] A trial judge has a wide discretion in awarding costs, although costs are generally awarded based on Schedule C: R. 10.31. Costs awards are designed to partially indemnify the successful party for the legal expenses incurred during the litigation. Party and party costs awards are deliberately set so that they do not fully indemnify the successful party. This discourages unwarranted litigation, it promotes proportionality in litigation that is commenced, and it creates an incentive on all litigants to litigate economically.

[179] The mere fact that a claim is unsuccessful is not sufficient to justify solicitor and client costs: ***Young v Young***, [1993] 4 SCR 3 at p. 134; ***Goldstick Estate (Re),*** 2019 ABCA 508 at paras. 24, 27, 55 ETR (4th) 1. There are some recognized situations when solicitor and client costs can be awarded, generally when there has been reprehensible, scandalous or outrageous conduct by a party: ***Young*** at p. 134. The misconduct alleged must arise from the conduct of the litigation; a distaste for the unsuccessful litigant, its pre-litigation conduct, or its cause of action is not sufficient: ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at paras. 72-73, 53 Alta LR (6th) 44; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras. 8-9, 153, 46 Alta LR (6th) 224. Further, there is no exception that "justice can only be done by the complete indemnification of costs": ***Luft v Taylor, Zinkhofer & Conway*** at para. 74. Any such exception invoking "justice" in the abstract (inappropriately relied on in the costs reasons at paras. 220, 237(b)) is conclusory and would overtake the rule.

[180] The costs reasons are summarized *supra*, paras. 40-55. The case management judge concluded that, in appropriate cases, a trustee in bankruptcy could be personally liable for costs. In this litigation the Trustee in Bankruptcy was the "real promoter" of the litigation, and for that and other reasons he should be personally liable for costs. The Trustee in Bankruptcy had not proven that the litigation was authorized by the inspectors. Trustees were officers of the court, and owed duties to potential defendants. The Trustee in Bankruptcy had commenced this action without a proper investigation, and without giving the defendants an opportunity to respond. The serious allegations against Ms. Rose were particularly egregious. Overall, the Trustee in

Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 227.

[181] Costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at paras. 24-7, [2004] 1 SCR 303; ***Metz v Weisgerber***, 2004 ABCA 151 at paras. 6-7, 33 Alta LR (4th) 17, 348 AR 143; ***Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2 at para. 49, [2007] 1 SCR 38; ***Walker v Ritchie***, 2006 SCC 45 at para. 17, [2006] 2 SCR 428. The costs award under appeal contains such reviewable errors.

[182] The costs appeal raises the following specific issues:

(a) Costs in bankruptcy proceedings

(b) Approval of the inspectors

(c) Trustees as officers of the court

(d) The duty to investigate

(e) Allegations against the respondent Ms. Rose

Costs in bankruptcy proceedings

[183] The costs reasons discuss the question of costs awards in bankruptcy proceedings generally, and in particular the personal liability of trustees in bankruptcy for costs.

[184] First of all, it is helpful to note that there is no "Bankruptcy Court" in Alberta, contrary to common parlance and what is suggested in the reasons: costs reasons at paras. 45, 67, 71. There are only three courts in Alberta: the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta, and the Provincial Court of Alberta. Section 183(1)(d) of the *Bankruptcy and Insolvency Act* provides that bankruptcy jurisdiction in Alberta is vested in the Court of Queen's Bench, but as pointed out in Holden, Morawetz & Sarra, The 2019 Annotated Bankruptcy and Insolvency Act, (Toronto: Thomson Reuters, 2019) para. B-13: "Although commonly referred to as the bankruptcy court, this reference is done for convenience only; there is in fact no such tribunal". See also ***Sam Lévy & Associés Inc v Azco Mining Inc,*** 2001 SCC 92 at para. 20, [2001] 3 SCR 978; ***Casson v Lakeside Hotel & Resort Ltd*** (1967), 61 DLR (2d) 421 at pp. 423-24, 59 WWR 65 (BCCA). The correct reference is to the "superior court exercising bankruptcy jurisdiction".

[185] It is true that the Court of Queen's Bench maintains a special "commercial" hearing list that deals with most bankruptcy matters. There is a group of judges that is routinely assigned to hear that list, but that does not constitute them a "bankruptcy court", any more than the existence

of special family law lists creates a "family court". Further, the existence of the commercial list does not in any way diminish the mandate of any other judge of the Court of Queen's Bench to deal with bankruptcy matters.

[186] The appropriate distinction, therefore, is not between proceedings in the "bankruptcy court" and proceedings in the "Court of Queen's Bench". For costs purposes, the proper distinction is based on the type of work being done. Matters related to what may loosely be called the mechanics of the bankruptcy process, and issues that arise within that process, are dealt with under the *Bankruptcy and Insolvency General Rules*, CRC, c. 368, including its tariff of costs. Section 197(1) of the *Bankruptcy and Insolvency Act* provides:

> 197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

This provision, by its specific wording, only applies to proceedings "under this Act", that is proceedings related to the mechanics of the bankruptcy.

[187] On the other hand, civil litigation conducted in the Court of Queen's Bench, even by a trustee in bankruptcy, is governed by the Alberta *Rules of Court*, and costs are dealt with under Part 10 and Schedule C of the Alberta *Rules*. While this litigation raises, in part, rights that are created under the *Bankruptcy and Insolvency Act* (specifically, under s. 96), it is primarily an action by the bankrupt estate against third parties. This litigation and its costs consequences are accordingly governed by the Alberta *Rules of Court*.

[188] When a corporation is assigned into bankruptcy, its assets and businesses are taken over by the trustee in bankruptcy. Corporations, including bankrupt corporations, are inanimate legal persons and can only act through human representatives. The trustee in bankruptcy is the personification of the bankrupt corporation. When the trustee commences litigation on behalf of a bankrupt corporation, there is no meaningful distinction to be drawn between the trustee, the estate in bankruptcy, and the bankrupt corporation. It is artificial to suggest that the trustee is the "real promoter" of such litigation, as held in the costs reasons at paras. 35-38. By this standard, the trustee would always be the "real promoter" of estate litigation. The trustee is the person that makes the decision to commence litigation, with the approval of the inspectors, but bankrupt estate litigation is conducted by and on behalf of the bankrupt corporation. In any event, this artificial distinction does not affect the liability of a trustee in bankruptcy for costs.

[189] When a trustee in bankruptcy commences litigation on behalf of a bankrupt, the trustee is always initially liable for costs awards payable to third parties: ***Sigurdson v Fidelity Insurance Co of Canada*** (1980), 110 DLR (3d) 491 at pp. 495-96, 20 BCLR 345 (CA); ***Pythe Navis Adjusters Corp v Columbus Hotel Co (1991)***, 2014 BCCA 262 at paras. 34-36, 61 BCLR (5th) 346; ***Akagi v Synergy Group (2000) Inc,*** 2015 ONCA 771 at paras. 22-23, 128 OR (3d) 64; ***Vancouver Trade Mart v Creative Prosperity Capital Corp*** (1998), 7 CBR (4th) 3 at para. 30

(BCSC). The seminal case is ***In Re Williams & Co; Ex parte The Official Receiver***, [1913] 2 KB 88 at pp. 94-95:

> The question in this appeal is one that is so familiar and so well settled with reference to other jurisdictions that I confess I was surprised to learn that it was thought capable of being argued in bankruptcy. If trustees of a settlement, or executors, or administrators of a deceased person, or a receiver, or a liquidator, raise a contest with another person and bring him into court to defend himself in respect of some claim which is set up against him, and the claim fails, the trustees, or executors, or receiver, or official liquidator, are personally liable to pay the costs. It is immaterial that in making the claim they acted *bona fide* in the belief that they were doing that which was for the benefit of the estate which they represented. They are personally liable as between them and the defendant; they are entitled to an indemnity out of the estate which they are representing unless they have been guilty of misconduct. The question of misconduct is not relevant at all in these circumstances as between the plaintiffs and the defendant whom they have brought into Court; it does not matter whether they have acted *bona fide* or not; they brought an action and failed, and they are personally liable to pay costs, but in a proper case they are, as I have said, entitled to an indemnity. (emphasis added)

The issue of "personal liability" for costs of a trustee in bankruptcy properly relates only to the ability of the trustee to be indemnified for its legal expenses by the bankrupt estate, not to the entitlement of third parties to recover their costs.

[190] Section 197(3) of the *Bankruptcy and Insolvency Act* provides:

> 197(3) Where an action or proceeding is brought by or against the trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

Three things should be noted: (a) this provision only relates to costs arising from "bankruptcy work" not general civil litigation: ***Sigurdson*** at pp. 493-94, (b) the trustee is presumptively entitled to be indemnified from the estate for its expenses relating to "bankruptcy work", in accordance with the priority scheme in s. 196(6), and (c) in the absence of some misconduct the court will not direct that the trustee personally bear the burden of those expenses.

[191] These general rules respecting the personal liability of trustees in bankruptcy in ordinary litigation are summarized in Holden, Morawetz & Sarra, Bankruptcy and Insolvency Law of Canada, 4th ed (Toronto: Thomson Reuters, online) at para. I§84:

> Section 197(3) only applies to proceedings in the bankruptcy court. If a trustee in bankruptcy takes proceedings or has proceedings taken against it in the ordinary

> civil courts, s. 197(3) has no application, and if the trustee is unsuccessful in such proceedings, it will be personally liable for costs. The trustee is, however, entitled to indemnity out of the bankrupt estate unless it has been guilty of some misconduct in bringing the proceedings or has taken them without the permission of the inspectors.

The distinction between the trustee's liability to pay costs, and its entitlement to be reimbursed by the bankrupt estate is not always recognized in the cases.

[192] Thus, when a trustee is said to be "personally liable" for costs in ordinary civil litigation, that can, at best, mean that the trustee is not entitled to be indemnified for those expenses from the estate. This, however, is primarily a matter for the creditors and inspectors. A third party litigant, who has been awarded costs but is a stranger to the bankruptcy itself, is generally not interested in whether the trustee is entitled to indemnity from the estate. That is a concern of the trustee, particularly if the estate lacks resources to indemnify the trustee.

[193] It follows that much of the discussion in the costs reasons respecting whether the Trustee in Bankruptcy should be personally liable for costs was moot. Ms. Rose, as the putatively successful litigant, was entitled to recover her costs from the Trustee in Bankruptcy. Absent any objection from the inspectors, there was no reason for the case management judge to rule on whether the Trustee in Bankruptcy was entitled to indemnity from the Perpetual/Sequoia estate: see the costs reasons at para. 43.

Approval of the inspectors

[194] Section 30(1)(d) of the *Bankruptcy and Insolvency Act* provides that litigation in the name of the estate must be authorized by the inspectors. The case management judge questioned the authority of counsel to commence the action. In response to the inquiry from the case management judge, "Have inspectors given permission for PWC to bring these legal proceedings?", the Trustee in Bankruptcy responded in writing "Yes". Counsel confirmed, in open court, that the proper authorization had been obtained, and offered further evidence "if that's required". In a later proceeding, counsel provided a redacted copy of minutes of a meeting of the inspectors which stated "Proceed as described in Special Counsel's memos". From time to time, some of the inspectors of the Perpetual/Sequoia bankruptcy were present in court.

[195] Despite these assurances, the case management judge held in the Costs Reasons:

> 64. In this case, despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose.

In the absence of any indication at all that the action had not properly been authorized, the case management judge's insistence on further "evidence" was unreasonable. There was no air of reality to the suggestion that litigation of this magnitude and notoriety had been advanced as far as it had without the inspectors being aware of it.

[196] It is trite law that the submissions of counsel are not evidence, but that does not mean that they can never be relied on. Representations by counsel relating to the conduct of the litigation can be "accepted by the court in the solemn fashion they are provided": ***Peddle v Alberta Treasury Branches***, 2004 ABQB 608 at para. 43. If counsel, as an officer of the court, states in open court that he or she has authority to pursue the litigation on behalf of the client, that representation can be relied on in the absence of actual evidence to the contrary: ***R. v Harrison***, [1977] 1 SCR 238 at p. 246; ***Selangor United Rubber v Cradock***, [1969] 1 WLR 1773 at pp. 1781-82, [1969] 3 All ER at p. 975 (Ch).

[197] The appellant Ms. Rose argued that from the heavily redacted material eventually provided it was not possible to tell if the action commenced was the one actually authorized, and if the authorization included suing Ms. Rose. Whether counsel for the Trustee in Bankruptcy is acting beyond his authority is primarily a concern of the inspectors. The defendants have no legitimate interest in inquiring into the decision making process behind the litigation, or the details of advice received from special counsel. Solicitor and client privilege precludes the defendants or the court from dissecting the trustee's litigation strategy and instructions to counsel. If a defendant has some actual evidence of a want of authority, that is one thing, but a defendant is not entitled to speculate or go on a fishing expedition.

[198] In summary, it reflected an error of principle for the case management judge to place any weight on the alleged deficiency in formal proof that the litigation had been properly authorized.

Trustees in bankruptcy as officers of the court

[199] One foundation of the costs award was inferences that the case management judge drew from the Trustee in Bankruptcy's status as an "officer of the court". Partly as a result of this status, the case management judge criticized the Trustee in Bankruptcy on a number of fronts, such as the very commencement of what the case management judge though was doomed litigation, the failure to properly investigate the claim, the failure to give notice to the defendants before suing, and the content of the pleadings and affidavits. The case management judge recognized that the duties he expounded had not previously been recognized, but reasoned "I have an ongoing obligation to expand the common law, where appropriate": costs reasons at para. 112. The Trustee in Bankruptcy points to the unfairness of identifying new standards of conduct, *ex post facto* and without allowing submissions from counsel, and then criticizing him for not having met them.

[200] It is true that trustees in bankruptcy are officers of the court, and are held to a high standard. In some instances, a trustee in bankruptcy may not even be able to rely on strict legal rights. For

example, in ***Ex parte James*** (1874), LR 9 Ch App 609 a trustee in bankruptcy was directed to repay money that had been paid under a mistake of law, even though the trustee had an undoubted legal right to retain the money. In ***Lehman Brothers Australia Ltd v MacNamara***, [2020] EWCA Civ 321 at para. 95, [2020] 3 WLR 147 the administrators were directed to correct an admitted mutual error in the amount of a claim, even though the claims were supposed to be final, and there was no legal obligation to amend.

[201] Some of the expectations of trustees in bankruptcy are set out in the *Code of Ethics for Trustees*, found in sec. 34-52 of the *Bankruptcy and Insolvency General Rules*:

> 34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act. . . .
>
> 36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care. . . .
>
> 39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act . . .

This *Code of Ethics* sets a high standard, but the case management judge's interpretation of the scope of these duties, and whether in fact they were violated here, reflect reviewable error.

[202] Trustees in bankruptcy, as officers of the court, obviously owe some duties to the court and the legal system. The trustee's primary duty, however, is to the creditors of the estate, through the inspectors. The obligation of a trustee in bankruptcy to be "honest and impartial" does not displace this primary duty, or imply some duty to potential defendants in estate litigation. The trustee would be placed in a conflict of interest if it was also under legal duties to third parties, particularly those that are adverse in interest to the bankrupt estate. Lawyers, for example, are also "officers of the court" who are held to high standards, yet they have no duty to third parties to investigate, consult, give notice, etc., of the type suggested by the case management judge.

[203] Further, the obligation of a trustee in bankruptcy to act "impartially" does not mean that a trustee cannot take a proper adversarial role in litigation. As noted in ***Golden Oaks Enterprises Inc (Trustee of) v Scott***, 2019 ONSC 5108 at para. 48:

> 48 The defendants' argument implies that a trustee in bankruptcy must refrain from any advocacy for the position it is taking in litigation. In my view, this is unrealistic and even antithetical to the role of the trustee. A trustee must approach an investigation without any unfounded bias and keep an open mind about what it will find. Having investigated, however, a trustee abdicates its responsibilities under the *BIA* if it fails to apply its expertise and experience to assess the information received and act on that assessment. Once a trustee has reasonably concluded that there are assets belonging to the estate in third party hands and that there are grounds to

> recover them, and it obtains instructions to begin legal proceedings from inspectors, its role necessarily involves some advocacy.

In this case the Trustee in Bankruptcy had investigated the circumstances, and had concluded that Perpetual/Sequoia had claims against various defendants. The Trustee in Bankruptcy was not only entitled, but was obliged to pursue those claims. This is not inconsistent with the role of a trustee in bankruptcy as an officer of the court.

[204] Specifically, a trustee in bankruptcy is not an administrative tribunal: ***Asian Concepts Franchising Corp (Re)***, 2016 BCSC 1581 at paras. 69-70, 40 CBR (6th) 73; ***Royal Bank of Canada v Drummie (Trustee of)***, 2004 NBQB 35 at para. 19, 49 CBR (4th) 90. The duty of good faith imposed on officers of the court precludes taking advantage of the mistakes of others, but it does not come anywhere near to requiring that trustees in bankruptcy conduct investigations in a manner consistent with "the principles of procedural fairness". Those principles of administrative law are not transferable to civil commercial matters; there is no free standing right to procedural fairness: ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall***, 2018 SCC 26 at para. 25, [2018] 1 SCR 750. The decision in ***Cormie v Principal Group Ltd (Trustee of)*** (1989), 66 Alta LR (2d) 340, 99 AR 1 turns on its particular facts, and disclaims any "broader or more wide-ranging duty of fairness". The generic statement in ***Kaiser (Re)***, 2011 ONSC 4877 at para. 20, 84 CBR (5th) 29 that a trustee in bankruptcy is an officer of the court and "must act fairly" is merely conclusory and, in its context, unobjectionable.

[205] A trustee's duty to provide "full and accurate information as required by the Act" obviously relates to information about the bankruptcy process. This duty cannot extend to information in the hands of third parties that the trustee does not have. Here, in any event, the core information about the Asset Transaction and the Aggregate Transaction was known to all. A trustee is under no obligation to reveal his litigation strategy, potential defendants, or the privileged advice he has received from counsel.

[206] Particular criticisms of the Trustee in Bankruptcy call for a separate analysis: the alleged failure to properly investigate, and the nature of the allegations made against the respondent Ms. Rose.

The failure to investigate

[207] The case management judge criticized the Trustee in Bankruptcy for failing to conduct a proper investigation before issuing the statement of claim. As just discussed, there is no general basis for placing such a free standing obligation on trustees in bankruptcy, and it is not usually a proper consideration when awarding costs.

[208] As a threshold consideration, it should be noted that the decision to sue was not that of the Trustee in Bankruptcy alone. The action was approved by the inspectors, based on the advice in

"Special Counsel's memos". The Trustee in Bankruptcy was not the only one who thought litigation was warranted, based on the investigation actually done. Neither the case management judge nor the respondents were privy to the nature of counsel's privileged advice, or the discussions by the inspectors.

[209] The general rule is that the unsuccessful litigant pays costs to the successful litigant. As long as the unsuccessful litigant acted in good faith it does not particularly matter why it lost. Perhaps it failed to investigate, or its witnesses were unreliable, or it could not meet the burden of proof, or it misjudged the law or its legal rights. Whatever the reason, losing should not be double counted. Because the unsuccessful litigant must pay costs, any "failure to properly investigate" has already been taken into account.

[210] On this record, there is also no basis to criticize the Trustee in Bankruptcy's investigation, or to accuse him of having "tunnel vision".

[211] Following his preliminary investigations, the Trustee in Bankruptcy concluded that the Asset Transaction might be void for being at an undervalue. On May 28, 2018 he wrote to Perpetual Energy Parent and Ms. Rose, indicating that some of the transactions "may be void", and that the Perpetual group might be indebted to Perpetual/Sequoia as a result. He demanded the production of the relevant records, but also suggested a "without prejudice meeting with you at the earliest mutually convenient opportunity to discuss the Transfers". On June 26, 2018 the Trustee in Bankruptcy wrote again, indicating that a further review of the documents since provided confirmed his initial view that the Asset Transaction was void.

[212] It is unclear why this course of conduct should be criticized for involving "tunnel vision", or otherwise. The Trustee in Bankruptcy was entitled to form an opinion from his investigations that the transactions were in breach of s. 96 of the *Bankruptcy and Insolvency Act*; the summary disposition reasons accepted that this is a viable claim. Having identified a possible undervalue transaction, there was nothing objectionable about the Trustee in Bankruptcy pursuing it: ***Option Industries Inc (Re)***, 2020 ABQB 535 at para. 45; ***Golden Oaks*** at para. 48. In the absence of any evidence to contradict his conclusion, the Trustee in Bankruptcy had no reason to change his opinion. The corporate oppression and director's duty claims were derivative of that conclusion. Absent any other obvious explanation, the Trustee in Bankruptcy had no reason to go looking down any other tunnels.

[213] There is no rule that a trustee must conduct any, or any particular type of investigation before suing. The trustee in bankruptcy might obviously seek information from the former directors of the corporation, but that is not invariably necessary. There may be ample information available in the corporate records, or from other sources.

[214] With respect to many issues in this appeal, the Trustee in Bankruptcy was entitled to rely on the documentary record. As one example, the case management judge was particularly critical of the Trustee in Bankruptcy's failure to make more inquiries about the Resignation & Mutual

Release: costs reasons at paras. 203-216. This, however, was an issue that could be analyzed from the documentary evidence. It was known that the Perpetual Energy group and Kailas Capital were dealing at arm's length. The Resignation & Mutual Release was negotiated as part of the Aggregate Transaction. The terms of the Resignation & Mutual Release were known. The timing of the execution of the Resignation & Mutual Release was known, as was the identity of the signatories of that document. The tenure of Ms. Rose as a director of Perpetual/Sequoia was also known, and the alleged effect of the Resignation & Mutual Release on her duties as a director was also known. The Trustee in Bankruptcy's allegation was that, in law, the Resignation & Mutual Release was ineffective and could not be relied on by Ms. Rose. The need for further investigation is not obvious.

[215] The case management judge nevertheless criticized the Trustee in Bankruptcy for not questioning the principals of Kailas Capital about the Resignation & Mutual Release, but it is unclear what relevant information they could have provided. Certainly, the Trustee in Bankruptcy was not required to act on their personal legal opinions about the legal effect of the Resignation & Mutual Release; the Trustee in Bankruptcy had his own counsel for that purpose. The case management judge suggested that the Trustee in Bankruptcy should have asked the principals of Kailas Capital: "Did Ms. Rose cause PEI to require you, the 198Co Principals, to execute the Release against your will?": costs reasons at para. 212. As previously noted (*supra*, para. 78), this is a contrived interpretation of the pleadings. No one suggested that Ms. Rose had forced anybody to do anything against their will, and it would have been absurd for the Trustee in Bankruptcy to pose the suggested question to the principals of Kailas Capital.

[216] As another example, the case management judge held that, with respect to the proper characterization of Abandonment and Reclamation Obligations, the Trustee in Bankruptcy "drew a legal conclusion without asking Ms. Rose for her position on the matter": reasons at para. 136. The characterization of the Abandonment and Reclamation Obligations was an issue of law, depending heavily on the interpretation of the yet-to-be released ***Redwater*** decision. The Trustee in Bankruptcy was entitled to take his legal advice from his own counsel, and Ms. Rose's legal opinion on the matter was irrelevant. As the CEO of a public oil and gas company, if asked she likely would have indicated that Perpetual Energy Parent, and the industry generally, regarded them as being real obligations.

[217] Likewise, there was no point in asking Ms. Rose her opinion about the legal effectiveness of the Resignation & Mutual Release. There was no point in asking Ms. Rose or the principals of Kailas Capital if the Perpetual Group and Kailas Capital/198Co were at arm's-length; they obviously were, and no one suggested otherwise.

[218] The case management judge also criticized the Trustee in Bankruptcy for issuing the statement of claim without waiting for further input from Perpetual Energy Parent and Ms. Rose: see *supra*, paras. 49, 211. To summarize, the Trustee in Bankruptcy had demanded and received certain documents, and on June 26, 2018 he wrote to Ms. Rose, advising of his preliminary

conclusion that the Asset Transaction was in breach of s. 96 and contrary to the interests of Perpetual/Sequoia. He asked Ms. Rose "if there was anything specific you want the Trustee to consider" or "any other aspect you consider relevant". Ms. Rose responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27.

[219] The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply. The statement of claim, which had been approved over two months earlier by the inspectors, was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

This criticism was unwarranted:

(i) The Trustee in Bankruptcy did not "request anything particular" because he had what he needed. The invitation of June 26, 2018 was an open-ended one, enabling Ms. Rose to provide anything she thought relevant that had not previously been produced. This letter was the opportunity the Trustee in Bankruptcy was criticized for not providing: an opportunity for Perpetual Energy Parent and Ms. Rose to provide whatever further input they wished.

(ii) The Trustee in Bankruptcy was not obliged to set any deadline on his open invitation, if only because Ms. Rose had set her own deadline. It is curious that the Trustee in Bankruptcy was criticized for not setting a deadline, but no criticism was directed at Ms. Rose for not meeting the one she imposed herself. The one month that passed before the statement of claim was issued was reasonable.

(iii) There was also no obligation to specifically mention a claim against Ms. Rose. The Trustee's letter indicated that the transaction did not appear to be in the best interests of Perpetual/Sequoia. Ms. Rose was the sole director, and she undoubtedly had access to her own advisers on the legal implications. As noted, there was no general duty on the Trustee in Bankruptcy to give advance notice to potential defendants.

In summary, there was no principled basis on which to award enhanced costs because of any perceived failure to investigate prior to issuing the statement of claim. This pre-litigation conduct cannot support an award of enhanced costs.

Allegations against the respondent Ms. Rose

[220] The case management judge was particularly critical of the claim against the respondent Ms. Rose. This was partly because of the perception that ***Redwater*** "nullified" much of the claim, the perceived "failure to investigate", and the failure to follow up discussed in the previous section of these reasons. As noted, the process followed by the Trustee in Bankruptcy did not justify enhanced costs.

[221] The case management judge specifically concluded that notice must be given before allegations of breach of duty are made against a director of a public corporation. This was because "serious allegations of wrongful conduct, eventually became publicly available". Given the "magnitude and potentially harmful impact on Ms. Rose's reputation" she should have been given advance notice of the allegations and an opportunity to respond: costs reasons at paras. 195-96. He concluded:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

On this record, there was nothing "egregious" about the Trustee's conduct, and it was inaccurate to suggest it was a "tactic". As previously discussed, while it may be prudent to do so, there was no "duty of fairness" to investigate, nor a duty to give advance notice that would justify these criticisms.

[222] The allegations against Ms. Rose were facially justified. As outlined previously in these reasons (*supra*, paras. 153-59), the Trustee in Bankruptcy had good reason to plead that Ms. Rose was in breach of her duties as a director. Ms. Rose essentially admitted she had abdicated her responsibility as the sole director of Perpetual/Sequoia, then inconsistently argued that she had exercised her "business judgment". ***Redwater*** did not "nullify" this claim. The size of the claim was what it was; this was not a "tactic".

[223] The case management judge criticized the wording of the pleadings: "unfairly prejudicial", "disregarding the interests", etc. The Trustee in Bankruptcy cannot be faulted for alleging breach of director's duties, and consequential oppression, using the very terminology provided in the *Business Corporations Act*. Any other form of pleading might well be criticized. Pleadings are supposed to outline the case, to avoid surprise. Further, it is doubtful that these pleadings carry the sense of moral opprobrium attributed to them by the case management judge. Directors of publicly

traded companies realize that they owe duties to the corporation, and they realize what those duties are. Others involved with pubic companies would understand the nature of the allegations.

[224] It is worth noting that these pleadings were no more hard-hitting than the allegations in the statement of defence that the claim was "abusive", and was "frivolous, irrelevant, and improper":

> 63. This action is an abusive attempt by Sequoia's trustee to indirectly pursue the agenda of the AER and energy companies that make significant contributions to the orphan well fund, by suing the Perpetual Defendants in relation to a Transaction that fully complied with the Regulatory Regime and the law. That agenda should not be pursued through an abusive lawsuit.

All of the pleadings in this litigation, while sometimes blunt, fairly engaged the underlying issues. Some of the factums filed in these appeals also included extravagant language.

[225] In addition, the case management judge returned repeatedly to his interpretation of the pleadings as alleging that Ms. Rose had "forced" the principals of Kailas Capital to enter into parts of the transaction against their will: costs reasons at paras. 203, 214, 216. Again, the pleadings could not reasonably be read as alleging duress in any form. That implausible reading of the pleadings did not justify enhanced costs.

Summary of the Costs Appeal

[226] As noted, costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong. On this record, the award to 85% of solicitor and client costs was not justified. The claim against Ms. Rose was arguable: ***Redwater*** did not "nullify" this claim. The case management judge overstated the implications of a trustee being an officer of the court. A trustee does not have to meet administrative law requirements of fairness. There is no independent duty to investigate owed to third parties. There was no litigation misconduct that would justify enhanced costs.

Conclusion

[227] In conclusion, appeal 1901-0255AC is allowed. The corporate oppression and public policy pleadings are restored. The Trustee in Bankruptcy is granted complainant status to pursue the corporate oppression claim if it so elects. The alternative *BIA* claim, and the interpretation, scope and legal effect of the Resignation & Mutual Release are returned to the trial court. The Trustee in Bankruptcy is granted leave to amend any portions of the statement of claim that would benefit from clarification, with any dispute about amendments to be resolved by the case management judge.

[228] Appeal 1901-0262AC is dismissed.

[229] Appeal 2001-0174AC is allowed. The awards of costs for the dismissal application and the application to set costs are set aside and referred back to the case management judge. The words "in its personal capacity" in paragraph 3 of the costs order were inappropriate.

Appeal heard on December 10, 2020

Memorandum filed at Calgary, Alberta
this 25th day of January, 2021

REGISTRAR
FILED
25 Jan 2021
JN
Court of Appeal of Alberta

Authorized to sign for: Paperny J.A.

Watson J.A.

Slatter J.A.

Appearances:

R. de Waal/L. Rasmussen
for the Appellant/Cross-Respondent PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

D.J. McDonald, Q.C./P.G. Chiswell
for the Respondents/Cross-Appellants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.

S.H. Leitl/G. Benediktsson
for the Respondent/Cross-Appellant Susan Riddell Rose

C.C.J. Feasby, Q.C./M. Wasserman
for the Appellant PricewaterhouseCoopers Inc., in its personal capacity

K.T. Lentz, Q.C.
for the Intervenor Orphan Well Association

G.S. Watson/C.W. Ang
for the Intervenors Canadian Natural Resources Limited, Cenovus Energy Inc., Torxen Energy Ltd.

PART I. OVERVIEW AND FACTS

(1) Overview

1. The proposed appeal by Susan Riddell Rose (**Ms. Rose**) raises the issue of when, if ever, a trustee in bankruptcy has legal authority to sue a former director of a bankrupt corporation for breach of fiduciary duty or oppression, not on the basis of the interests of the corporation or its stakeholders, but rather on the basis of regulatory obligations owed by the corporation to the public – in this instance, an oil and gas producer's abandonment and reclamation obligations (**ARO**) prescribed pursuant to the Alberta *Responsible Energy Development Act* and related regulations.

2. The decision of the Alberta Court of Appeal[1] (**ABCA** and the **ABCA Decision**) has bestowed on trustees in bankruptcy a new authority to act as enforcers of provincial regulatory obligations owed by bankrupt corporations, and to make directors the financial guarantors of such obligations. This is a remarkable and troubling departure from: (i) the authority conferred upon trustees by the *Bankruptcy and Insolvency Act*[2] (the **BIA**); (ii) jurisprudence regarding the interests of a bankrupt estate; (iii) the law regarding the duties of directors to the corporation; and (iv) the law regarding the test for oppression. The ABCA Decision is fundamentally flawed at law; it will distort the administration of bankruptcies, and unjustifiably expose corporate directors to an entirely new area of personal liability.

3. The Trustee alleged personal liability on the part of Ms. Rose *qua* former director of PEOC-Sequoia[3] on the basis of the subsequent bankruptcy of Sequoia and its consequent inability to fund the anticipated ARO associated with its energy asset portfolio.[4] The trial court

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[1] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 [**Appeal Decision**].

[2] RSC 1985, c B-3.

[3] As is set out further herein, Ms. Rose was the sole director of Perpetual Energy Operating Corp. (**PEOC**) at the time of an impugned transfer between PEOC and Perpetual Operating Trust (**POT**). Following a sale of the shares of PEOC to an arm's length third party, and Ms. Rose's resignation, PEOC changed its name to Sequoia Resource Corp. (**Sequoia**).

[4] Appeal Decision at para 13(a)-(d). The Trustee alleged, among other things, that Ms. Rose's conduct with respect to the Asset Transaction (as separate from the Aggregate Transaction of

rightly struck the claims as being manifestly unsupported by the law: the regulatory duty in question was Sequoia's, not that of Ms. Rose, and the impugned transaction which formed the basis for Ms. Rose's alleged liability was perfectly lawful. In contrast, on the basis of new visions of the laws pertaining to bankruptcy, director duties and the oppression remedy, the ABCA sanctioned the Trustee's claims.

4. The ABCA Decision raises issues of public and national importance; for all common law jurisdictions, it profoundly alters the authority and role of trustees in bankruptcy, and significantly expands corporate directors' exposure to personal liability. In the case of a bankrupt oil and gas company, the trustee in bankruptcy may now sue the directors of the bankrupt corporation based on the corporation's own regulatory defaults, even if the regulatory regime does not provide for personal director liability, the bankruptcy occurred long after the director's departure, and was caused by unforeseeable changes in business conditions and the response of new directors and management to external factors. The trustee may even do so while pursuing claims in oppression that never belonged to the bankrupt, and do not belong to its estate.

5. This case accordingly concerns the scope of authority of a trustee in bankruptcy in respect of the bankrupt's public and regulatory obligations, and thus sits at the intersection of *Redwater*[5] (the public duty to satisfy ARO), *BCE*[6] (oppression and directors' duties in the context of corporate transactions) and *Wilson*[7] (the limits of personal liability of directors, particularly in oppression). The ABCA itself acknowledged this case raises "novel issues respecting corporate law, bankruptcy law, oil and gas regulation, contracts, and procedure."[8]

(2) Facts

6. The defendants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp. (**Perpetual**) have separately applied for leave to appeal the ABCA Decision. Ms. Rose supports and agrees with Perpetual's application, and adopts the statement of facts and

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which it was part) acted oppressively within the meaning of the Alberta *Business Corporations Act*, RSA 2000, c B-9 [the **BCA**], and breached her fiduciary duties to the company.

[5] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [***Redwater***].
[6] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 [***BCE***].
[7] *Wilson v Alharayeri*, 2017 SCC 39 [***Wilson***].
[8] *PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2021 ABCA 92 at para 7.

defined terms from the Memorandum of Argument filed by Perpetual on even date herewith (the **Perpetual Memorandum**).

7. Additional incremental facts are set out below.

(A) The provincial regulatory regime

8. The nature of the energy regulatory regime devised by the government of Alberta is aptly summarized in *Redwater*.[9] For the purposes of this application, it is sufficient to note ARO is an obligation of the licensee – in this case PEOC-Sequoia. Enforcement of ARO and related obligations is the sole jurisdiction of the AER. The regime specifically contemplates the risk of a licensee's bankruptcy, including through the program administered by the Orphan Well Association (**OWA**). The regime makes no provision for personal liability of directors in relation to unsatisfied ARO.[10]

9. The BIA does not confer on trustees in bankruptcy any authority to take proceedings to enforce the bankrupt's public obligations against others. The director duty provisions of the Alberta *Business Corporations Act* (**BCA**) do not provide for director liability in relation to such obligations.

(B) Sequoia's bankruptcy

10. After closing the Aggregate Transaction, PEOC changed its name to Sequoia (under 198 Alberta's control) and implemented its own business plan pursuant to which it, among other things, acquired additional assets, took steps to increase production, and executed, on an accelerated basis, the abandonment and reclamation of some of its shut-in assets.[11] At first, Sequoia flourished; an unforeseen collapse in the Alberta natural gas market negatively impacted

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[9] For the purposes of this appeal, the regulatory regime governing ARO is still materially the same as what was considered by this Court in *Redwater*.

[10] The AER may seek limited remedies against directors and officers if a licensee's ARO goes unsatisfied, including as the result of a licensee's receivership or bankruptcy. These remedies are prescribed under s. 106 of the *Oil and Gas Conservation Act*, RSA 2000 c. O-6 [the **OGCA**], which does not contemplate directors' personal liability for ARO.

[11] Affidavit of Mark Schweitzer filed October 4, 2018 [**Schweitzer Affidavit**] at para 24 & Exhibit "A".

the industry and eventually rendered Sequoia unable to operate.[12] Sequoia initially sought to restructure its affairs through Notice of Intention proceedings under the BIA; however, it ultimately assigned itself into bankruptcy on March 23, 2018 (nearly 18 months after the closing of the Aggregate Transaction and Ms. Rose's resignation as a director of PEOC).

(C) The Trustee's claim

11. On August 2, 2018, the Trustee filed a Statement of Claim against PEI, Perpetual Operating Corp. and Perpetual Operating Trust and Ms. Rose. Relief was claimed against Ms. Rose on behalf of PEOC, including based on alleged breaches of fiduciary duty and oppression.[13] Damages were claimed in excess of $220 million, largely comprised of an estimate of Sequoia's unfunded ARO for the Goodyear Assets at the time of its bankruptcy.

12. Ms. Rose defended and filed a combined striking and summary dismissal application.[14]

(D) The Chambers Judge's Decision

13. Ms. Rose adopts the summary of the Chambers Judge's decision in the Perpetual Memorandum, and adds the following in relation to the regulatory regime, and the Trustee's oppression and directors' duties claims.

14. The Chambers Judge concluded, correctly, that the Trustee's claims would in effect hold a prior licensee liable for ARO, contrary to the Legislature's express intentions: "The position now advanced by the Trustee is what was advanced by the ERCB, and rejected by the legislature, that the prior licensee should be liable for abandoned wells."[15]

15. The Chambers Judge properly noted that oppression actions are *not* a "means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a Court to accord with an assessment of a third-party as to what is just and equitable, especially on an *ex post facto* basis."[16]

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[12] Schweitzer Affidavit at para 24, Exhibit "A" & Exhibit "B" (Trustee's Preliminary Report Dated April 11, 2018).
[13] Statement of Claim of PricewaterhouseCoopers Inc., LIT, in its capacity as trustee in bankruptcy of Sequoia Resources Corp at paras 15, 16 & 19 [**Trustee SOC**].
[14] Appeal Decision at para 13.
[15] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 at paras 123, 125 [**QB Reasons**] [emphasis added].
[16] QB Reasons at para 188.

16. The Chambers Judge recognized that a creditor may have status as a "complainant"[17] to sue the corporation or its directors for oppression, but only if the creditor is a "proper person"[18] who has an interest in the corporation's management, akin to a minority shareholder.[19] An oppression action is not an appropriate means of enforcing a debt,[20] which is why creditors do not have automatic "complainant" status to sue in oppression.[21]

17. Citing relevant authorities, the Chambers Judge reasoned that a trustee in bankruptcy may pursue a claim *on behalf of the bankrupt estate* (to recover what is owed to the bankrupt debtor) but it "may not pursue the claims of individual creditors."[22] That result flowed from the collective nature of the bankruptcy regime: "It must be a collective pursuit, and not a selective pursuit."[23]

18. The Chambers Judge held that the AER is not a "creditor" in relation to a licensee's ARO, per *Redwater*.[24] ARO is an "inchoate" future obligation that "ha[s] not crystalized into a liability."[25] ARO "form a fundamental part of" the value of the assets to which they relate.[26]

19. The Chambers Judge concluded that the Trustee's oppression claim was framed to focus only on the interests of the AER and municipalities, not creditors generally;[27] indeed, ARO was the "substantive focus" of the claim and it could be inferred from the Statement of Claim that "the only significant liability of PEOC is the ARO associated with the Goodyear Assets."[28] The Trustee's oppression claim was not "collective" in nature.[29] The Chambers Judge therefore

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[17] QB Reasons at para 127.
[18] QB Reasons at para 128.
[19] QB Reasons at paras 131 &191.
[20] QB Reasons at para 190, citing *Royal Trust Corp of Canada v Hordo* (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)) at para 14.
[21] QB Reasons at paras 134, 136, 184 & 193.
[22] QB Reasons at para 137, quoting from *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.
[23] QB Reasons at paras 204 & 207.
[24] QB Reasons at paras 143 & 151.
[25] QB Reasons at paras 147 & 148, citing *Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 at para 32, leave to appeal to SCC refused 22655 (16 January 1992) [***Northern Badger***].
[26] QB Reasons at para 166, citing *Redwater, supra* note 5 at para 157.
[27] QB Reasons at para 210.
[28] QB Reasons at paras 212 & 231.
[29] QB Reasons at para 210.

declined to recognize the Trustee as a "proper person" who should be granted standing as a "complainant" to pursue the creditor-based oppression claim.[30]

20. Neither the AER nor any creditor had a contingent claim against PEOC for ARO at the time of the alleged oppressive conduct,[31] including because the public is the beneficiary of the duty to satisfy ARO, there was insufficient certainty that the AER would ultimately perform the related environmental work, and the Trustee's theorized contingent claim for ARO was "too speculative" and incapable of valuation (just as was held in *Redwater*).[32]

21. The Trustee's oppression claim was accordingly struck for failing to disclose a cause of action.[33] In addition, the Chambers Judge summarily dismissed the claims against Ms. Rose; as against Ms. Rose, there were no genuine issues for trial. [34]

(E) The Appeal Decision

22. Ms. Rose adopts the summary of the ABCA Decision in the Perpetual Memorandum, adding the following.

23. The ABCA agreed with the Chambers Judge that ARO is inherent in every well from the moment it is drilled;[35] however, it disagreed with the Chambers Judge's characterization of ARO as a contingent liability. The ABCA reasoned that ARO is only contingent while the well is producing in the sense that it is unknown when production will cease, not in the sense that ARO may (or may not) ever come into existence.[36] The ABCA perceived that ARO crystallizes when a well is shut-in[37] and ceases being "contingent" at that point.[38] Once a well is shut-in, "the owner[39] of the well is under a public duty to shut in the well and reclaim the surface."[40]

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[30] QB Reasons at paras 210-211.
[31] QB Reasons at para 218.
[32] QB Reasons at paras 221-224.
[33] QB Reasons at paras 232 & 241.
[34] QB Reasons at paras 327, 328, 364 & 370-372.
[35] Appeal Decision at para 86.
[36] Appeal Decision at paras 86 & 87.

[37] In truth, there is no regulatory obligation to abandon and reclaim shut-in wells. Shut-in wells may be returned to production. Abandonment and reclamation may also be deferred indefinitely unless there is a pressing environmental concern, the AER orders otherwise, or the licensee makes an insolvency filing. This is evident from the fact that PEOC was not ordered by the AER

24. The ABCA reasoned that "*Redwater* does not stand for the proposition that [ARO] are not a liability or obligation of the bankrupt corporation" because obligations that are not provable claims in bankruptcy must still be complied with. [41] ARO was accordingly accepted as "depress[ing] the tenure's value at the time of sale."[42]

25. The KeepCo Assets and Retained Interests were recognized by the ABCA as not carrying immediate ARO because they were still producing at the time of the impugned transaction. In contrast, the Goodyear Assets were "mature" (already including 910 shut-in and 727 abandoned wells) and their ARO was "more immediate" and no longer contingent.[43] The extent to which the value of the Goodyear Assets was depressed by ARO was identified as a triable issue. Accordingly, none of the Trustee's claims could be struck out or summarily dismissed based on *Redwater.*[44]

26. The Trustee was recognized as an appropriate "complainant" in oppression based on the allegation that PEOC-Sequoia had reorganized its affairs in a way that rendered it unable to pay its debts.[45]

27. The ABCA recognized that, under s. 242(2) of the BCA, an oppression action must be directed at the interests of a security holder, creditor, director or officer, as distinct from the environment or the public.[46] However, the Trustee's oppression claim was accepted by the ABCA as focussed on the prejudice allegedly caused to the legitimate interest of creditors "in preventing management from conducting the business of the corporation [in] a way that prevents

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to abandon and reclaim any of its shut-in wells prior to the Asset Transaction, or at any time prior to Sequoia's bankruptcy.

[38] Appeal Decision at para 87(c).
[39] Under the regulatory regime, the licensee (not the "owner") is responsible for ARO.
[40] Appeal Decision at para 87(c).
[41] Appeal Decision at paras 94, 95 & 138.
[42] Appeal Decision at para 96, citing *Redwater, supra* note 5 at para 157.
[43] Appeal Decision at para 88.
[44] Appeal Decision at para 97.
[45] Appeal Decision at paras 124 & 126.
[46] Appeal Decision at para 121.

it from satisfying its obligations."[47] The oppression claim was therefore accepted as sufficiently directed toward an interest of creditors.

28. Curiously, the ABCA concluded that the Trustee's oppression claim was rightfully brought by the Trustee, on behalf of Sequoia's estate (even though Sequoia was a *party* to the allegedly oppressive transaction) rather than by the creditors who were allegedly oppressed.[48] The ABCA reasoned that the necessity of having a "complainant" pursue collective interests in oppression is "not generally a barrier to a trustee in bankruptcy" because a trustee in bankruptcy by definition "represent[s] all of the creditors of the bankrupt."[49]

29. The ABCA accepted the conceptual underpinning of the Trustee's oppression claim. Although there is no "creditor" with a claim for ARO,[50] per *Redwater*, ARO may ground an oppression action on behalf of creditors indirectly if it is "manage[d] … in a manner that is unfairly prejudicial to the interests of creditors"[51] – and such an oppression claim may nonetheless be pursued by the Trustee on behalf of all creditors of the estate.[52]

30. The interplay between the regulatory regime and the Trustee's oppression claim was seen by the ABCA as a "complex issue" that could only be resolved with a proper evidentiary record.[53] In particular, the ABCA declined to see the oppression claim as a disguised attempt by the Trustee to advance a regulatory claim (not contemplated in the regulatory regime) against Perpetual and Ms. Rose as PEOC's sole director at the time.

31. The ABCA was satisfied that the Chambers Judge had erred by striking the Trustee's oppression claim.[54]

32. The ABCA held that Ms. Rose owed duties to PEOC as PEOC's sole director and "directing mind",[55] and that such duties were not necessarily aligned with the interests of PEOC's then parent corporation and sole shareholder, PEI. The ABCA went so far as to hold that

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[47] Appeal Decision at paras 126 & 129.
[48] Appeal Decision at paras 127 & 128.
[49] Appeal Decision at para 131.
[50] Appeal Decision at para 139.
[51] Appeal Decision at paras 131 & 141.
[52] Appeal Decision at para 140.
[53] Appeal Decision at paras 142 & 143.
[54] Appeal Decision at para 144.
[55] Appeal Decision at para 155.

Ms. Rose abdicated her duty to the extent she caused PEOC to enter the Asset Transaction at the "bidding" of PEI, reasoning that Ms. Rose's duty was to resign and be replaced by a new director rather than to act in furtherance of PEI's interests;[56] the ABCA did not explain how any replacement director was to have navigated this situation. Further, the Trustee's breach of duty claim against Ms. Rose was not nullified by *Redwater*.[57]

33. The ABCA concluded that, "on the face of it", the Trustee's breach of duty claim against Ms. Rose was not appropriate to strike out or summarily dismiss.[58]

34. In the result, the ABCA confirmed the Trustee's right to advance a $220 million claim, including against Ms. Rose personally, based on PEOC's theorized acquisition of an ARO-based "net deficit" through the Asset Transaction, and the subsequent inability of Sequoia to perform its public duties and regulatory obligations.[59]

PART II. QUESTION IN ISSUE

35. The proposed appeal raises the issue of when, if ever, a trustee in bankruptcy has legal authority to sue a former director of a bankrupt corporation for breach of fiduciary duty or oppression, not on the basis of the interests of the corporation or its stakeholders, but rather on the basis of future obligations, not yet due, but inherent to the assets and owed by the corporation to the public: an oil and gas producer's ARO. The ABCA Decision has bestowed such authority on trustees in bankruptcy, effectively making directors of bankrupt corporations guarantors of future regulatory obligations. That newfound, quasi-regulatory authority now permits a trustee in bankruptcy *de facto* status as a complainant in oppression, *and* the ability to allege, *ex post facto,* a breach of a director's fiduciary duties to the company on the basis of remote and speculative interests of future stakeholders of the company's environmental and future regulatory obligations.

PART III. ARGUMENT

36. Ms. Rose respectfully submits that as creatures of statute, trustees in bankruptcy have no authority to sue in order to enforce, directly or indirectly, the public duties owed by bankrupt

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[56] Appeal Decision at paras 156, 157.
[57] Appeal Decision at para 158.
[58] Appeal Decision at para 159.
[59] Court of Appeal Judgment Roll dated January 25, 2021.

corporations against the bankrupt's current or former directors. Moreover, neither the fiduciary duty owed by directors to the corporation, nor any possible director duty in relation to the reasonable expectations of the corporation's shareholders or creditors, can result in personal director liability flowing from the corporation's inability to meet such public duties.

(1) When can a trustee in bankruptcy claim status as a complainant in oppression to pursue third party claims against a bankrupt's former director?

37. The issue of when a trustee in bankruptcy may be a complainant in oppression is central to this proposed appeal. In the instant case, the Trustee purports to advance a claim in oppression on the basis that the Asset Transaction (a single required and negotiated step in a larger commercial arm's length deal) was "oppressive" because it allegedly left Sequoia unable to fund its ARO nearly a year and a half later.[60] In that regard, the Trustee sues on behalf of the bankrupt (Sequoia), but its claims are truly based on rights of action that (if they exist at all) were never part of the Sequoia bankrupt estate and are not the Trustee's to pursue.

38. A trustee in bankruptcy is a creature of statute.[61] A trustee in bankruptcy represents the bankrupt estate, and *all* of its creditors, but only in respect of the creditors' claims *against the estate*.[62] The trustee may litigate the *estate's* claims against others; all of the property of the debtor (including any rights of action) vests in the trustee upon bankruptcy.[63] The trustee can then pursue the bankrupt's rights of action for the benefit of the estate and *all* of its creditors, who will share in the proceeds in accordance with their own legal rights against the estate.

39. A Trustee may, in rare cases, be recognized as a complainant in oppression: the aim, in such cases, is to protect the Trustee's ability to take *collective* action on behalf of the estate's creditors, not to permit the Trustee to pursue rights of action that creditors should rightly pursue themselves.[64] The Trustee's mandate is not normally understood to include the pursuit of creditors' personal rights of action against third parties for the benefit of the estate.[65]

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[60] Trustee SOC at para 20.
[61] *BDO Canada Limited v Dorais*, 2015 ABCA 137 at para 8.
[62] *A Marquette & Fils Inc v Mercure*, 1975 CarswellQue 51 (SCC) at para 9 [***A Marquette & Fils***].
[63] BIA, *supra* note 2, s 71.
[64] A Trustee in bankruptcy is "neither automatically barred from being a complainant nor automatically entitled to that status" (*PricewaterhouseCoopers Inc, v Olympia & York Realty*

40. The ABCA Decision in effect overturns this longstanding principle, suggesting not only that the Trustee may pursue and enforce the personal rights of individual creditors, but that it may obtain complainant status under the guise of representing the estate and its creditors, while in fact pursuing a remedy that will benefit neither. After all, if the Trustee recovers damages equal to the value of Sequoia's ARO, the performance of that ARO will rank in priority to any creditor claims as a public duty of the company binding on its trustee. In effect, the Trustee will have appropriated the claims of Sequoia's allegedly oppressed *creditors*, and used the proceeds to benefit stakeholders that have never been recognized as complainants in oppression: the regulator, the public interest in performance of ARO, or the Orphan Well Association.

41. This finding of the ABCA is in error, and contrary to jurisprudence from across Canada, (including this Court) which has found the Trustee's role to be representing *the estate*, and the creditors only collectively, and only "to the extent that [the Trustee] can even act on [creditors'] behalf against the debtor."[66] That finding is entirely consistent with authorities that require a trustee, in order to obtain complainant status, to be pursuing an interest of the estate's creditors in a *collective* sense.[67]

42. The effect of the ABCA Decision is to overturn this law and invent a new role for the trustee as the representative of *individual* creditor interests,[68] *and* to expand recognized creditor interests to include regulatory compliance by the bankrupt corporation, including in respect of regulatory obligations that were not current as at the time of the impugned transaction.

Corp, 68 OR (3d) 544, [2003] OJ No 5242 at para 45). It is for "the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant" (*ibid,* emphasis added). In this case, the judge at first instance determined the Trustee is not a proper person as its aim is not the collective interest of the estate and its creditors.

[65] *Toyota Canada Inc v Imperial Richmond Holdings Ltd* (1997) 202 AR 274 (Alta QB) at para 20 [***Toyota Canada***].

[66] *A Marquette & Fils*, *supra* note 62 at para 9.

[67] See eg *Toyota Canada, supra* note 65*; Principal Group (Trustee of) v Principal Savings & Trust Co*, [1990] AJ No 907, 111 AR 81 (Alta QB), aff'd 1990 (Alta CA), leave to appeal to SCC refused, 22324 (13 June 1991).

[68] This Aspect of the Appeal Decision is addressed in further depth in the Perpetual Memorandum.

43. The following passage from the ABCA Decision is illustrative:

> The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy.[69]

44. In short, the ABCA Decision transforms the legal *requirement* that trustees act collectively in bringing claims in oppression into a legal doctrine that *deems* a trustee to be doing so, even when the trustee patently is not. Furthermore, the ABCA Decision holds, in effect, that even if a creditor *cannot* pursue a claim in oppression (because oppression is not a mechanism to enforce a debt), the Trustee can *nevertheless* do so on the creditor's behalf because "trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt."[70] This *de facto* complainant status can then (or so it seems), be used by the Trustee to recover a judgment that is measured by reference to a regulatory obligation that was not current or due at the time of the transaction, has never been actionable by either Sequoia's creditors *or* the estate, and is not a claim in the bankruptcy: the estate's ARO.

45. This creates intractable conceptual difficulties, not addressed in the ABCA Decision. If the structuring of PEOC's affairs by Ms. Rose and others was unfairly prejudicial *to creditors*, that would give rise to a right of action against Ms. Rose *by those creditors*; not a right of action by PEOC (a party to the allegedly oppressive transfer), and certainly not a right of action by PEOC's trustee in bankruptcy. The Trustee has no legal right to use *third party creditors' rights of action* as a means of converting Sequoia's allegedly unfunded ARO into a judgment against its former director (Ms. Rose) and shareholder (PEI), particularly when that judgment cannot

[69] Appeal Decision at para 131 [emphasis added].
[70] Appeal Decision at para 131.

benefit a creditor and relates to an obligation that can only become current at some remote time in the future.

46. Put another way: if certain Sequoia creditors believed the actions of Perpetual and Ms. Rose were oppressive, or unfairly prejudicial to them, they had personal rights of action in oppression and should have commenced their own actions. There was no impediment. The Trustee cannot do it for their benefit, for an obvious reason: any recovery of damages by the Trustee on behalf of the Sequoia estate, is not available to creditors, but instead must be used to fund Sequoia's ARO deficit in accordance with *Redwater*.

47. In this case, the Trustee's claim is stated to be made "on behalf of" certain creditors of Sequoia; however, the Trustee's claim is clearly not seeking redress for conduct that was unfairly prejudicial to those creditors. Rather, the Trustee's conspicuous objective is to allege oppression in the shoes of Sequoia, while actually pursuing the public's interest (or the interests of non-creditors like the AER and OWA) in the funding of Sequoia's ARO.[71] The ABCA Decision suggests such a claim would not be permitted to proceed in oppression, stating, correctly, that:

> Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, **creditor**, director or officer. **Neither "the environment" nor "the public" is listed.**[72]

48. Nevertheless, the ABCA Decision allows the Trustee's claim to proceed, on the theory that an arm's length corporate transaction which includes the disposition of producing assets could somehow affect the reasonable expectations of a *creditor* in respect of the public duty to perform ARO. This finding is novel: the ABCA in effect suggests that a trustee in bankruptcy, standing in the shoes of the bankrupt company, may advance an oppression action on behalf of "creditors" where by definition the alleged oppressive conduct did not relate to creditor interests but to some inchoate duty in respect of public or regulatory burdens on the bankrupt company and its trustee. In this case, the Trustee's stated objective is to recover the value of Sequoia's ARO into the estate.[73] If accomplished, this result would bring about no recovery to creditors at all, whose claims against Sequoia are in every case subject to Sequoia's public duty to perform

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[71]For instance, see Trustee SOC at paras 20.2, 20.3, & 24, and Affidavit of Paul Darby filed August 2, 2018 at paras 51, 56, & 57.
[72] ABCA Decision at para 121 [emphasis added].
[73] Trustee SOC at 8, para 2.

the ARO. It was on this novel basis that the ABCA Decision granted complainant status to the Trustee, on the supposition that creditors could somehow benefit, when they cannot and will not.[74]

49. The only possible beneficiaries of such a claim are the very stakeholders the ABCA Decision suggested are *not* able to obtain status as oppression complainants—the public at large, the AER, the OWA (or its industry funders) or perhaps, the environment itself. This places the ABCA Decision in conflict with existing law regarding who may bring actions in oppression. An oppression action must be brought by a proper person to act as a complainant, and as the ABCA correctly noted, must "be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer.[75] An action in oppression may therefore not be used to further the interests of the environment or the public, and certainly not the AER, because (as the ABCA recognized) the environment, the public and the AER are not "creditors" in respect of ARO.[76] These stakeholders may have *other* legal remedies – most notably, in the regulatory regime – but the law does not permit them status as oppression complainants.

50. In this case, Ms. Rose faces the significant risk of reputational damage and ruinous financial consequences, all in service of the Trustee's unprincipled attempt to expand the law governing oppression to encompass the Trustee's self-anointed, quasi-regulatory role in which it attempts to turn a bankrupt company's former directors into guarantors of the bankrupt's public obligations, even if those directors bear no moral or legal fault for the bankrupt's failure and even after those directors have resigned and been released.

(2) Can the Trustee use corporate law theories to attempt to render a company's prior directors personally responsible for ARO?

51. In effect, the ABCA Decision held that the AER may qualify as a complainant, and that the Trustee is a convenient vehicle of regulatory enforcement. Both propositions are wrong at law.

52. The Legislature of Alberta has enacted a comprehensive suite of statutes, not only enabling the AER, but also governing all aspects of energy (including oil and gas) production. Those statutes, the regulations promulgated thereunder and the AER's policies and directives, in

[74] ABCA Decision at paras 140, 141 & 144.
[75] ABCA Decision at para 121.
[76] ABCA Decision at para 139.

combination, establish a complete and comprehensive regulatory regime.[77] The Asset Transaction complied with all relevant regulations, and no one has alleged otherwise.

53. The regime does not contemplate the enforcement of ARO by trustees in bankruptcy. The regime makes no provision for personal liability of directors in relation to unsatisfied ARO.[78] The regime does not envision the trustee circumventing the limitations on director liability by visiting the unpaid future obligations of a bankrupt producer upon its former directors.

54. This Court has confirmed that the obligations of a licensee under that regime are not claims of a creditor but public duties binding on the licensee after bankruptcy and upon its trustee.[79] What the Trustee seeks to do, in an exotic legal approach now endorsed by the ABCA, is circumvent this regulatory regime by attempting to offload the bankrupt's regulatory duties onto persons who could never be personally liable under the regulatory regime in that manner. The Chambers Judge was right to view this as an attempt to "impose a form of predecessor liability for ARO that was rejected by the Legislature in structuring the regulatory regime.[80]

55. The ABCA Decision speculated that there might be some "interplay" between the Trustee's claim and the relevant regulatory regime, and that this could create "complex issues" that could only be resolved with a proper evidentiary record.[81] What these "complex" issues are, or what evidence could possibly clarify this pure question of law, the ABCA did not clarify. Fundamentally, the ABCA Decision proposes a novel principle under which a Trustee can bring claims in oppression on behalf of the estate's creditors, including where the claims do not belong to the estate and cannot benefit any creditor at all, in an effort to attach personal liability for ARO to a bankrupt company's former directors, in a manner specifically rejected by Alberta's

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[77] Both the Chambers Judge, and this Court in *Redwater*, stressed that this regulatory regime was chosen by the Legislature. QB Reasons at paras 123 and 125. See also *Redwater, supra* note 5 at paras 29 and 30.

[78] The AER may seek limited remedies against directors and officers if a licensee's ARO goes unsatisfied, including as the result of a licensee's receivership or bankruptcy. These remedies are prescribed by the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (the **OGCA**), including s. 106. Director personal liability is not contemplated.

[79] *Redwater, supra* note 5 at paras 135 and 159-160.

[80] QB Decision at para 125.

[81] Appeal Decision at para 142.

Legislature. This is a novel and troubling evolution of our corporate law; clarification from this Court is needed.

(3) Does a director owe a prevailing fiduciary duty in respect of the environment, or a corporation's future public duties?

56. A director owes a statutory fiduciary duty ("act honestly and in good faith with a view to the best interests of the corporation") and a duty of care ("exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances") under s. 122(1) of the BCA.[82] These duties are owed only to the corporation.[83] They are not owed to creditors or regulators. The ABCA Decision, by overturning the summary dismissal of the Trustee's claim against Ms. Rose, recognized a fiduciary duty not only to the company's future creditors, but in respect of the company's future insolvency or inability to fund ARO. Indeed, the ABCA suggests this interest is so dominant, its conflict with shareholders interests so intractable, that a director in Ms. Rose's position has no option other than to resign.[84]

57. The ABCA reached this conclusion in the face of a record showing that Ms. Rose considered the interest of all stakeholders and a factual finding indicating she did so consistently with her business judgment.[85] In doing so, the ABCA Decision threatens to radically alter the scope of director's fiduciary duties, particularly in change of control transactions, such that a director in that situation can no longer discharge his or her duty by considering the company's known stakeholders in the transaction, or by reliance on the business judgment rule.

58. Part of the Trustee's claim is based on the allegation that Ms. Rose owed a duty to PEOC (which she has never denied) in respect of the Asset Transaction, which she breached by having PEOC enter that transfer (a condition precedent to a larger commercial deal) to further the

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[82] BCA, *supra* note , s 122(1).

[83] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at paras. 45-6 & 53 [***Peoples***]. Note that while in some circumstances a trustee in bankruptcy may act on behalf of other corporate stakeholders under the *oppression* remedy, the same is not true with respect to an alleged breach of fiduciary duty. In any such action, the Trustee must stand in the shoes of the bankrupt, and cannot advance a claim on behalf of any other stakeholder.

[84] Appeal Decision at para 157.

[85] QB Reasons at para 323. See also Affidavit of Susan Riddell Rose filed October 19, 2018 at para 80 [**Rose Affidavit**].

interests of PEOC's current and future shareholders, and not PEOC's own interests. Neither the Trustee, nor the ABCA, have clarified what PEOC's supposedly divergent interests in the Asset Transaction actually were, but the Trustee's claim makes clear that the interest was in respect of future obligations to perform ARO.

59. The Trustee's claim is truly predicated on the existence of a stakeholder interest in ensuring the past, present and *future* discharge of regulatory obligations, which directors must recognize as prevailing over all other stakeholder interests in deciding how to give effect to their fiduciary duties. The ABCA Decision endorses this theory, and puts directors of corporate takeover targets in an impossible position as a result.

60. In this respect, the ABCA Decision is contrary to existing law. PEOC was a single-purpose, wholly owned subsidiary of PEI;[86] its interests and those of PEI were never out of alignment. At minimum, PEI and 198Co were stakeholders of PEOC with legitimate interests that were rightly taken into account by Ms. Rose in determining how best to serve PEOC's own interests.[87]

61. The best interests of a corporation are evaluated by directors with regard for the interests of all stakeholders, as was recognized by this Court in *Peoples* and *BCE*.[88] The business judgment rule prevents the second-guessing of directors' decisions, particularly with the benefit of hindsight, so long as reasonable decision making processes were used. Directors are meant to balance the competing interests of stakeholders in furtherance of their corporations' best interests.[89] In any given case, and in this case particularly, the competing interests that directors must balance may include (without limitation) those of a parent corporation and a prospective purchaser.[90]

62. While this Court has recognized "the environment" as a form of stakeholder interest that may inform directors' decisions,[91] it has not come close to suggesting that directors may be held personally liable for breaching their fiduciary duties to the corporation (in whose shoes the

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[86] Rose Affidavit at para 12.
[87] *Ibid* at para 80.
[88] *Peoples, supra* note 83 at para 42; *BCE, supra* note 6 at paras 37, 38 & 40.
[89] *BCE, ibid* at para 40.
[90] QB Reasons at para 323.
[91] *Peoples, supra* note 83 at para 42; *BCE, supra* note 6 at paras 39 & 40.

Trustee stands) on the basis of the *corporation's* failure to satisfy environmental regulations, and certainly not for failing to ensure the *future* satisfaction of environmental regulatory obligations--notwithstanding very recent new case law (consistent with the decision of the Chambers Judge) holding that no ARO is owing by a licensee until the AER issues an Abandonment Order.[92] Such a conclusion would vastly expand potential director liability in the energy sector, far beyond the limits of most insurance policy limits.

63. In *BCE*, this Court rejected the proposition that directors of takeover targets must recognize shareholders' interests as prevailing over the interests of other stakeholders, such as creditors and the environment.[93] (The *Revlon* line of cases from Delaware was specifically rejected.)[94] While this Court affirmed that directors must always act in the corporation's best interests, commentators have called for clarity about how a target corporation's interests are best served by directors in this context.[95]

64. Maximizing the return from the corporation's purchaser is accepted in the context of a change of control transaction as advancing a target corporation's best interests. As stated in *Canadian Business Corporations Law*:

> When a board of directors decides to undertake the process of selling the corporation it directs, the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise. There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end. Moreover, the board has the burden of proving that it acted reasonably. It has a duty to seek the highest value reasonably available for the company's

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[92] *Manitok Energy Inc (Re)*, 2021 ABQB 227 at para 42. No AER Abandonment Orders were outstanding at the time of the Asset Transaction..

[93] *BCE, ibid* at para 86.

[94] *Ibid* at paras 86-88.

[95] Edward J Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 460, 462 & 463; Sarah P Bradley, "BCE Inc v 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41:2 Ottawa L Rev 325 at 330, 331, 338, 343 & 344; Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Maximization in the Change of Control Context" (2011) 20 Dal J Leg Stud 1 at 16-20; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 JSDLP 53 at 70-73; David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis Canada, 2014) at 18.68, 18.69, 18.85; Li-Wen Lin, "The 'Good Corporate Citizen' Beyond BCE" (2021) 58:3 Alta Law Rev 551 at 523, 565 & 566.

> shareholders regardless of where that value comes from. These are simply applications of the duty of loyalty and the general requirement that the directors of a corporation must act in the best interests of the corporation.[96]

65. The ABCA Decision upends this law by converting a director's fiduciary duty from a duty owed to the corporation and informed by the interests of all stakeholders into a duty owed prevailingly to the environment or the public. The ABCA Decision incorrectly applies *Redwater* (which had nothing to do with directors' duties) to justify a transformation of the law in this area, going far beyond what was contemplated in *BCE*. Ms. Rose was fully entitled to balance competing stakeholder interests, and her fiduciary duty did not require her to recognize the interests of the environment and the public as prevailing over the interests of PEI and the Kailas Group.

66. Even if the environment and the public were prevailing interests, only the AER (not the Trustee in Sequoia's shoes) would have standing to complain. *Redwater* stood for the proposition that ARO are a public obligation of a *licensee*, which survives its bankruptcy and is binding upon a trustee. It did not authorize that same trustee to circumvent the prevailing regulatory regime by offloading the ARO burden onto the bankrupt's released former directors, who owed no such regulatory duty in the context of a transaction that was perfectly lawful in any event.

PART IV. COSTS

67. Ms. Rose respectfully suggests the costs of this application be in the cause.

PART V. ORDER SOUGHT

68. Ms. Rose respectfully requests an order granting leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March , 2021.

Norton Rose Fulbright Canada LLP

Steven H. Leitl, QC | Gunnar Benediktsson
Counsel for the Applicant, Susan Riddell Rose

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[96] KP McGuinness, *Canadian Business Corporations Law*, 3rd ed (Markham: LexisNexis Canada, 2017) at 14.131 [emphasis added], citing *In re Answers Corp Shareholders Litigation*, CA No 6170-VCN (Del Ct Ch 2012).

PART VI. TABLE OF AUTHORITIES

Jurisprudence	Paragraph(s)
A Marquette & Fils Inc v Mercure, [1977] 1 SCR 547	38, 41
BCE Inc v 1976 Debentureholders, 2008 SCC 69	5, 62, 63, 64
BDO Canada Limited v Dorais, 2015 ABCA 137	17, 38
Orphan Well Association v Grant Thornton Ltd, 2019 SCC 5	5, 8, 18, 24, 53, 55
Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd, 1991 ABCA 181	18
Peoples Department Stores Inc (Trustee of) v Wise, 2004 SCC 68	57, 62, 63
PricewaterhouseCoopers Inc v Olympia & York Realty Corp, 68 OR (3d) 544	39, n 64
PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2020 ABQB 6	14, 15, 16, 17, 18, 19, 20, 21, 52, 54, 59, 60
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PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 92	5
Principal Group (Trustee of) v Principal Savings & Trust Co, [1990] AJ No 907	41
Toyota Canada Inc v Imperial Richmond Holdings Ltd (1997), 54 Alta LR (3d) 183	39, 41
Wilson v Alharayeri, 2017 SCC 39	5

Secondary Sources	Paragraph(s)
Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise"	62

(2013) 9:1 JSDLP 53	
David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis Canada, 2014)	64
Edward J Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439	64
KP McGuinness, *Canadian Business Corporations Law*, 3rd ed (Markham: LexisNexis Canada, 2017)	65
Li-Wen Lin, "The 'Good Corporate Citizen' Beyond BCE" (2021) 58:3 Alta Law Rev 551	64
Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Maximization in the Change of Control Context" (2011) 20 Dal J Leg Stud 1	64
Sarah P Bradley, "BCE Inc v 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41:2 Ottawa L Rev 325	64

Statutory Provisions
Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 71 *Loi sur la faillite et l'insolvabilité* (L.R.C. (1985), ch. B-3), a. 71
Oil and Gas Conservation Act, RSA 2000, c O-6, s 106
Business Corporations Act, RSA 2000, c B-9, s 122(1)

CLERK'S STAMP

CLERK OF THE COURT
FILED
AUG 0 2 2018
CALGARY, ALBERTA

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	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DE WAAL LAW 1010, 505 – 3RD Street SW Calgary, AB T2P 3E6 Phone: (403) 266-0012 Attention: Rinus de Waal/Luke Rasmussen Direct: (403) 266-0013 Facsimile: (403) 266-2632 E-mail: rdewaal@dewaallaw.com

NOTICE TO THE DEFENDANTS:

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

{00028524-6/283.001}

The Parties

1. The Plaintiff is PricewaterhouseCoopers Inc. LIT ("**PwC**"), a licensed insolvency trustee and the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp. ("**Sequoia**" or "**PEOC**").

    1.1. Sequoia was formerly known as Perpetual Energy Operating Corp. and was the trustee of Perpetual Operating Trust ("**POT**") until October 1, 2016.

    1.2. On or about March 2, 2018, Sequoia filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended (the "***BIA***") and on or about March 23, 2018 Sequoia assigned itself into bankruptcy.

2. The Defendants are:

    2.1. Perpetual Energy Inc. ("**PEI**"), a corporation duly incorporated pursuant to the laws of the Province of Alberta;

    2.2. POT, an unincorporated trust formed pursuant to the laws of the Province of Alberta;

    2.3. Perpetual Operating Corp. ("**POC**"), a corporation duly incorporated pursuant to the laws of the Province of Alberta, and

    2.4. Susan Riddell Rose ("**Rose**"), an individual residing in Calgary, Alberta.

3. At all material times:

    3.1. Rose was a director of PEI, PEOC and POC;

    3.2. Rose was the beneficial owner of shares in PEI;

    3.3. PEOC and POC were wholly-owned subsidiaries of PEI; and

    3.4. PEI controlled POT, as the parent corporation of its trustee, PEOC and then POC.

The Agreements

4. In or about the summer or fall of 2016, PEOC and the Defendants entered into a series of transactions, with the intent to benefit the Defendants to the prejudice of PEOC, by:

    4.1. transferring a large number of shallow gas wells and related assets with significant associated liabilities (the "**Goodyear Assets**") from POT to PEOC; and then

    4.2. severing the corporate relationship between PEOC and the Defendants by:

        4.2.1. the transfer, by PEOC, of the rights, licenses and other interests it held in trust for POT, to POC;

4.2.2. the sale, by PEI, of all the shares of PEOC to a third-party purchaser;

4.2.3. the replacement of PEOC as trustee for POT;

4.2.4. the resignation of Rose as director of PEOC; and

4.2.5. the change of the name of PEOC, from Perpetual Energy Operating Corp. to Sequoia Resources Corp.

The Asset Transaction

5. Pursuant to a Purchase and Sale Agreement dated October 1, 2016 (the "**Asset PSA**"), PEOC, as trustee for POT, purchased the Goodyear Assets, which had significant associated abandonment and reclamation liabilities (the "**ARO**"), from POT for $10.00.

6. In the Asset PSA, POT, through its trustee PEOC, agreed with PEOC, *inter alia*, that:

6.1. the amount and scope of the ARO associated with the Goodyear Assets were not capable of being quantified;

6.2. the ARO was inextricably linked to the Goodyear Assets;

6.3. PEOC would be liable for the ARO;

6.4. there was an inextricable link between the Goodyear Assets and the ARO which had been taken into account in establishing the purchase price for the Goodyear Assets;

6.5. PEOC would indemnify POT for all Losses and Liabilities (as defined in the Asset PSA), including the ARO; and that

6.6. no value was attributed to the assumption by PEOC of the ARO or for the indemnities provided by PEOC.

The Share Transaction

7. Pursuant to a Share Purchase and Sale Agreement dated September 26, 2016 (the "**Share PSA**"), PEI sold all the shares in PEOC to 1986114 Alberta Inc. ("**198**") for $1.00.

8. In the Share PSA, PEI and 198 agreed, *inter alia,* that:

8.1. there would be a "Pre-Transaction Reorganization", defined as the sale and transfer of the Goodyear Assets from POT to PEOC, and the resignation of PEOC as trustee of POT;

8.2. the assumption by 198 of responsibility for the ARO was taken into account in determining the purchase price;

8.3. an independent engineering evaluation of the assets held by PEOC, prepared by McDaniel & Associates Consultants reasonably represented the value of the Goodyear Assets; and that

8.4. PEI would continue to benefit from the Goodyear Assets from October 1, 2016 through August 31, 2018.

9. The transaction contemplated by Share PSA (the "**Share Transaction**") closed immediately after the related transaction contemplated by the Asset PSA (the "**Asset Transaction**").

The Retained Interests Agreement

10. Pursuant to a Retained Interests Agreement with PEOC, also dated October 1, 2016 (the "**Retained Interests Agreement**"), POT, by its new trustee, POC, and PEOC agreed, *inter alia*, that:

10.1. PEOC would retain an undivided 1% legal interest in certain highly productive gas assets (the "**Retained Interests**") and the right to be the licensee of record with respect to the wells associated with those assets;

10.2. PEOC would hold the Retained Interests as bare trustee in trust for POT;

10.3. POT would retain 100% of the beneficial interest in the Retained Interests, in contemplation of the eventual transfer of the Retained Interests from PEOC to POT; and that

10.4. PEOC would transfer the Retained Interests back to POT if, one year after the closing date, PEOC's LLR, calculated without reference to the Retained Interests, was 1.1 or higher.

11. The objective of the transaction contemplated by the Retained Interests Agreement (the "**Retained Interests Transaction**") was to support the LLR rating for PEOC, as determined by the Alberta Energy Regulator ("**AER**"), to allow the Asset Transaction and Share Transaction to be completed without regulatory intervention by the AER.

Value and Consideration

12. Prior to the Asset Transaction, the Share Transaction and the Retained Interests Transaction (collectively, the "**Transactions**"), Sequoia, then known as PEOC, had functioned solely as trustee for POT and had no material assets or operations.

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

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:

14.1. Sequoia acquired assets with associated ARO and other liabilities which exceeded the value of the assets;

14.2. Sequoia received consideration which was conspicuously less than the consideration provided by Sequoia; and

14.3. if Sequoia was not already insolvent, it was rendered insolvent, as its liabilities exceeded its assets and it was unable to pay its debts as they became due.

Rose as Director of PEOC

15. At all material times until her resignation as director of PEOC following the closing of the Transactions, Rose:

15.1. was the sole director and directing mind of PEOC;

15.2. owed fiduciary duties to PEOC, including a duty to act honestly and in good faith with a view to the best interests of PEOC, in accordance with s. 122(1)(a) of the Alberta *Business Corporations Act*, RSA 2000 c B-9 (the "***ABCA***");

15.3. owed PEOC a duty of care, including a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, in accordance with s. 122(1)(b) of the *ABCA*; and

15.4. was required to comply with the provisions of the *ABCA*, including s. 120.

16. Rose breached her duties to PEOC, *inter alia*, by:

16.1. failing to act honestly and in good faith with a view to the best interests of PEOC;

16.2. failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

16.3. causing PEOC to enter into the Asset Transaction with POT in circumstances where:

16.3.1. Rose and the other Defendants had determined that the assets to be purchased by PEOC were high liability assets that should be disposed of by, and for the benefit of, the Defendants;

16.3.2. Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear Assets;

16.3.3. Rose was aware that PEOC was insolvent, or would be rendered insolvent by the Asset Transaction; and

16.3.4. Rose would benefit personally from the Asset Transaction, including as a beneficial shareholder in PEI;

16.4. failing to disclose to PEOC, contrary to sections 120 and 122 of the *ABCA*, *inter alia*:

16.4.1. that the Transactions were not reasonable or fair to PEOC and were not in PEOC's best interests;

16.4.2. that the Transactions were highly prejudicial to PEOC's interests; and

16.4.3. that Rose, as a beneficial shareholder and director of PEI, had a material interest in PEI, POT and POC, which benefited from the Transactions, at the expense of PEOC; and

16.5. 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*.

17. As a result of the breaches by Rose of her duties as the director of PEOC:

17.1. the Asset Transaction should be set aside and declared void, *inter alia* pursuant to s. 120(9) of the *ABCA*;

17.2. Rose should be required to account to PEOC for any profit she realized as a result of the Asset Transaction; and

17.3. PEOC suffered damages, including:

17.3.1. the difference between the consideration given and received by PEOC as a result of the Asset Transaction;

17.3.2. costs incurred until the Goodyear Assets are returned to POT, including the costs related to address safety, environmental and other issues relating to the Goodyear Assets; and

17.3.3. costs incurred to investigate the Transactions and to act in the best interests of creditors of PEOC.

Oppression

18. The Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, including sections 239 and 242.

19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT and POC to enter into and carry out the Transactions:

19.1. Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2. PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

20. As a result of the Transactions generally, and the Asset Transaction in particular:

20.1. if PEOC was not insolvent, it was rendered insolvent;

20.2. 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

20.3. PEOC became liable for, but unable to pay, the ARO associated with the Goodyear Assets;

all for the benefit of PEI, POC and Rose personally.

Transfer at Undervalue

21. The Asset Transaction constituted a transfer at undervalue within the meaning of the *BIA*, including sections 2 and 96.

22. The Asset Transaction:

22.1. was a disposition of property for which the consideration received by PEOC was conspicuously less than the fair market value of the consideration given by PEOC, including by its assumption by PEOC of the ARO associated with the Goodyear Assets;

22.2. was entered into between PEOC and POT in circumstances where:

22.2.1. PEOC was the trustee of POT;

22.2.2. PEI controlled PEOC and POT;

22.2.3. Rose was a director and beneficial shareholder of PEI and the sole director of PEOC;

22.2.4. PEOC, PEI, POC, POT and Rose were not dealing at arm's length with each other within the meaning of the *BIA*; and

22.2.5. PEI, POC and Rose benefited from and were privy to the Asset Transaction within the meaning of s. 96 of the *BIA*;

22.3. occurred in October 2016, less than 5 years before Sequoia filed the NOI and assigned itself into bankruptcy in March 2018; and

22.4. was entered into while PEOC was insolvent, *alternatively* rendered PEOC insolvent.

23. Pursuant to s. 96 of the *BIA*:

    23.1. the Asset Transaction is void as against the Trustee; or

    23.2. the Trustee is entitled to judgment against PEI, POC, POT and Rose for the difference between the value of the consideration received by PEOC and the value of the consideration given by PEOC in the Asset Transaction.

Public Policy, Statutory Illegality and Equitable Rescission

24. The Transactions are void:

    24.1. on grounds of public policy, for being contrary to the public policy reflected in Alberta's oil and gas regulatory regime, including the *Oil and Gas Conservation Act*, RSA 2000, ch. O-6, the *Oil and Gas Conservation Rules*, AR 151/71 and the AER's Directive 001, Directive 006, Directive 011 (the "**Regulatory Regime**");

    24.2. on the basis of statutory illegality, as they were expressly or impliedly prohibited by the Regulatory Regime; and

    24.3. on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim.

Remedy sought:

1. An order setting aside Asset Transaction and declaring the Asset Transaction void as against the Trustee;

2. *Alternatively to paragraph 1*, judgment against PEI, POC, POT and Rose, jointly and severally, for the difference between the value of the consideration received by PEOC and the value of the consideration given by PEOC pursuant to the Asset Transaction;

3. Judgment against Rose for damages caused by the breach of her duties to PEOC;

4. An Order, directing Rose to account to the Trustee for any profit or gain realized on the Transactions;

5. An Order pursuant to Part 19 of the *ABCA;*

6. Costs of this Action on a solicitor-and-own-client, full indemnity basis; and

7. Further and/or alternative relief.

NOTICE TO THE DEFENDANTS
You only have a short time to do something to defend yourself against this claim:

- 20 days if you are served in Alberta
- 1 month if you are served outside Alberta but in Canada
- 2 months if you are served outside Canada.

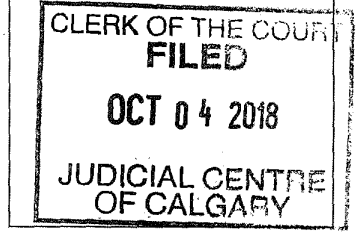
You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

Form 49
[Rule 13.19]

Clerk's Stamp:



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	**AFFIDAVIT OF W. MARK SCHWEITZER**
PARTIES FILING THIS DOCUMENT	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE

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AFFIDAVIT OF W. MARK SCHWEITZER

Sworn on October 3, 2018

I, **W. Mark Schweitzer**, of the City of Calgary, of the Province of Alberta, SWEAR AND SAY THAT:

Introduction

1. I am the Vice-President, Finance, and Chief Financial Officer of the Defendants Perpetual Energy Inc. (**Perpetual**) and Perpetual Operating Corp. (**POC**). I commenced employment in this position with Perpetual in May 2017.

2. As such I have personal information regarding the matters set out in this Affidavit, except where I state my information is from another source, in which case I believe that information to be true.

3. I am a Chartered Professional Accountant, a graduate of Queen's University with a Bachelor of Commerce degree, and a member of the Chartered Professional Accountants of Ontario.

4. Unless otherwise defined, the abbreviations and defined terms in the Perpetual Defendants' Statement of Defence are used in this Affidavit.

5. I was not involved in the Transaction in 2016, but I have been actively involved in Perpetual's review of files, communications with Mr. Darby following Sequoia's bankruptcy and this action since Mr. Darby's first communication with Perpetual by letter dated May 28, 2018.

6. I have read the Statement of Claim, Statements of Defence, Applications filed on behalf of the Plaintiff and on behalf of the Defendants, and the Affidavit of Paul J. Darby in this action. The Defendants' applications for summary dismissal filed August 27, 2018 seek orders summarily dismissing this action based on certain threshold issues.

7. Based on my knowledge of the Plaintiff's claims and the Defendants' defences, determining the threshold issues as an initial step in this action should:

(a) dispose of all or substantially all of the Plaintiff's claim;

(b) eliminate the need for a trial or any other further proceedings in this action;

(c) save all parties substantial expense; and

(d) expedite the Plaintiff's ability to perform its obligations as trustee in bankruptcy.

8. The Defendant's applications also seek to stay the Plaintiff's application to set aside the Asset Transaction (as defined in the Statement of Claim) and alternatively for judgment for $217,570,800 jointly and severally against all the Defendants.

9. Based on my knowledge of this action, I have set out below some of the issues that I believe must be addressed, and the Defendants' anticipated evidence to address those issues if the Defendants' summary dismissal applications are not heard and determined prior to the hearing of the Plaintiff's application for judgment on the Statement of Claim.

Consideration received by PEOC under the Transaction

10. While the Asset Purchase Agreement was but one component of the Transaction, Mr. Darby isolates the Asset Purchase Agreement in his discussion of consideration.

11. Mr. Darby states in paragraph 44.3 of his Affidavit that it is his opinion that the value of the "actual" consideration received by PEOC in the Asset Transaction was at most $5,670,200. He relies exclusively on reserve reports prepared at year-end 2015 that were based upon assumptions, interpretations and forecasts made at that time. The reports are not attached but rather Mr. Darby attaches certain summary pages as Exhibit L to his Affidavit. Based on paragraph 44.2 of Mr. Darby's Affidavit, it appears that he did not understand the information presented in the reserve reports, as the end of life abandonment and reclamation costs and property taxes for the recognized reserves were in fact included.

12. It is commonly understood in the oil and gas industry that there is no direct correlation between the net present value discounted at 10% in a reserve report (particularly an outdated reserve report) and the fair market value of the reserves. There are a variety of reasons, including that:

(a) As expressly noted on all reserve reports, including those cited by Mr. Darby, they are based on numerous assumptions (including with respect to available financing, timing of planned expenditures, capital and operating costs and forecasted prices).

(b) Reserve report information is effective at a fixed point in time. The information may be materially different at a later time. Among other things, production, well

performance, capital expenditures, pricing, operating costs and exploitation and operational strategies all could change during that period.

(c) Reserve reports do not include the value of other assets, such as pipelines, other surface facilities, prospect drilling inventory and undeveloped acreage.

(d) Reserve reports do not account for a buyer's view of its ability to increase the value of the reserves and other assets under its own business plan. The fair market value of assets determined by negotiations between informed industry participants is complex and influenced by assumptions, forecasts, financing costs, business plans, strategies and competitive forces.

(e) Reserve reports do not consider price risk management positions or cost structure reductions that a buyer and seller may negotiate in determining fair market value.

(f) Reserve reports do not consider the cost of financing, timing of planned expenditures, changes in development and operating strategies and costs that a buyer may bring to the assets.

13. In this regard, I also note that Perpetual's Statement of Reserves Data and Other Oil and Gas Information included in its publicly filed 2015 Annual Information Form states at page 8: "It should not be assumed that the estimates of future net revenues presented in the tables below represent the fair market value of the reserves. There is no assurance that the forecast prices and cost assumptions will be attained and variances could be material."

14. The Perpetual Defendants claim in paragraph 42 of their Statement of Defence that the value of the consideration received by PEOC/Sequoia was equivalent to the value given by PEOC/Sequoia under the Asset Purchase Agreement, and list several components of that consideration, including "the beneficial interest in producing and non-producing oil and gas properties, which included production, wells, pipelines, facilities and their associated liabilities at end of life, being the Goodyear Assets...".

15. The Defendants will require factual and expert evidence to show the fair market value of the consideration received by PEOC (as it then was).

Consideration given under the Transaction

16. Mr. Darby states in paragraph 44.1 of his Affidavit that it is his opinion that the Goodyear Assets had no positive fair market value at the time of the Asset Transaction but represented a significant net liability of at least $223,241,000.

17. That was not the conclusion of the new owner of PEOC (soon to be Sequoia) on October 1, 2016, following extensive arm's length negotiations and the new owner's considerable due diligence.

18. Mr. Darby states in paragraph 44.2 of his Affidavit that it is his opinion that the value of the "actual" consideration given by PEOC in the Asset Transaction was at least $223,241,000. To support this calculation, Mr. Darby states in paragraphs 39 and 40 of his Affidavit that an entity named XI Technologies Inc. has developed a software model that estimates abandonment and reclamation costs, and according to that model the liabilities associated with the Goodyear Assets were "ARO of $192,127,241 for the Goodyear Wells (abandonment costs of $98,855,218 and reclamation costs of $93,272,056)"; "ARO of $26,831,000 for the facilities associated with the Goodyear Wells"; and "Property taxes of $10,047,744.20".

19. The Perpetual Defendants state the value of the consideration given by Sequoia was not $223,241,000 and claim in paragraph 44 of their Statement of Defence that the value of PEOC/Sequoia's liabilities at the time of the Transaction was approximately equivalent to the value of its assets.

20. The Defendants will require factual and expert evidence to show: (a) the inaccuracy of the figures used by Mr. Darby[1]; and (b) the fair market value of the consideration given by PEOC (as it then was).

[1] As one example, the $10,047,744.20 figure cited by Mr. Darby at paragraph 40.3 of his Affidavit represents information sourced from the Goodyear data room regarding property taxes paid by Perpetual in 2015. Perpetual believes that in 2016, Sequoia and Perpetual paid $6,376,323 in property taxes with respect to the Goodyear Assets. The difference would relate to Perpetual's retained Mannville and Panny heavy oil property taxes paid in 2015 as well as taxes paid with respect to the Warwick gas storage business that was sold by Perpetual in May 2016.

Proof of insolvency

21. Mr. Darby states in paragraphs 45 to 47 of his Affidavit that:

(a) prior to the "Goodyear Restructuring", PEOC "had no assets or operations and may have been insolvent, if it was personally liable to pay the municipal property tax obligations associated with the assets it held as trustee for POT";

(b) by acquiring the Goodyear Assets, PEOC was immediately rendered insolvent; and

(c) "As a result of the Asset Transaction, PEOC had no property which, at a fair valuation, was sufficient to enable payment of all its obligations."

22. The Perpetual Defendants claim in paragraphs 48 to 50 of their Statement of Defence that:

(a) PEOC was not insolvent prior to the Transaction;

(b) Sequoia was not rendered insolvent by the Transaction nor by the Asset Purchase Agreement if considered in isolation; and

(c) Sequoia was not rendered insolvent by the Transaction, but rather was rendered insolvent as a result of its own conduct and market forces occurring in the 18 month period after the Transaction.

23. The Defendants will require factual and expert evidence to address solvency before and after the Transaction and the causes of Sequoia's ultimate insolvency and bankruptcy. As part of that evidence, the Defendants will require, among other things, extensive record production from the Trustee concerning Sequoia's insolvency and oral evidence from Mr. Wang and Mr. Yang and other management of Sequoia.

24. For instance, in a March 26, 2018 Letter to Stakeholders, a copy of which is attached as **Exhibit A**, the Sequoia Board of Directors and Management provided an overview of Sequoia's business plan and the factors contributing to its insolvency, stating:

> Sequoia Resources Corp., or SRC, was formed in October of 2016 to implement a gas asset acquisition strategy during what was thought to

be the bottom of the gas price cycle. The strategy involved acquiring gas assets, some of which were close to the end of their life-cycle, and work on reducing the operating costs of these assets, in part through the implementation of an aggressive abandonment and reclamation program that would see the restoration of the lands and inactive wells acquired from previous producers back to their original state prior to the commencement of oil and gas activities.

Generally, the completion of abandonment and reclamation activities reduces surface and mineral rental costs and other ongoing expenses, thus reducing overall operating costs. However, up-front capital is required to complete these abandonment and reclamation activities. SRC believed that by completing abandonments in strategic groups (i.e. on an area by area basis) and completing portions of the abandonment process in-house, SRC would be able to clean up legacy obligations more efficiently and economically than under an otherwise less structured program. To this end, SRC created an internal abandonment and reclamation team with in-house environmental functions, guided by a seasoned and established operational team, most of whose members have had more than 20 years of experience in Alberta managing these same acquired assets.

Operations commenced on October 1, 2016 and SRC immediately began its aggressive abandonment and reclamation program. From October 1, 2016 to December 31, 2017, SRC abandoned 150 wells and received reclamation certificates for 91 wells.

Due to its outsize focus on cleaning up environmental liabilities, SRC ranked fifth in the province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017. Ahead of SRC were CNRL, Husky, Cenovus and Paramount, each major Alberta producers that are orders of magnitude larger than SRC, a small start-up. Further, SRC did not drill any new wells or contribute to the creation of any new environmental obligations during its existence and focused all of its cash on either rehabilitating legacy assets through workover programs or the suspension, abandonment and reclamation of those assets which had completed their productive life and restoring the associated lands to their original condition, in accordance with applicable AER and environmental requirements.

SRC also implemented other cost reduction programs throughout its operations from field to head office and took advantage of the low cost of office space in Calgary to build a very low G&A, and a lean but experienced and effective team.

These strategies were successful and on target through to the end of the summer of 2017. SRC steadily increased its production and reduced its overall environmental liabilities.

However, by the end of the summer of 2017, gas prices in Alberta began to slide. In October, where gas had averaged $2.95/GJ over the past four years, prices collapsed to an average of $1.32/GJ for 2017 (source for all historic prices: www.cga.ca). On certain days in October, gas traded at negative prices; producers such as SRC paid purchasers to take the gas instead of getting paid. During the 2017/2018 winter (Nov. to Mar., inclusive), at a time when gas prices are typically higher seasonally

> as heating demand peaks, and where historic prices have averaged $3.07/GJ for the past four years, prices for the 2017/2018 winter were $2.04/GJ. During the spring of 2018, gas prices and especially gas futures continued to collapse. The 2018 summer forecast is now $1.13/GJ (source for forward prices: www.gasalberta.com as of today's date). Forecast pricing for 2019, 2020 and 2021 are also very significantly down from forecast pricing when SRC began operations. Unfortunately, the turn in prices did not appear to be just a short term anomaly. SRC, as a "dry" gas company also does not benefit from high liquids pricing as does some of its non "dry" gas competitors.
>
> As prices continued to drop, SRC's management investigated various options to diversify its gas exposure, to sell assets, to re-capitalize, to convert vehicle fleets to use compressed natural gas, to purchase generators and convert gas to electricity for sale to the grid. SRC even investigated using gas to generate electricity for cryptocurrency mining. In this environment, both purchasers of dry gas assets and refinancing providers were difficult to find. None of the special projects had the economics or scale to make a significant enough difference, especially when factoring in the newly implemented and escalating carbon levy.
>
> Ultimately, as a result of the low price environment, SRC could not complete its abandonment program or continue to operate without sustaining significant losses. SRC attempted but was unsuccessful in negotiating with municipalities to reduce its tax burden for 2017 and 2018. Municipal taxes do not scale with gas prices and so in a low price environment account for a significant portion of SRC's costs. SRC also attempted but was unable to obtain refinancing necessary to outlast this protracted price collapse.
>
> As a result of these developments, on February 22, 2018 SRC met with the AER to discuss the options available to SRC for shutting down operations in a safe and orderly manner. On notice to the AER, SRC began closing down its biggest loss centres, following a plan for the shut-in of the remaining assets. SRC continued to meet with the AER to work collaboratively and ensure that environmental and safety concerns were addressed throughout the shut-down of operations.
>
> SRC entered into this project believing it had a workable strategy to create a sustainable and profitable gas company through a methodical abandonment and reclamation program, with a focus on efficiency. None of the directors were ever paid any fees or remuneration and none of the shareholders (the majority of whom are Canadian) received any dividends or return of capital. This unfortunate outcome is not what anyone had hoped for, and should not have been the end result after the extraordinary dedication, creativity and hard work from the employees and partners of SRC over the past year and a half.
>
> The Board of Directors and Management Team at SRC sincerely wish to thank SRC's employees and partners for all of their contributions.

25. Sequoia's representations to its stakeholders regarding the cause of its insolvency appears to directly contradict the opinion of Mr. Darby expressed in his affidavit, as well as the Trustee's Preliminary Report dated April 11, 2018, a copy of which is attached as **Exhibit B**.

Damages claimed

26. In paragraph 17 of the Statement of Claim, the Plaintiff claims PEOC suffered damages, which are claimed against all the Defendants, as:

(a) the difference between the consideration given and received by PEOC as a result of the Asset Transaction;

(b) costs incurred until the Goodyear Assets are returned to POT, including the costs related to address safety, environmental and other issues relating to the Goodyear Assets; and

(c) costs incurred to investigate the Transactions and to act in the best interests of creditors of PEOC.

27. The Perpetual Defendants claim in paragraph 51 of their Statement of Defence that there was no material difference between the value of the consideration given and received either pursuant to the Asset Purchase Agreement or the Share Purchase Agreement.

28. The Defendants will require factual and expert evidence to address the alleged damages the Plaintiff claims PEOC suffered.

Public Policy, Statutory Illegality and Equitable Rescission

29. In paragraph 24 of the Statement of Claim, the Plaintiff claims the Transactions are void:

(a) on the grounds of public policy, for being contrary to the public policy reflected in the Regulatory Regime;

(b) on the basis of statutory illegality; and

(c) on equitable grounds.

30. Mr. Darby does not address what public policy reflected in the Regulatory Regime or what provisions of what statutes the Plaintiff relies on.

31. Alberta Energy Regulator President and CEO Jim Ellis issued AER Public Statement 2018-08-08, a copy of which is attached as **Exhibit C**, addressing Sequoia's bankruptcy. He stated:

> However, sometimes there are situations beyond our control. When this happens, it is our responsibility to identify and address any gaps in our requirements. Earlier this year, Sequoia Resources Corp. (Sequoia) informed us that it planned to cease operations without properly decommissioning more than 4,000 wells, pipelines, and facilities. As a result, we ordered the company to address its end-of-life obligations.
>
> But how did Sequoia get to this point? What happened that caused them to be in this position? This is where a gap in the system has been identified. ...
>
> For the AER, this situation has exposed a gap in the system and raised questions with respect to how we better manage liability in the future. In some cases, our governing legislation did not provide us the necessary flexibility to do what is needed, while in other cases our own requirements and processes were limiting. We are working to fix both. ...

32. If these claims are not struck, the Defendants will require evidence from various witnesses, including AER witnesses, regarding the public policy, statutory illegality and equitable rescission claims.

Document production

33. I am advised by counsel that the Plaintiff is required to serve an affidavit of records within 3 months of the service of the Statements of Defence, that is, by November 27, 2018, and the Defendants are required to serve affidavits of records within 2 months after they are served with the Plaintiff's affidavit of records. In a lawsuit of this complexity, I expect the record production by the parties will be extensive. The Perpetual Defendants have already commenced the process to collect, review and produce records.

34. I swear this Affidavit for the limited purpose of the Defendants' Application to Resolve Particular Questions and to Stay the Plaintiff's Application filed August 27, 2018.

SWORN BEFORE ME at the City of Calgary, in the Province of Alberta this 3rd day of October, 2018.

A Commissioner for Oaths in and for the Province of Alberta

KRISTIN AMBROZY
A Commissioner for Oaths
In and for Alberta
My Commission Expires October 10, 2019

W. Mark Schweitzer

9255454.1

Sequoia Resources Corp.

Sequoia Resources Corp. (SRC) is a private, majority Canadian owned and managed gas company with operations in Alberta.

March 2, 2018

On March 2, 2018, SRC filed a Notice of Intention to Make a Proposal ("NOI") pursuant to Section 50.4 (1) of the Bankruptcy and Insolvency Act ("BIA") and PricewaterhouseCoopers Inc., LIT ("PwC") was named as proposal trustee.

Please see the PwC Trustee website at:
https://www.pwc.com/ca/en/services/insolvency-assignments/sequoiaresources.html

March 23, 2018

On March 23, 2018, SRC made a voluntary assignment into bankruptcy under section 49 of the BIA. PwC has been appointed trustee of the estate of SRC.

THIS IS EXHIBIT "A"
referred to in the Affidavit of
Mark Schweitzer
Sworn before me this 3rd
Day of Oct A.D. 2018
A COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

KRISTIN AMBROZY
A Commissioner for Oaths
In and for Alberta
My Commission Expires October 10, 2019

March 26, 2018
Letter to Stakeholders

Sequoia Resources Corp., or SRC, was formed in October of 2016 to implement a gas asset acquisition strategy during what was thought to be the bottom of the gas price cycle. The strategy involved acquiring gas assets, some of which were close to the end of their life-cycle, and work on reducing the operating costs of these assets, in part through the implementation of an aggressive abandonment and reclamation program that would see the restoration of the lands and inactive wells acquired from previous producers back to their original state prior to the commencement of oil and gas activities.

Generally, the completion of abandonment and reclamation activities reduces surface and mineral rental costs and other ongoing expenses, thus reducing overall operating costs. However, up-front capital is required to complete these abandonment and reclamation activities. SRC believed that by completing abandonments in strategic groups (i.e. on an area by area basis) and completing portions of the abandonment process in-house, SRC would be able to clean up legacy obligations more efficiently and economically than under an otherwise less structured program. To this end, SRC created an internal abandonment and reclamation team with in-house environmental functions, guided by a seasoned and established operational team, most of whose members have had more than 20 years of experience in Alberta managing these same acquired assets.

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Due to its outsize focus on cleaning up environmental liabilities, SRC ranked fifth in the province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017. Ahead of SRC were CNRL, Husky, Cenovus and Paramount, each major Alberta producers that are orders of magnitude larger than SRC, a small start-up. Further, SRC did not drill any new wells or contribute to the creation of any new environmental obligations during its existence and focused all of its cash on either rehabilitating legacy assets through workover programs or the suspension, abandonment and reclamation of those assets which had completed their productive life and restoring the associated lands to their original condition, in accordance with applicable AER and environmental requirements.

SRC also implemented other cost reduction programs throughout its operations from field to head office and took advantage of the low cost of office space in Calgary to build a very low G&A, and a lean but experienced and effective team.

These strategies were successful and on target through to the end of the summer of 2017. SRC steadily increased its production and reduced its overall environmental liabilities.

However, by the end of the summer of 2017, gas prices in Alberta began to slide. In October, where gas had averaged $2.95/GJ over the past four years, prices collapsed to an average of $1.32/GJ for 2017 (source for all historic prices: www.cga.ca). On certain days in October, gas traded at negative prices; producers such as SRC paid purchasers to take the gas instead of getting paid. During the 2017/2018 winter (Nov. to Mar., inclusive), at a time when gas prices are typically higher seasonally as heating demand peaks, and where historic prices have averaged $3.07/GJ for the past four years, prices for the 2017/2018 winter were $2.04/GJ. During the spring of 2018, gas prices and especially gas futures continued to collapse. The 2018 summer forecast is now $1.13/GJ (source for forward prices: www.gasalberta.com as of today's date). Forecast pricing for 2019, 2020 and 2021 are also very significantly down from forecast pricing when SRC began operations. Unfortunately, the turn in prices did not appear to be just a short term anomaly. SRC, as a "dry" gas company also does not benefit from high liquids pricing as does some of its non "dry" gas competitors.

As prices continued to drop, SRC's management investigated various options to diversify its gas exposure, to sell assets, to re-capitalize, to convert vehicle fleets to use compressed natural gas, to purchase generators and convert gas to electricity for sale to the grid. SRC even investigated using gas to generate electricity for cryptocurrency mining. In this environment, both purchasers of dry gas assets and refinancing providers were difficult to find. None of the special projects had the economics or scale to make a significant enough difference, especially when factoring in the newly implemented and escalating carbon levy.

Ultimately, as a result of the low price environment, SRC could not complete its abandonment program or continue to operate without sustaining significant losses. SRC attempted but was unsuccessful in negotiating with municipalities to reduce its tax burden for 2017 and 2018. Municipal taxes do not scale with gas prices and so in a low price environment account for a significant portion of SRC's costs. SRC also attempted but was unable to obtain refinancing necessary to outlast this protracted price collapse.

As a result of these developments, on February 22, 2018 SRC met with the AER to discuss the options available to SRC for shutting down operations in a safe and orderly manner. On notice to the AER, SRC began closing down its biggest loss centres, following a plan for the shut-in of the remaining assets. SRC continued to meet with the AER to work collaboratively and ensure that environmental and safety concerns were addressed throughout the shut-down of operations.

SRC entered into this project believing it had a workable strategy to create a sustainable and profitable gas company through a methodical abandonment and reclamation program, with a focus on efficiency. None of the directors were ever paid any fees or remuneration and none of the shareholders (the majority of whom are Canadian) received any dividends or return of capital. This unfortunate outcome is not what anyone had hoped for, and should not have been the end result after the extraordinary dedication, creativity and hard work from the employees and partners of SRC over the past year and a half.

The Board of Directors and Management Team at SRC sincerely wish to thank SRC's employees and partners for all of their contributions.

The Sequoia Resources Corp. Board of Directors and Management

Emergency: 1-844-858-8038
Other Inquiries, please visit:
https://www.pwc.com/ca/sequoiaresources

Contact: sequoiaresourcescorp@gmail.com

TRUSTEE'S PRELIMINARY REPORT

IN THE MATTER OF THE BANKRUPTCY OF

ESTATE NO.: 25-2351565 - SEQUOIA RESOURCES CORP.

hereinafter referred to as "SRC" or the "Company"

of the City of Calgary, in the Province of Alberta

I. Background

SRC (formerly Perpetual Energy Operation Corp.) was acquired by 1986114 Alberta Inc., a Canadian corporation, on October 1, 2016. SRC grew through a series of transactions in which SRC purchased primarily dry gas assets. Between September 2016 and August 2017, the Company grew to approximately 3,200 gas wells ("Wells") and their associated facilities and pipelines. The key transactions were as follows:

Source	Transaction	Approximate % of Wells acquired
Perpetual Energy Operating Corp.	Corporate sale	~75%
Husky Oil Operations Ltd.	Asset purchase	~11%
Waldron Energy (in bankruptcy)	Asset purchase	~6%
Other	Asset purchase	~8%

Former management of SRC has advised the Trustee that SRC's business strategy was to:

- acquire gas assets, some at close to the end of their life cycle, from gas producers;
- implement cost reduction programs throughout its operations to reduce overall costs to the Company both in the field and at head office; and
- reduce the operating costs of the assets, in part, by cleaning up older wells, and where appropriate, abandoning and reclaiming well sites, reducing long term surface, mineral and other carrying costs.

Former management of SRC advises the Trustee that the acquisitions were completed at a time when gas prices were at historic lows and thought to be at the bottom of the commodity cycle. Former management of SRC also advises that by cleaning up the old wells and implementing the abandonment and reclamation program, through the creation of an in-house team, SRC believed that it could reduce costs sufficiently to turn a profit and responsibly produce the remaining assets.

Based on materials reviewed by the Trustee, for the period October 1, 2016 to December 31, 2017, SRC abandoned approximately 150 wells and received reclamation certificates for approximately 90 wells. This ranked SRC fifth in the province for number of properties abandoned and reclaimed, behind CNRL, Cenovus, Husky and Paramount Energy.

THIS IS EXHIBIT "13"
referred to in the Affidavit of
Mark Schweitzer
Sworn before me this 23rd
Day of OCT A.D. 2018
A COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA
KRISTIN AMBROZY
A Commissioner for Oaths
In and for Alberta
My Commission Expires October 10, 2019

1

SRC did not drill any new wells since inception. Based on discussions with former management of SRC, it appears that the Company's cash flow was primarily used on operations, a rehabilitation program, and on the abandonment and reclamation program.

Former management of SRC has advised the Trustee that SRC's strategies appeared to be successful until around August, 2017, when gas prices in Alberta began to decline significantly. Gas price depression has continued through the spring of 2018 and forecasted prices for summer 2018 remain low.

Former management of SRC advised the Trustee that it investigated various options to diversify its gas exposure, to sell certain assets and find other ways to reduce costs. Former management of SRC noted that none of the projects identified had the economics or scale to make a big enough difference in the face of the low price environment. Former management of SRC asserts that because of this low price environment, SRC could not complete its abandonment program or continue to operate without sustaining significant cash losses.

Former management of SRC advised the Trustee that SRC recently attempted, unsuccessfully, to negotiate with several municipalities to reduce the Company's municipal tax obligations as in some cases SRC's municipal tax burden exceeded the price of gas being sold in the area. The Trustee understands that SRC also attempted to obtain the refinancing required to continue operations during the depressed price environment, but was unable to obtain further funds.

Based on the Trustee's review of SRC's records, it does not appear that any of SRC's directors were paid salary, fees or other remuneration, nor were the shareholders paid any dividends or returns of capital throughout SRC's existence.

Former management of SRC states that because of its financial difficulties and inability to complete its abandonment and reclamation program, on February 22, 2018, SRC contacted the Alberta Energy Regulator ("AER") to discuss the possibility of shutting down operations in manner satisfactory to the AER. Shortly after this meeting, SRC pursued a plan for the shut-in of its assets. All of this was completed on notice to the AER. Further discussions with the AER were held on February 28, 2018 to provide an update to AER on the status of the shut-in program.

II. NOI and Bankruptcy Proceedings

On March 1, 2018, SRC received a closure order from the AER. On March 2, 2018, to ensure the fair and equitable treatment of its creditors and stakeholders while responsibly working with the AER to safely deal with its assets, SRC filed a Notice of Intention to Make a Proposal.

SRC continued to use its cash on hand to fund the safe and orderly shutdown of its assets and entertained offers for its non-producing assets to generate further cash. On March 22, 2018, SRC closed a sale for a package of gross overriding royalties to provide liquidity and continue the orderly shutdown. SRC continued to meet with the AER regularly throughout the NOI proceedings to provide updates regarding its operations and the status of the shutdown process.

On March 23, 2018, when SRC no longer had certainty it would have sufficient cash to continue its operations, SRC terminated all of its employees and contractors and filed a voluntary assignment into bankruptcy.

III. Interim Actions of the Trustee

Securing well sites:
As at the date of bankruptcy, SRC, its staff and various contractors had worked diligently, using the time and financial resources available, to shut in production on all of the approximately 836 wells that were producing on February 22, 2018. The majority of these well locations were concurrently locked and chained to prevent access by unauthorised parties as part of the shut in process. However, as of the date of bankruptcy, approximately 20-25 well sites had not been locked and chained. Given the public safety concerns associated with unlocked well sites, the Trustee engaged four former SRC employees and contractors to complete this work on a contract basis. As of April 5, 2018, the work was completed and all of SRC's well sites (with the exception of one, as described below) had been locked and chained.

Continue removal of contaminants:
As at the date of bankruptcy, former management of SRC informed the Trustee that during the well shut in process, the Company did not have sufficient time and resources to arrange for the draining and removal of contaminated contents in a salt-water bath at one of its well sites. In order to mitigate the risk of an environmental incident and the associated public safety risks, the Trustee contracted with a former SRC employee to monitor the site and assist the Trustee in safely removing the contaminated contents. Subsequent to removal of the contaminated contents by a third party environmental service provider, the site will be locked and chained.

Taking possession and recording inventory:
The majority of SRC's movable assets include trucks, trailers, off highway vehicles and various agriculture equipment used to perform abandonment and reclamation work. The Company was not able to provide a detailed ledger of assets with unique unit identification numbers, however various spreadsheets exist that summarised the assets purchased in the key transactions over the past two years. Using these summaries, the Trustee worked with former management to coordinate a group of seven previous SRC employees hired on a contract basis to assist in gathering assets, securing them in central locations and taking an inventory. The movable assets were spread out across Alberta and the Trustee directed the former employees to relocate assets to central locations over a period of eight days, advising which locations were not accessible and the condition of assets found.

Head Office:
The Trustee has contracted with one member of former management and seven former employees to provide expertise and assistance with coordinating the completion of field safety work, advising on the Emergency Response Plan, shut-in well status submissions to the regulator, review and execute crossing requests, completion of revenue accounting and various other matters. The Trustee has also entered into a short-term tenancy agreement for office space and access to software at SRC's former shared office.

The Trustee is receiving cooperation from former management in the provision of information as and when requested by the Trustee.

IV. Overview of Assets and Secured Claims

Estate Funds:

Summary of cash held by the estate and funds spent to date:

Sequoia Resources Corp.- In Bankruptcy
Effective April 9, 2018

Cash available at date of Bankruptcy:	2,393,921
Less: Funds segregated pending security review	(450,000)
	1,943,921
Collection of accounts receivable	26,101
Disbursements to date:	
Asset collection consultants and storage	(19,580)
Office consultants	(22,940)
Rent and storage	(104)
Securing well sites	(15,994)
	(58,618)
Estimated funds committed to date:	
Asset collection consultants and storage	(42,295)
Office consultants	(10,000)
Rent and storage	(15,000)
Salt tank consultant and disposal	(50,000)
Securing well sites	(18,000)
	(135,295)
Estimated funds available for the estate	1,776,109

Inventory and Movable Assets:

The Trustee has worked with former employees and contractors to gather and secure SRC's trucks, site equipment, trailers, off highway vehicles and tools into two secure locations. The estimated value of the assets collected to date is unknown at this time.

Secured Creditors

SRC's largest known secured creditor is Mercuria Commodities Canada Corporation ("Mercuria") which has an outstanding claim in the amount of $447,846.21. Subject to an arrangement entered into by SRC and Mercuria shortly prior to the date of bankruptcy, the Trustee is holding $450,000.00 in trust pending completion of the Trustee's independent security review.

As at April 9, 2018, 40 liens in the aggregate amount of $331,104 have been received by the Trustee.

Books and Records

The Trustee took possession of the Company's books and records following the assignment in bankruptcy, ensuring a complete electronic backup was created. As part of the short-term tenancy agreement for office space at SRC's former shared office, the Trustee has access to the various programs and databases used by SRC in the ordinary course of operations.

Projected Distribution and Anticipated Realization

Until the magnitude of claims has been resolved and the required field safety work is completed, the Trustee is not in a position to determine the likelihood of any distributions.

Third-Party Deposits and Indemnity

Prior to the Company filing a NOI on March 2, 2018, SRC provided the Trustee with a $250,000 retainer and an indemnity for fees and expenses in respect of acting as a Trustee. In accordance with OSB Directive 16, these funds do not form part of the estate and are held in a clearly identified trust account separated from estate funds.

V. Legal Matters

The Trustee has engaged independent legal counsel, Torys LLP. The Trustee's legal counsel will be providing an opinion regarding the validity and enforceability of Mercuria's security and will be providing assistance with the evaluation of liens.

VI. Fraudulent Preferences and Reviewable Transactions

The Trustee, as part of its due diligence, will be reviewing the books and records for any fraudulent preferences and reviewable transactions.

VII. Creditors

The claims of creditors filed prior to the meeting are as follows:

Secured	$7,054,630
Preferred	$53,745
Unsecured	$237,393,343
Total	**$244,501,718**

VIII. Fees

Fees and disbursements of the Trustee incurred during the Administration of the bankruptcy will be paid from the funds it has swept from the account held by SRC prior to the bankruptcy.

Dated this 11th day of April, 2018

PricewaterhouseCoopers Inc.
Trustee in the Estate Sequoia Resources Corp.

Per: Paul Darby LIT
Trustee

Form 49
[Rule 13.19]

Clerk's Stamp:
CLERK OF THE COURT
FILED
OCT 19 2018
CALGARY, ALBERTA

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	**AFFIDAVIT OF SUSAN RIDDELL ROSE**
PARTIES FILING THIS DOCUMENT	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT

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AFFIDAVIT OF SUSAN RIDDELL ROSE

Sworn on October 19, 2018

I, **Susan Riddell Rose**, of the City of Calgary, of the Province of Alberta, SWEAR AND SAY THAT:

Introduction

1. I am the President, Chief Executive Officer and a director of the Defendants Perpetual Energy Inc. (**Perpetual**) and Perpetual Operating Corp. (**POC**) and am a Defendant in this Action. Until October 1, 2016, I was also President, Chief Executive Officer and a director of Perpetual Energy Operating Corp. (**PEOC**), which was the trustee of the Defendant Perpetual Operating Trust (**POT**) and a subsidiary of Perpetual.

2. As such I have personal information regarding the matters set out in this Affidavit, except where I state my information is from another source, in which case I believe that information to be true.

3. I am a geological engineer, a graduate from Queen's University with a Bachelor of Applied Science in Geological Engineering and a member of the Association of Professional Engineers and Geoscientists of Alberta. I have been a Governor of the Canadian Association of Petroleum Producers since 2008.

4. Unless otherwise defined, the abbreviations and defined terms in the Perpetual Defendants' Statement of Defence are used in this Affidavit.

5. I have read the Statement of Claim, Statements of Defence, Applications filed on behalf of the Plaintiff and on behalf of the Defendants, and the Affidavit of Paul J. Darby in this action. I understand from my review of the Statement of Claim that the Plaintiff (also referred to in this Affidavit as the **Trustee**) alleges, among other things, that:

   (a) the "Asset Transaction" as defined in the Statement of Claim was entered into between PEOC and POT in circumstances where PEOC, Perpetual, POC, POT and myself were not dealing at arm's length with each other within the meaning of the *BIA*; and

   (b) the Trustee is a proper complainant within the meaning of Part 19 of the *ABCA*, that I exercised my powers as a director of PEOC, and Perpetual and POC conducted their business, in a manner that was oppressive to the interests of the creditors of PEOC for the benefit of Perpetual, POC and myself personally.

6. I swear this Affidavit in support of the Defendants' Applications for Summary Dismissal filed August 27, 2018 seeking orders summarily dismissing this action. This affidavit addresses two of the threshold issues raised by those applications:

(a) Were the parties dealing at arm's length with each other within the meaning of the *BIA*?

(b) Is the Plaintiff a "complainant" entitled to bring an oppression claim under s. 242 of the *ABCA*?

7. The Defendants' Applications also raise the threshold issue as to whether the claim made on the grounds of "Public Policy, Statutory Illegality and Equitable Rescission" in paragraph 24 of the Statement of Claim should be struck.

8. My Application also raises the threshold issue as to whether the entire claim made against me should be dismissed given that I was released from any claims, and whether the claim regarding my duties to PEOC should be struck.

The Perpetual Entities

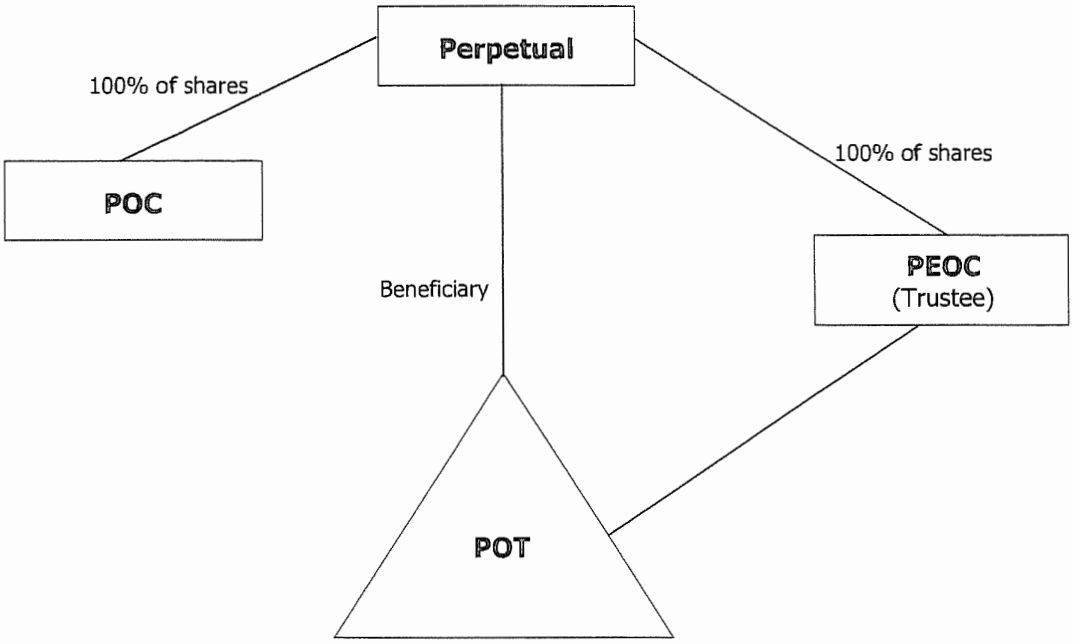
9. Perpetual is a publicly-traded oil and natural gas exploration, production and marketing company headquartered in Calgary, Alberta. Perpetual operates a diversified asset portfolio, including liquids-rich natural gas assets in the deep basin of west central Alberta, heavy oil and shallow natural gas in eastern Alberta, with longer term opportunities through undeveloped oil sands leases in northern Alberta. Perpetual is an Alberta corporation.

10. POT is a trust established pursuant to the POT Trust Indenture effective as of August 1, 2002. Perpetual is the beneficiary under the POT Trust Indenture to various oil and gas properties, licences and permits. POT administers the beneficial interest in the assets subject to the POT Trust Indenture. At all material times prior to the Transaction, PEOC was the trustee under the POT Trust Indenture.

11. POC is an Alberta corporation and wholly owned subsidiary of Perpetual. Following the Transaction, POC was the trustee under the POT Trust Indenture.

12. PEOC was at all material times prior to the Transaction an Alberta corporation and a wholly owned single-purpose subsidiary of Perpetual.

13. At all material times prior to the Transaction, the relationship of the Perpetual entities was as shown on the following chart:



14. Immediately after the Transaction, under its new ownership and management, PEOC changed its name to Sequoia.

Summary of the Transaction

15. The Transaction refers to the sale by Perpetual of some of its shallow gas properties in Alberta to an unrelated third party in October 2016. Perpetual held the properties in its wholly owned subsidiary, PEOC, which held legal title as trustee of POT.

16. As set out in the Perpetual Defendants' Statement of Defence under the headings "Background to the Transaction" and "The Transaction", the Transaction resulted from Perpetual's decision in 2016 to sell, and 198's decision to purchase, certain shallow natural gas assets in light of the parties' respective business plans.

17. As part of the marketing process, Perpetual solicited third party buyers, established a data room, entered into confidentiality agreements with third parties, and made multiple presentations to third parties, all as discussed in more detail below.

18. One of the parties that entered into a confidentiality agreement was Kailas. Negotiations with Kailas (and 198, which it incorporated to effect its business strategy) ensued over several months between May 2016 and October 1, 2016. Those negotiations were conducted by representatives of Kailas, referred to as the Purchaser Team, and representatives of Perpetual, referred to as the Vendor Team. At all material times, and respecting all steps in the Transaction, the Purchaser Team and the Vendor Team negotiated as self-interested adversaries at arm's length.

19. On September 26, 2016, the negotiations between the Purchaser Team and the Vendor Team culminated in an agreement to effect the Transaction, the substance of which was that 198 would acquire all of the shares of PEOC, conditional upon PEOC and POT first combining into PEOC the legal and beneficial interests in the sale assets, being certain producing and non-producing oil and gas properties in north and east Alberta (the **Goodyear Assets**). Production from the Goodyear Assets was approximately 35 MMcf/d. Booked reserves were approximately 83 Bcf.

20. A transaction structure was used by the parties to execute the Transaction in preference to a direct sale of the Goodyear Assets to Kailas as it resulted in a considerable reduction in the number of agreements, licenses and registrations associated with the assets that needed to be conveyed to complete the sale. Additionally, the delivery of the Goodyear Assets in a turn-key corporate form on closing was commercially desirable to Kailas. As detailed in **Exhibit A**, the transaction structure used an estimated 6,404 conveyances to complete, an approximate two-thirds reduction from an estimated 19,382 conveyances that would have been required if the Goodyear Assets were sold directly to Kailas.

21. As part of the Transaction, Perpetual negotiated with a counterparty and contracted to pay for the Gas Marketing Contract for the benefit of PEOC which provided a minimum gas price for an estimated 90% of the anticipated production from the Goodyear Assets for 23 months following closing.

The Parties were dealing at arm's length with each other

22. Based on my review of the Statement of Claim, I understand that the Plaintiff claims that the Asset Purchase Agreement, being the Purchase and Sale Agreement between PEOC and POT dated October 1, 2016 (also referred to in the Statement of Claim and in this Affidavit as the Asset Transaction), was made in circumstances where "PEOC, PEI, POC, POT and Rose were not dealing at arm's length with each other within the meaning of the *BIA*".

23. That is not correct. The Asset Transaction was a necessary and integral imbedded step in the Transaction that involved the combination of the legal and beneficial interest in the Goodyear Assets into PEOC. The negotiation of and entering into the entire Transaction, including each of the Share Purchase Agreement, the Asset Purchase Agreement and each of the other related steps, were at arm's length.

24. This section of my Affidavit shows that from the start of the sales process to the closing of the Transaction, and with respect to all aspects and steps in the Transaction, the parties were dealing at arm's length with each other.

The Sales Process

25. When Perpetual determined in 2016 that it was in the company's best interests to sell certain shallow natural gas assets, it took the steps typically taken by oil and gas companies that want to sell assets.

26. Perpetual established a data room that included relevant and material technical, operational, administrative, and legal information, including title and operating documents, well files, joint venture agreements, marketing agreements, handling agreements, gathering agreements, transportation agreements, consulting contracts, environmental information, corporate information, and lease operating statements regarding the assets that Perpetual wanted to sell. A list of all the records in the data room is attached as **Exhibit B**.

27. Perpetual solicited over 10 potential third party buyers of the assets.

28. POT entered into confidentiality agreements with 4 third parties to permit them to conduct due diligence and review the information in Perpetual's data room.

29. Perpetual provided multiple presentations to prospective purchasers, including extensive analysis of recently implemented operating models, its in-house management system of abandonment and reclamation activities and results, and workover, recompletion and drilling opportunities with respect to the assets.

The Negotiations with Kailas/198

30. In May 2016, Kailas approached Perpetual as a potential purchaser. Kailas and its principals were unknown and unrelated to me and Perpetual. I was advised that Kailas is a private financial consulting and investment company. I came to understand that Kailas is a sophisticated and active investor in the Canadian oil and gas sector. A copy of an Alberta corporate search of Kailas dated October 1, 2016 is attached as **Exhibit C**. It shows that the directors of Kailas were then Hao Wang and Wentao Yang and that each was a 50% shareholder.

31. On May 12, 2016, PEOC, as trustee of POT, and Kailas entered into a confidentiality agreement, a copy of which is attached as **Exhibit D**.

32. On May 17, 2016, Kailas gained access to Perpetual's data room.

33. On May 18, 2016, Perpetual formally retained Macquarie Capital Markets Canada Ltd. (**Macquarie**), which had introduced Perpetual to Kailas, as its independent third party financial advisor in relation to Kailas. Macquarie provided ongoing strategic advice to Perpetual throughout the negotiation and consummation of the Transaction.

34. On July 7, 2016, Kailas delivered an unsigned letter of intent proposing a corporate transaction specifically to purchase shares of PEOC, "which will hold all of the legal and beneficial interests in certain Eastern Alberta shallow gas assets" of Perpetual for $1, "including the assumption of outstanding environmental obligations associated with" the assets and the establishment of a gas marketing contract securing a floor price for natural gas sales. A copy of the letter of intent is attached as **Exhibit E**. The parties did not execute the letter of intent but decided it would be more efficient to start negotiating all aspects of the Transaction and the agreements required to effect the Transaction as proposed by Kailas/198.

35. The Purchaser Team negotiating on behalf of Kailas/198 was comprised of Hao (Harold) Wang and Wentao Yang, and was advised by Kailas/198's lawyers McCarthy Tétrault LLP. The

Vendor Team providing information and negotiating with the Purchaser Team on behalf of Perpetual included myself, Gary Jackson (VP Land, Acquisitions & Divestitures), Vicki Benoit[1] (then VP, Production), Linda McKean (VP, Exploitation), Marcello Rapini (VP, Marketing), Eugene Doherty (Manager, Acquisitions & Divestitures), Josh Lambden (Senior Evaluation Engineer, Acquisition & Divestitures), Susan Hargreaves (Manager, Mineral Lands & Contracts) and other senior employees of Perpetual, and was advised by Perpetual's lawyers Burnet, Duckworth & Palmer LLP. The Purchaser Team and the Vendor Team were strangers.

36. While I was intimately involved with the negotiations, some of the information below I have learned from speaking with other members of the Vendor Team who had direct responsibility for such matters.

37. Perpetual's negotiations with the Purchaser Team were not exclusive. Gary Jackson continued to pursue and solicit other interested purchasers until Kailas delivered its letter of intent on July 7, 2016.

38. Based on my experience and observations, the Purchaser Team was knowledgeable, willing, unpressured, and experienced in negotiating and executing oil and gas transactions of the scale, complexity and scope of the Transaction.

39. From July 2016 until October 1, 2016, the Purchaser Team and the Vendor Team negotiated the Transaction as self-interested adversaries, each advised by separate legal counsel and the Vendor Team further advised by Macquarie. In particular:

(a) the Vendor Team and the Purchaser Team actively negotiated the structure and commercial terms of the Transaction, including which assets would be included in the Asset Purchase Agreement to form the composition of PEOC at closing, and all agreements that implemented the Transaction;

(b) the Purchaser Team conducted and completed extensive and detailed reviews of the Goodyear Assets, including by visiting field sites to assess the assets and personnel, and numerous meetings with Perpetual's staff to further understand the performance potential of the assets, ask questions and request further information. This involved the

[1] On September 26, 2016, Kailas offered to employ Ms. Benoit following closing as an employee of Sequoia. She resigned from her employment with Perpetual the same day.

Purchaser Team obtaining a complete understanding of the associated hydrocarbon pools, wells and tangible assets, reserve reports, land schedules, lease operating statements, the established lower cost operating model and practices for the Goodyear Assets, and associated future estimated abandonment and reclamation costs that would be required;

(c) the Purchaser Team engaged in extensive technical discussions and presentations with the Vendor Team to assist in their assessment of the Goodyear Assets and the business going forward. A copy of the management presentation is attached as **Exhibit F**;

(d) the Purchaser Team and the Vendor Team negotiated the specifics of transitioning the assets to a sustainable cost structure relative to current natural gas prices, including the transition of a reduced group of field and office employees and in-house abandonment and reclamation equipment and processes;

(e) the Purchaser Team and the Vendor Team negotiated the Gas Marketing Contract to substantially eliminate natural gas price risk for PEOC/Sequoia under the new ownership of 198 and, combined with the sustainable cost structure, ensure profitable operation of the Goodyear Assets for close to two years to enhance the execution of the Purchaser's business plan. The Gas Marketing Contract was also negotiated to allow Perpetual to retain some natural gas price upside opportunity in certain circumstances; and

(f) the Purchaser Team and the Vendor Team negotiated the specifics of the statement of adjustments to establish responsibility for costs and revenue for the Goodyear Assets as Perpetual's prior to October 1, 2016 and as the Purchaser's after the closing date. In addition, the statement of adjustments was negotiated to provide a typical mechanism for settlement of working capital adjustments.

40. On August 8, 2016, Kailas incorporated 198. A copy of an Alberta corporate search of 198 dated October 1, 2016 is attached as **Exhibit G**, showing that the directors of Kailas were then Wang and Yang, and that 198 had changed its name to Kailash Natural Resources Corp. as of September 29, 2016. 198 became the purchaser of PEOC's shares as per the Share Purchase Agreement entered into on September 26, 2016.

The Share Purchase Agreement dated September 26, 2016

41. Perpetual and 198 entered into the Share Purchase Agreement dated September 26, 2016, a copy of which, with only cover pages for certain schedules, is attached as **Exhibit H**.

42. The Share Purchase Agreement established the Goodyear Assets to be included in the Transaction and mandated several other interrelated and interdependent agreements and steps as necessary and integral parts of the Transaction, including the Asset Purchase Agreement. The Share Purchase Agreement incorporated the Asset Purchase Agreement, Gas Marketing Contract and several other agreements as schedules, and as constituting "the entire agreement between the Parties".

43. Key terms of the Share Purchase Agreement included the following:

(a) 198 purchased all of Perpetual's shares in PEOC for $1.00;

(b) Perpetual warranted to 198 that the transfer of the beneficial interests in the Goodyear Assets from POT to PEOC would be executed and would constitute binding obligations on the parties, and its delivery in the agreed form was a condition of closing;

(c) Perpetual, as negotiated by Kailas for 198, provided additional consideration to PEOC to enable it to successfully operate its assets on a go forward basis and to effect Kailas and 198's business strategy:

(i) POT entered into the Gas Marketing Contract with Mercuria on September 26, 2016 to secure a minimum natural gas price for PEOC, and 198 committed to deliver at least the Hedged Monthly Production Volume to Mercuria from closing on October 1, 2016 to October 31, 2018. A copy of the Gas Marketing Contract is attached as **Exhibit I**;

(ii) Perpetual entered into the Office Sublease, subleasing to PEOC 15,300 square feet of office space without PEOC having any obligation to pay rent or operating costs until March 31, 2018;

(iii) Perpetual caused POT to grant PEOC ownership rights and licences for Proprietary Seismic Data; and

(iv) Perpetual cooperated with 198 to establish a low operating and administrative cost structure through the orderly transition of 40 employees from Perpetual to PEOC;

(d) Perpetual and 198 negotiated additional terms:

(i) to provide sharing of benefit from future municipal tax reductions that may occur in the fourth quarter of 2016 and 2017;

(ii) to allow for the recovery of the Crown royalty deposit and Crown royalty credit;

(e) between the date of the agreement and closing, except pursuant to the Pre-Transaction Reorganization (as defined in the Share Purchase Agreement) and the Asset Purchase Agreement, Perpetual agreed that it shall cause PEOC to not permit or otherwise agree, without the prior written consent of 198, to do anything outside the ordinary course of business. The practical effect of this obligation was that 198 directed the operation of PEOC during the interim period;

(f) Perpetual agreed not to dispose of or alienate any of the Goodyear Assets, or to enter into any material contracts with respect to the Goodyear Assets; and

(g) immediately following closing of the Share Purchase Agreement, 198 was required to file articles of amendment to change the name of PEOC to remove all references to Perpetual, and take all action necessary to remove references to Perpetual in conducting its business, including signage relating to assets.

The Asset Purchase Agreement dated October 1, 2016

44. As part of the Transaction, Perpetual and Kailas/198 also negotiated the Asset Purchase Agreement between PEOC and POT dated October 1, 2016, a copy of which, with only cover pages for certain schedules, is attached as **Exhibit J**.

45. At all material times prior to the Transaction, PEOC held the legal interests to the Goodyear Assets. The Asset Purchase Agreement combined in PEOC those legal interests and the beneficial interests held by POT.

46. The Asset Transaction was entirely negotiated between the Vendor Team on behalf of POT and the Purchaser Team on behalf of PEOC. Specifically, as the buyer of the Goodyear Assets, the Purchaser Team (representing Kailas/198) was the party that was economically interested in, controlled and negotiated the commercial terms and all other aspects of the Asset Purchase Agreement on behalf of PEOC, including which assets would comprise the Goodyear Assets, and the terms of the statement of adjustments, the first two pages of which are attached as **Exhibit K**. Perpetual's economic interest in, and control of, the commercial terms of the Asset Purchase Agreement was as a seller of the Goodyear Assets by POT.

47. The Asset Transaction would not have occurred had PEOC already owned the beneficial interest in those assets. That is, it was a necessary step in the Transaction required by 198, but not a step that would have occurred independent of the Transaction, and not a step that would have occurred had PEOC, like most companies, held the legal and beneficial interests in its assets.

48. The Purchaser Team and the Vendor Team negotiated key terms of the Asset Purchase Agreement which included:

(a) PEOC paid POT a purchase price of $10. In addition, $134,022 was paid by POT to PEOC to balance adjustments to reconcile prepaid expenses related to PEOC's business after October 1, 2016 and invoices for portions of expenses related to the period prior to October 1, 2016 and not yet due. The payment by POT to PEOC of $134,022 was paid to McCarthy Tétrault LLP in trust for the benefit of PEOC. The receipt for this payment is attached as **Exhibit L**;

(b) POT transferred its beneficial interest in the Goodyear Assets to PEOC;

(c) PEOC provided a licensed copy of the Purchaser Proprietary Seismic Data; and

(d) at its own cost, POT acquired on September 26, 2016 and then assigned and novated PEOC in its personal capacity into the Gas Marketing Contract dated September 26, 2016 with Mercuria, a third party marketing company, by which Mercuria agreed to pay PEOC a gas price of at least $2.58/GJ on an average 33,611 GJ/day (or approximately 90% of PEOC's production) for 23 months. Under the agreement, POT

retained upside for monthly index settlements higher than $2.81/GJ over the same period.

49. With respect to (d), the cost to POT of the Gas Marketing Contract over its life was $12.9 million, whereas POT earned $900,000.

50. The beneficial interest in those assets not sold to PEOC, referred to as the KeepCo Assets, remained in POT. The legal interests in the KeepCo Assets were transferred from PEOC to POC between August and October 2016 along with related Crown and freehold mineral lease transfers and related assignments, caveat transfers, contract assignments and novations and operating licence transfers.

51. Immediately following closing of the Asset Purchase Agreement, POC replaced PEOC as the legal owner of the KeepCo Assets and as trustee of POT.

52. As President and CEO of PEOC, I executed the Asset Purchase Agreement on behalf of both parties (POT's execution was by its trustee PEOC). That agreement was executed prior to closing, when I was still an officer of PEOC. Execution of the Asset Purchase Agreement occurred only after the Purchaser Team advised that all the terms were accepted by 198, which upon closing became the sole shareholder of PEOC. I resigned as an officer and director upon closing.

53. The execution of the Asset Purchase Agreement on behalf of PEOC was necessary to satisfy the condition in the Share Purchase Agreement that the transfer of the beneficial interest in the Goodyear Assets would occur in the agreed form on closing of the Asset Purchase Agreement and to effect the Transaction.

Emails and Drafts of Agreements showing Arm's Length Dealings

54. In the course of preparing this Affidavit, I have reviewed emails between the Purchaser Team and the Vendor Team or their respective counsel that illustrate the arm's length dealings between the parties concerning the Transaction as a whole and the Asset Purchase Agreement on its own. These records clearly show that, with respect to the Asset Purchase Agreement, the Vendor Team was representing POT and the Purchaser Team was representing PEOC, and that in all aspects of the negotiations leading to the execution of these agreements (and the other agreements that formed part of the Transaction) they were dealing at arm's length. I have set

out below a chronology starting with emails in the relatively early stage of the negotiations and concluding shortly before closing. These emails are between the Purchaser Team and the Vendor Team and are examples of the arm's length process.

Date (2016)	Comment	Exhibit No.
May 26	Email chain regarding Purchaser Team accessing virtual data room (**VDR**), requesting management presentations, and commenting on their review of the records in the VDR	M
July 25	Email chain regarding draft of Share Purchase Agreement, site visit, and structure of hedging contract with Mercuria	N
August 3	Contentious email chain regarding Purchaser Team's requests concerning the Mercuria hedging contract; Vendor Team makes concession and agrees to revisions to Asset Purchase Agreement	O
August 15	Email chain regarding additional due diligence, including abandonment notices and well lists	P
August 22	Email chain referencing finalized well list	Q
September 19	Email chain listing additional information updating the VDR	R
September 23	Email chain between counsel for Purchaser Team and counsel for Vendor Team including a blacklined draft of Asset Purchase Agreement and certain schedules	S
September 25	Email chain regarding draft Asset Purchase Agreement and schedules, with a blacklined draft Asset Purchase Agreement attached	T
September 25	Email chain regarding further revisions to the Share Purchase Agreement	U
September 26	Email chain regarding near final comments on the Share Purchase Agreement and Asset Purchase Agreement	V
September 26	Email chain with confirmation by Purchaser Team that certain schedules are final	W

Closing on October 1, 2016

55. The Share Purchase Agreement between Perpetual as the Vendor and 198 as the Purchaser was entered into on September 26, 2016 and required that the Asset Purchase

Agreement be executed prior to closing of the Share Purchase Agreement. The Asset Purchase Agreement was entered into at 12:01 a.m. (Calgary time) on October 1, 2016 and closed concurrently upon execution. Closing of the Share Purchase Agreement occurred at 12:03 a.m. (Calgary time) on October 1, 2016.

Release

56. The release of me as a director of PEOC attached to the Darby Affidavit as Exhibit H was negotiated at arm's length between Perpetual and 198. It was signed on behalf of PEOC by the new directors appointed by 198.

57. In my experience, it is standard industry practice to release outgoing directors in a change of control. To do otherwise would be highly unusual. Indeed, the retiring directors often receive additional protection, such as extended director and officer liability insurance coverage, which was not extended to me upon my resignation and release by PEOC.

58. At no time has the Trustee asked me any questions about the release or suggested that it is not binding on Sequoia.

Perpetual Cooperated with the Trustee

59. At paragraphs 11 and 12 of his affidavit, Mr. Darby refers to selected correspondence between the Trustee and Perpetual. At paragraph 13, Mr. Darby states: "To date, no further records or information have been received from the Perpetual Group."

60. Mr. Darby's statement is not accurate.

61. Between May 28 and July 6, 2018, the Trustee and Perpetual met and exchanged numerous correspondence. Based on the discussions and correspondence with Mr. Darby, Perpetual believed that there was an agreement that Perpetual would provide an initial set of responses and data to the Trustee after which the Trustee would provide comments and questions for further response by Perpetual. Perpetual also provided the Trustee with access to a virtual data room that was populated with extensive records regarding the Transaction. I repeatedly followed up with the Trustee. Upon receipt of the Trustee's preliminary comments, I told Mr. Darby that Perpetual did not agree with the preliminary comments, that Perpetual would be providing further responses and information, and that Perpetual would be available to

meet Mr. Darby to review the information provided. Attached as **Exhibit X** are copies of a series of correspondence in this regard.

62. Perpetual worked diligently to prepare the further information but was unaware of any time constraint imposed by the Trustee.

63. On August 3, 2018, I wrote to Mr. Darby to advise that Perpetual would be sending a full submission the following week. To my surprise, Mr. Darby responded that the Trustee had filed a Statement of Claim and an application. Later that afternoon – the Friday before the August long weekend – the Trustee's counsel sent Perpetual's counsel copies of the filed court documents. Attached as **Exhibit Y** is a copy of our exchange.

The Plaintiff should not be granted standing as a complainant under s. 242 of the *ABCA*

64. This section of my Affidavit addresses evidence relevant to whether the Plaintiff could qualify as a "complainant" entitled to bring an oppression claim, and in particular, addresses PEOC's creditors at the time of the Transaction and Sequoia's creditors at the time of its bankruptcy.

65. As the purchaser of PEOC's shares, 198 required assurances that it knew what if any debts it was acquiring.

66. Section 11.01(b) of the Asset Purchase Agreement states:

> 11.01 **Adjustments** Except as otherwise provided in this ARTICLE XI and subject to all other provisions of this Agreement, the Parties will adjust and apportion expenditures and revenues of every kind and nature incurred, payable or paid in respect of the operation of the Assets including operating, maintenance, development and capital costs, proceeds from the sale of Hydrocarbon Substances, royalties, property taxes, prepayments and deposits, duties, taxes and assessments, as at the Closing Time on an accrual basis including, but not limited to the Vendor's share of the Orphan Well Levy and the AER Administration Fee attributable to the Assets, and the following: ...
>
> (b) Vendor is entitled to the revenues and benefits from the ownership and operation of the Assets incurred or accrued prior to the Closing Time and is responsible for and will pay for the expenditures pertaining to the ownership, operation and development of the Assets incurred or accrued prior to the Closing Time.

67. Section 5.2(cc) of the Share Purchase Agreement states:

> **5.2 Regarding the Corporation**
>
> Except that and subject in all instances to the Permitted Encumbrances and any matter disclosed in any of the Schedules the Vendor represents and warrants to the Purchaser that in respect of the Corporation in its personal capacity and not as trustee of POT, unless otherwise specified, as at the date hereof and as at the Closing Date: ...
>
> (cc) **Debt**: except as set out in Schedule I, the current and long-term debt of the Corporation is $0; ...

68. The provisions detailed above had the combined effect of assuring 198 that PEOC would be acquired without any debts at the time of closing, with the exception of certain amounts expected to be paid in the fourth quarter of 2016 with respect to municipal property taxes that were identified on Schedule I to the Share Purchase Agreement and materially offset by prepaid expenses relating to periods after closing and deferred payment obligations to Perpetual related to recovery of the Crown royalty deposit and Crown royalty credit.

69. Schedule 11.01(n) of the Asset Purchase Agreement states:

> Notwithstanding the foregoing, as an adjustment in favour of Purchaser, Vendor will pre-pay its share or any amounts relating to 2016 municipal property taxes for the period prior to the Closing Time. Following the Closing Time, Purchaser will be responsible for the payment of all amounts owing for municipal property taxes for 2016 regardless of when the invoice is or was issued.

70. I understand that all 2016 municipal taxes associated with the Goodyear Assets were paid in full by either Perpetual or Sequoia, with the exception of three municipalities (Athabasca County, Lamont County, and the Municipal District of Opportunity #17) which I understand voluntarily agreed with Sequoia at some time after closing to permit Sequoia to pay its 2016 municipal property taxes without penalty in multiple payments over an extended payment period.

71. While I do not have access to all of Sequoia's records relating to these municipalities, I am attaching as **Exhibit Z** copies of Perpetual's analysis of 2016 property tax payments associated with the Goodyear Assets. It shows total 2016 property taxes owing in the amount of $6,374,201 which was paid either by Sequoia or Perpetual with the exception of voluntary

deferred payment amounts. With respect to the three municipalities referred to in the previous paragraph:

(a) I am attaching a copy of a letter from Sequoia to the Municipal District of Opportunity No. 17 dated October 20, 2016 as **Exhibit AA** outlining Sequoia's request of the Municipal District of Opportunity #17 to defer 2016 property tax payments, and Municipal District of Opportunity #17's letter to Sequoia dated January 26, 2018 confirming the agreement to establish an extended payment plan for the 2016 municipal tax invoice as **Exhibit BB**; and

(b) I do not have copies of Sequoia's communications with Athabasca County or Lamont County but am advised by others that those counties stated that payment plans were also established for 2016 municipal tax invoices and that all payments were made according to the payment plans with the exception of the payments due after 2016.

72. Oil and gas industry partners were advised of the sale of Perpetual's shallow gas assets by means of a Notice to Industry posted to Enerlink on October 1, 2016 (a corrected notice was posted on November 16, 2016) which is the normal process used by the industry to advise industry partners of changes in corporate ownership. Sequoia registered a certificate of amendment with the Alberta Registrar of Corporations to change its name from PEOC to Sequoia on October 3, 2016 and issued a similar industry notice on Enerlink. Copies of Perpetual's industry notices posted to Enerlink are attached as **Exhibit CC**. Consistent with common industry practice and the Asset Purchase Agreement and Share Purchase Agreement, Perpetual paid all Goodyear Asset obligations incurred up to closing and Sequoia paid all Goodyear Asset obligations incurred after closing.

73. Trade and service providers to the Goodyear Assets were similarly paid by Perpetual for goods and services provided with respect to the Goodyear Assets up to closing. Subsequent to closing, trade and service providers to the Goodyear Assets began transacting with Sequoia and accordingly would have been required to establish new accounts with Sequoia and voluntarily make commercial decisions whether or not to extend trade credit to support their business with Sequoia in the normal course.

74. I understand that all amounts owing to the AER at the time of closing by PEOC were paid in full either by Perpetual or Sequoia. Asset retirement obligations (**ARO**) associated with

the Goodyear Assets sold to Sequoia did not represent a creditor claim or current liability at the time of closing. ARO represented an accounting estimate of the expenditures to be incurred many years in the future after the associated reserves have been fully produced and wells have been permanently shut in.

75. On October 4, 2018, counsel for the Trustee sent to counsel for the Perpetual Defendants copies of certain proofs of claim filed by parties in the Sequoia bankruptcy. Attached as **Exhibit DD** is a copy of the proofs of claim filed by the AER on April 6 and 11, 2018 respectively. I understand that the Trustee has not yet determined the validity of the AER proofs of claim. In any event, the alleged unsecured claim has a stated value as low as $1 as of the date of the bankruptcy. Further, the alleged secured claim of $573.30 relates to AER charges with respect to data requests made in January and February 2018. The AER proofs of claim do not allege or suggest that the AER was a creditor of PEOC on the closing of the Transaction.

76. I am satisfied that through the obligations undertaken by Perpetual and Sequoia pursuant to the Asset Purchase Agreement and the Share Purchase Agreement, none of the creditors of PEOC at the time of the Transaction were creditors of Sequoia at the time of its bankruptcy with respect to amounts owing at the time of the Transaction, other than the three municipalities referred to above that voluntarily chose to extend credit to Sequoia subsequent to closing and the recovery of the Crown royalty deposit and Crown royalty credit owing to Perpetual as described in paragraph 42(2)(ii).

The claim against Ms. Rose personally

I received no "personal benefit" from the Transaction

77. Mr. Darby speculates that I received a "personal benefit" from the Transaction. He does not say what kind of benefit or how much it might be worth. He never asked me about any such benefit in the course of our discussions and correspondence.

78. I did not receive a personal benefit from the Transaction. As an officer and director of PEOC, I received no salary and no other form of compensation. I received no compensation from Perpetual or any other party other than my normal salary for my work on the Transaction.

All of the shares of PEOC were owned by Perpetual. My work on behalf of PEOC was in my capacity as the director and officer nominated by Perpetual.

79. I am a shareholder of Perpetual, a publicly traded company. There was no material impact on the Perpetual share price following the Transaction as described in **Exhibit EE**. I have not sold any shares of Perpetual that I owned at the time of closing.

I was not the "directing mind" of PEOC

80. PEOC was a special purpose wholly owned subsidiary of Perpetual. I took my responsibilities as a director and officer of PEOC seriously, considered its best interests and the interests of its stakeholders, and exercised my business judgment to the best of my ability, but the ultimate decision to enter into the Transaction was that of Perpetual and its board of directors.

81. Immediately upon the closing of the Transaction, PEOC (quickly to become Sequoia) was controlled exclusively by 198 and the owners of 198.

SWORN BEFORE ME at the City of Calgary, in the Province of Alberta this 19th day of October, 2018.

A Commissioner for Oaths in and for the Province of Alberta

Susan Riddell Rose

Maria Etoile Rooney
A Commissioner for Oaths/Notary Public
In and for the Province of Alberta

Maria Etoile Rooney
Student at Law

9287047.6

CLERK'S STAMP

CLERK OF THE COURT
FILED
AUG 13 2018
JUDICIAL CENTRE
OF CALGARY

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	**AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DE WAAL LAW 1010, 505 – 3RD Street SW Calgary, AB T2P 3E6 Phone: (403) 266-0012 Attention: Rinus de Waal/Luke Rasmussen Direct: (403) 266-0013 Facsimile: (403) 266-2632 E-mail: rdewaal@dewaallaw.com

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AFFIDAVIT OF PAUL J. DARBY
SWORN ON AUGUST 2, 2018

I, Paul J. Darby, of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am a Senior Vice President with PricewaterhouseCoopers Inc., LIT ("**PwC**"), the Applicant in this matter. I am a Chartered Accountant and a licensed insolvency trustee.

{00028292-9/283.001}

2. I have personal knowledge of the facts and matters herein deposed to, except where the context indicates otherwise. Where I have stated something on the basis of information provided to me, I believe that information to be true.

3. PwC is a licensed insolvency trustee and the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp., previously known as Perpetual Energy Operating Corp. ("**PEOC**" or "**Sequoia**").

4. I swear this affidavit in support of an application by PwC, in its capacity as Trustee of Sequoia, to set aside the transfer of certain assets and related liabilities to Sequoia in or about October, 2016 and for related or alternative relief.

The Parties

5. Perpetual Energy Inc. ("**PEI**") is an Alberta corporation. As at October 1, 2016, PEOC and Perpetual Operating Corp. ("**POC**") were wholly-owned subsidiaries of PEI.

6. Perpetual Operating Trust ("**POT**") is an unincorporated trust pursuant to the laws of Alberta. PEOC was the trustee for POT, until PEOC resigned and was replaced by POC.

7. Sequoia is an Alberta corporation. Its sole function, until it was replaced by POC, was to act as trustee for POT. Until October 1, 2016, Sequoia had no material assets or operations.

8. Susan Riddell Rose ("**Rose**") is an individual, residing in the Province of Alberta. Rose is a director of PEI and the sole director of POC. Rose was the sole director and directing mind of Sequoia, then still known as Perpetual Energy Operating Corp., until she resigned on October 1, 2016. I will refer to Rose, PEI, POC and POT as the "**Perpetual Group**".

Background

9. On or about March 2, 2018, Sequoia filed a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended (the "***BIA***") and on March 23, 2018, Sequoia assigned itself into bankruptcy.

10. As part of its investigation into the financial circumstances of Sequoia, the Trustee considered the terms and circumstances of various transactions leading up to the bankruptcy. The Trustee identified transactions involving PEOC and some of the Respondents which may be void as against the Trustee, as transfers at undervalue or on other grounds, and determined that some or all of the Perpetual Group may be liable to PEOC for the difference between the value of the consideration received by PEOC and the value of the consideration given by PEOC in those transactions, or on other grounds.

11. On May 28, 2018, the Trustee wrote to the Perpetual Group to request specific records, pursuant to s.164 of the *BIA*. A copy of the letter is attached, as **Exhibit A**. In response, the Perpetual Group provided the Trustee with access to some of its records relating to the transactions the Trustee had identified as potentially void (the "**Perpetual Disclosure**").

12. On June 26, 2018, the Trustee again wrote to the Perpetual Group to advise of the Trustee's preliminary conclusions from a review of the Perpetual Disclosure and to invite comments or additional information regarding specific aspects, or generally, for consideration by the Trustee. A copy of the letter is attached, as **Exhibit B**.

13. To date, no further records or information have been received from the Perpetual Group.

The Goodyear Restructuring

14. On or about August 4, 2016, a presentation, referred to as the "Goodyear Presentation", was made to the board of directors of PEI. Copies of the individual slides of the Goodyear Presentation are attached, as **Exhibit C**.

15. The Goodyear Presentation listed, among strategic goals for 2016, reduction of "ARO costs" by $50 million. The presentation set out various steps in a proposed corporate restructuring and the related sale of specific assets to achieve this goal (the "**Goodyear Restructuring**").

16. For the purposes of the Goodyear Restructuring, the assets of POT were divided into three categories:

    16.1. "Goodyear Assets" - the POT shallow gas assets, including a large number of gas wells, which had been identified for disposition,

    16.2. "KeepCo Interim Assets" - all assets except the Goodyear Assets and four East Edson wells and related interests; and

    16.3. "KeepCo Assets" - all assets except the SaleCo Assets. I assume from the context that "SaleCo" means "Goodyear", so that the "SaleCo Assets" are all the assets that would be sold as part of the Goodyear Restructuring.

17. PEOC owned no interests in its own right, but held the licenses, permits and legal title to assets, as trustee of POT. Because it already owned the licenses and permits, no transfer of assets and therefore no regulatory approval for a transfer of assets was required if POT assets were to be sold to PEOC. PEOC would simply continue to own the assets, but in its own right, rather than as trustee for POT.

18. In what is referred to in the Goodyear Presentation as the "Readiness Restructuring", POC would be set up to accept the transfer of the licenses and operations associated with the

KeepCo Assets, and the KeepCo Interim Assets would be transferred from PEOC to POC under a trust agreement. That would leave PEOC with the Goodyear Assets which had been identified for sale, as well as the four East Edson wells and related interests (the "**Retained Interests**"), for the time being.

18.1. The Goodyear Assets, which had been identified to be disposed of, were described in public disclosure documents and media statements as "mature legacy" and "high liability" assets, which were "a major drain on the company" and "operating on a negative cash flow basis", and which had "net asset retirement obligations ('ARO') of $131.0 million".

18.2. The Retained Interests, on the other hand, included four strong producing wells. As I will refer to below, the Retained Interests were excluded from the KeepCo Interim Assets and retained in PEOC for the time being, to maintain the PEOC Licensee Liability Rating ("**LLR**") above 1.0 until the final steps in the restructuring had been completed.

19. Finally, in what is referred to in the Goodyear Presentation as the "Goodyear Restructuring", the Retained Interests would also be transferred to POC, leaving only the Goodyear Assets with PEOC, and POT would sell its interests in the Goodyear Assets to PEOC.

20. Although this was not specifically referred to in the Goodyear Presentation, it appears from the events that followed that the Perpetual Group contemplated that PEI would then sell all its shares in PEOC, Rose would resign as director of PEOC and PEOC's name would be changed to Sequoia Resources Corp, to complete the steps necessary for the Perpetual Group to dispose of the Goodyear Assets.

21. In accordance with the Goodyear Presentation, effective October 1, 2016, Rose, in her capacity as sole director of PEOC, which was also the trustee for POT, agreed that POT would sell and PEOC would buy the Goodyear Assets for a nominal purchase price of $10.00 (the "**Asset Transaction**"). Rose executed a Purchase and Sale Agreement (the "**Asset PSA**") as President and CEO of PEOC, on behalf of both parties. A copy of the Asset PSA is attached (without the schedules) as **Exhibit D**.

22. In a related agreement (the "**Share PSA**"), which is dated September 26, 2016 but which closed minutes after the Asset Transaction, PEI sold 100% of its shares in PEOC to 1986114 Alberta Ltd. ("**198**"), also for nominal consideration (the "**Share Transaction**"). A copy of the Share PSA (without the schedules) is attached, as **Exhibit E**.

23. The Share PSA expressly contemplated a "Pre-Transaction Reorganization", defined as the sale and transfer of the "Purchased Assets" from POT to PEOC, as well as the resignation of PEOC as trustee of POT. It specifically allowed the Perpetual Group to continue to

benefit from the Goodyear Assets if the price of gas improved after the transaction, through an option to purchase 90% of the gas production from the Goodyear Assets at a fixed price for a certain period.

24. Included in the Perpetual Disclosure are separate calculations of the "Goodyear LLR" for Northern Wells and Facilities and for Southern Wells and Facilities, as well as an undated schedule with "LLR Northern Southern and Totals". A copy of this schedule, attached as **Exhibit G**, shows an LLR below 1.0 for the two areas combined.

25. Following the sale of PEI's PEOC shares to 198, PEOC and POT agreed that PEOC would temporarily retain an undivided 1% legal interest in certain petroleum and natural gas rights and the right to be the licensee of record for certain highly productive wells. A copy of the Retained Interests Agreement entered into between PEOC and POT (the "**Retained Interests Agreement**") is attached as **Exhibit F**.

26. Although POT would own 100% of the beneficial interests in the Retained Interests, which were held by PEOC as bare trustee for POT, the highly productive wells would contribute positively to PEOC's LLR as long as PEOC remained licensee of record for those wells.

27. The Retained Interests compensated on an interim basis for the negative LLR associated with the Goodyear Assets, allowing PEOC to maintain a positive LLR while the rest of the restructuring and sale proceeded without intervention from the Alberta Energy Regulator (the "**AER**").

28. Rose resigned as a director of PEOC on October 1, 2016. I attach a copy of a "Resignation & Mutual Release", as **Exhibit H**. It confirms, in the preamble, that Rose acted as a director and officer of PEOC "at the request of " PEI, that the Share PSA required her to resign and that PEI requested her to resign. It also provides that PEI and PEOC agree to release Rose with respect to "having acted, at the request of PEI, as director and officer of PEOC." Rose was replaced as director of PEOC by Wentao Yang and Hao Wang.

29. On October 3, 2016, PEOC changed its name to Sequoia Resources Corp.

30. The Asset Transaction was a material transaction for PEOC. PEOC had no significant assets, capitalization or sources of funding in October 2016, as evidenced by:

    30.1. the "internally prepared statements of financial position and statements of income, excluding notes to the financial statements" of PEOC "as at and for the year ending December 31, 2015 (unaudited) and as at and for the six months ending June 30, 2016 (unaudited)", a copy of which is attached as **Exhibit I**; and

30.2. the "Internal Operating Statements" of PEOC assets for the year ended December 31, 2015 and the six months ended June 30, 2016, a copy of which is attached as **Exhibit J**.

31. PEOC was unable to pay the abandonment and reclamation costs ("**ARO**"), the municipal property tax liabilities or other liabilities associated with the Goodyear Assets and was insolvent at the time of, or immediately after, the Asset Transaction.

Review by the Trustee

32. The Trustee has identified all the Sequoia wells, reconciled all those wells with the various agreements by which those were acquired and confirmed the status of all the wells.

33. I attach, as **Exhibit K**, schedules prepared to show the results of this reconciliation.

The Value of the Actual Consideration Given and Received

34. From the information provided by the Perpetual Group, it is clear that the consideration received by PEOC in the Asset Transaction was conspicuously less than the consideration given by PEOC in the Asset Transaction, including its assumption of the ARO associated with the Goodyear Assets.

35. Four reserve reports were included in the Perpetual Disclosure. Copies of the summary portions of these reports are attached as **Exhibit L**.

36. The first two reports valued the assets on a "PPDP" (Proved + Probable Developed Producing) basis, using "Strip Price" and the "McD Jan" price respectively. At a 10% discount rate to calculate net present value, the total value of the "*North and South Gas (no Panny or Mannville)*" was negative – in the amounts of $(36,772,800) and $(7,828,700) respectively.

37. The other two reports both valued the assets on a less conservative "TPP (Total Proved + Probable)" basis.

37.1. The first of these reports ("*North and South Gas (no Panny or Mannville) – TPP – Strip Price*") shows a negative NPV(10) value of $(34,709,000) on a Total Proved and Probable (2P) basis.

37.2. The second ("*North and South Gas (no Panny or Mannville) – TPP – McD Jan*" - the "**McDaniel Report**") is dated April 11, 2016. It only includes 652, or approximately 26%, of the 2,502 wells included in the Goodyear Assets (the "**Goodyear Wells**") and excludes the balance, or approximately 74%, of the Goodyear Wells. The McDaniel Report determines a value of $5,670,200, also on a (2P) NPV10 basis, but using a McDaniel pricing forecast.

38. For the purposes of evaluating the Asset Transaction, the Trustee has used the reserve report received as part of the Perpetual Disclosure that attributes the highest value to the Goodyear Assets.

39. By its nature, future ARO costs depend on many variable factors and can only be estimated. XI Technologies Inc. has developed a software model to provide an estimate of future abandonment and reclamation costs for wells and facilities. The Trustee understands that the model was developed based on public information and data, has been tested against actual operations and provides an objective estimate of ARO costs.

40. According to the XI Technologies Inc. ARO Cost Model and based on the records produced as part of the Perpetual Disclosure, the Trustee estimates that the liabilities associated with the Goodyear Assets and assumed by PEOC as part of the Asset Transaction, were:

    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; and

    40.3. Property taxes of $10,047,744.20, taken as the total annual property taxes payable with respect to the Goodyear Assets according to the Perpetual Disclosure and assumed outstanding at the time of the Asset Transaction. I attach, as **Exhibit M**, a schedule provided as part of the Perpetual Disclosure.

41. I attach a schedule with the Trustee's estimated valuation of the Asset Transaction, as **Exhibit N**. This shows a net negative value of $223,241,000 for PEOC immediately after the Asset Transaction.

    41.1. I note that the McDaniel Report value of $5,670,200 includes an estimate of abandonment costs for those Goodyear Wells included in the report, as well as estimates for salvage value. For this reason, the amount for ARO included in the schedule, Exhibit N, may be overstated as it has to some extent already been included in the value of some of the Goodyear Wells. The Trustee does not consider this to be material to its analysis.

    41.2. I also note that there is some indication in the Perpetual Disclosure that payment of municipal property taxes for some of the properties had been deferred. It is not clear to the Trustee how much of the annual total taxes payable were due and immediately payable on October 1, 2016. The Trustee also does not consider this to

be material to its analysis of the consideration given and received by PEOC in the Asset Transaction.

42. The conclusion of the Trustee, that the consideration received by PEOC was conspicuously less than the consideration it provided in return, is supported by public disclosure statements from PEI itself. In a news release issued by PEI on September 27, 2016, at year-end 2015, PEI forecast the undiscounted cost of the ARO for the Goodyear Assets at $133.6 million. The ARO is reflected as $131.0 million in PEI's Third Quarter 2016 Interim Financial Statements effective September 30, 2016. Copies of the news release and the Interim Financial Statements are attached, as **Exhibit O** and **Exhibit P** respectively.

43. The conclusion of the Trustee is also consistent with the statements on behalf of PEI that it had strategically disposed of "high liability" assets and net asset retirement obligations and that it would materially improve its LMR as a result of the disposition of the Goodyear Assets.

44. In the opinion of the Trustee:

    44.1. the 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 $223,241,000;

    44.2. the value of the 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 received by PEOC in the Asset Transaction was at most $5,670,200.

Insolvency of PEOC

45. As I have stated, the sole purpose of PEOC prior to the Goodyear Restructuring was to act as trustee for POT. It had no assets or operations and may have been insolvent, if it was personally liable to pay the municipal property tax obligations associated with the assets it held as trustee for POT.

46. Accordingly, by acquiring the Goodyear Assets which, according to PEI:

    46.1. had been cash flow negative for many years;

    46.2. represented ARO and tax liabilities of more than $130 million on Perpetual's own records; and

46.3. required capital for ARO and recompletion of $22.6 million over the next three years,

PEOC was immediately rendered insolvent, if it had not already been insolvent immediately prior to acquiring the Goodyear Assets.

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

Rose as Director of PEOC

48. As sole director of PEOC, which was the trustee for POT at the time of the Asset Transaction, Rose acted on behalf of both parties to the Asset Transaction.

49. 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.

50. Rose executed a written resolution as director of PEOC on October 1, 2016, to approve the Asset Transaction and to execute the Asset PSA. A copy of the Certified Resolution is attached, as **Exhibit Q**. Although the preamble to the resolution states that "the directors" believed it was in the best interests of PEOC to execute the Asset PSA and to accept transfer of the Goodyear Assets, the Trustee has not identified any aspect of the Asset Transaction which benefited or was in the best interests of PEOC.

Oppression and Prejudice to Creditors

51. In the opinion of the Trustee, the Asset Transaction was clearly not in the best interests of PEOC. The transaction also disregarded and prejudiced the creditors of PEOC. In particular, the inability of PEOC to pay the ARO and municipal property taxes directly affected its creditors.

Orphan Wells

52. Where no party is legally responsible or where the legally responsible party is financially unable to comply with the abandonment and reclamation obligations relating to a well, pipeline, facility or associated site, such a well, pipeline, facility or associated site is designated an "orphan" by the AER.

53. The AER annually prescribes an orphan fund levy pursuant to Part 11 of the *Oil and Gas Conservation Act* which is payable proportionally by each licensee and approval holder.

The levy is administered by the Orphan Well Association (the "**OWA**"), a non-profit organization which operates under the delegated legal authority of the AER. Members of the oil and gas industry in Alberta fund most of the costs incurred by the OWA through the orphan fund levy.

54. In its Annual Report for 2016/17, the OWA reported that it had spent just under $30 million, of which almost $12.5 million was spent on abandoning 232 wells. In that year, 928 new wells had been added to the orphan well inventory.

55. According to the OWA, as of June 28, 2018, there were 1,908 orphan wells for abandonment, 1,102 orphan wells for suspension and 1,129 orphan sites for reclamation. In addition, there were 729 orphan reclaimed sites, 2513 orphan pipeline segments for abandonment and 1333 orphan pipeline segments for suspension.

56. From this information it is clear that the potential addition of the 2,502 Goodyear Wells and all the associated pipelines, facilities and sites to the orphan well fund, will have a significant financial impact on the licensees and approval holders under the AER through the orphan well levy.

Municipal Property Tax

57. As a result of the Asset Transaction, PEOC became liable for the municipal property taxes with respect to the Goodyear Assets, with no right to claim reimbursement from POT or anyone else. As these assets were cash flow negative, PEOC has no ability to pay the taxes.

I swear this affidavit on behalf of the Trustee, to support an application for an order, setting aside the Asset Transaction and granting related and/or alternative relief.

SWORN BEFORE ME at Calgary)
Alberta, this 2nd day of August, 2018)
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)
)
)
)

Luke Rasmussen)
A Commissioner for Oaths in and for the)
Province of Alberta)

PAUL J. DARBY

LUKE RASMUSSEN
Barrister & Solicitor

B. BCE Inc. v. 1976 Debentureholders

Canadian Securities Regulation 5th. Ed.

David Johnston and Kathleen Rockwell

18 — CORPORATE GOVERNANCE

18.03 Evolving Understanding of the Public Corporation's Role in Society

B. *BCE Inc. v. 1976 Debentureholders*

¶18.65 In *BCE Inc. v. 1976 Debentureholders*, the Supreme Court of Canada embraced elements of stakeholder theory and provided definitive guidance that the “best interests” of a corporation cannot be identified with the interests of only its equity securityholders.[1] *BCE* reflects an evolving understanding of the public corporation in Canada and highlights the changing perception of the role of the public corporation in society and its obligations with respect to various social values.

¶18.66 The background is that three consortia of investors participated in an auction to purchase BCE. All three offers were leveraged buyouts and would have added substantial new debt for Bell Canada, a wholly-owned subsidiary of BCE. Under the offer ultimately selected by BCE's board, Bell Canada would guarantee approximately $30 billion of BCE's new debt. Although approved by almost 98 per cent of BCE's shareholders, a group of Bell Canada debentureholders objected — arguing that the value of those debentures would decline significantly because of the additional debt.

¶18.67 The board of directors selected the offer it believed to be in the best interest of BCE's equity shareholders. The question before the Court was whether the fiduciary duty owed by BCE's board to act in the “best interests of the corporation” required it also to consider the interests of the debentureholders and, if so, to what extent. The Court explained that the “fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value.”[2] “In considering what is in the best interests of the corporation,” the Court elaborated, “directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.”[3] In sum:

> the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[4]

¶18.68 The Court's decision in *BCE* has been criticized for failing to articulate clearly what is to be expected of directors in practice, even though it reached an outcome (*i.e.*, an understanding of the corporation) that is consonant with evolving social norms.[5] The Court provided no practical guidance, for instance, on what directors ought to do when the interests of different stakeholders conflict, beyond stating that directors must treat all stakeholders fairly, in accordance with their “reasonable expectations”.[6] Some worry that this vagueness will actually make directors less accountable insofar as their decisions may be protected if they “can be justified as plausibly promoting the interests of the corporation and a minimum standard of fairness is observed in relation to all stakeholders.”[7]

¶18.69 Similarly, though the Court suggested directors should "act in the best interests of the corporation viewed as a good corporate citizen",[8] the Court offered no practical guidance on what the requirements of good or responsible corporate citizenship might be: "There are no absolute rules".[9] Some scholars have suggested that corporate citizenship should be viewed as being synonymous with corporate social responsibility,[10] but it is far from clear that that is what the Court intended. Another view is that in referring to corporate citizenship the Court is simply "seeking to engage a broader, non-legal audience" by setting "a contextual, social standard, rather than a legally precise one."[11] On this view, the Court can be interpreted as responding directly to "a growing public awareness of the role of corporations in society".[12]

Footnote(s)

1 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 (S.C.C.) [*BCE*].

2 *Ibid*., at para. 38.

3 *Ibid*., at para. 40.

4 *Ibid*., at para. 82. In departing from the pure shareholder primacy model, Canadian corporate governance practices have diverged somewhat from those of the U.S. Should this gulf widen, it may pose problems for Canadian issuers cross-listed on U.S. exchanges participating in the Multijurisdictional Disclosure System. See Chapter 7 The Prospectus, 7.07 Multijurisdictional Disclosure System (MJDS).

5 See, *e.g.*, J. Anthony VanDuzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since Peoples" (2010) 43 U.B.C. L. Rev. 205; Sarah P. Bradley, "BCE Inc. v. 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41 Ottawa L. Rev. 325; Edward J. Waitzer & Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall L.J. 439.

6 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 at paras. 64, 72, 81-82 (S.C.C.). For an interesting solution to a closely related problem, see Steven J. Haymore, "Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma" (2011) 64 Vand. L. Rev. 1311 (attempting to resolve how directors might balance the conflicting interests of "traditional" and "socially responsible" investors in a corporation expressly dedicated to social responsibility when confronted with a take-over bid).

7 J. Anthony VanDuzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since Peoples" (2010) 43 UBC L. Rev. 205 at 207-208.

8 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 at para. 66 (S.C.C.); also see paras. 81 and 82 ("responsible corporate citizen") [*BCE*].

9 *Ibid.*, at para. 82. Although *BCE* is undoubtedly a landmark decision, the extent to which it embraces stakeholder theory should not be exaggerated. At issue was whether directors of a corporation, when determining what is in its "best interests", must consider the interests of its debt securityholders, a class of persons not so very different from its equity shareholders. In future cases, context and circumstances will be key.

10 Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis Canada, 2009) at 22. See 18.03 Evolving Understanding of the Public Corporation's Role in Society, D. Corporate Social Responsibility (CSR).

11 Sarah P. Bradley, "BCE Inc. v. 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41 Ottawa L. Rev. 325 at 345.

12 *Ibid*.

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a. Obligation to Consider Stakeholders: BCE

Canadian Securities Regulation 5th. Ed.

David Johnston and Kathleen Rockwell

18 — CORPORATE GOVERNANCE

18.03 Evolving Understanding of the Public Corporation's Role in Society

D. Corporate Social Responsibility (CSR)

2. Legal Requirements

a. Obligation to Consider Stakeholders: *BCE*

¶18.84 In *BCE*, the Supreme Court of Canada suggested that directors should act in the best interests of the corporation viewed as a "good corporate citizen" or "responsible corporate citizen".[1] However, the Court (cautioning that the particular circumstances are key) offered no practical guidance on what the requirements of good or responsible corporate citizenship might be. Indeed, it is not clear if the Court intended to create any requirements at all. The Court said only that:

> Directors, acting in the best interests of the corporation, *may be obliged* to consider the impact of their decisions on corporate stakeholders….This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen.[2]

¶18.85 The phrase "may be obliged" is vague. It seems to suggest a potential, but not universal, mandatory requirement. Thus it is not clear, after *BCE*, whether corporations have a legal obligation to be "good" corporate citizens.[3] What is clear is that directors may legitimately consider the interests of a wide variety of stakeholders when determining what is in the best interests of the corporation — although the scope of the broad language in the decision to the effect that "directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions"[4] remains untested. It nevertheless seems clear that *BCE* licenses directors and management to undertake a broader range of CSR initiatives than would have been possible under a pure shareholder primacy model.[5]

Footnote(s)

1 *BCE*, *ibid*., at paras. 66, 81, 82. See Sarah P. Bradley, "BCE Inc. v. 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2009-2010) 41 Ottawa L. Rev. 325-349; Ed Waitzer & Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall L.J. 439.

2 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 at para. 66 (S.C.C.).

3 See Sarah P. Bradley, “BCE Inc. v. 1976 Debenture-holders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?” (2009-2010) 41 Ottawa L. Rev. 325 at 346.

4 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 at para. 40 (S.C.C.).

5 See, *e.g.*, Jeffrey Bone, “Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of BCE Inc. and Bell Canada”, Windsor Review of Legal and Social Issues (May 2009) 27 W.R.L.S.I. 5.

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(5) Directors—Sale of the Corporation's Business

Canadian Business Corporations Law, 3rd ed (McGuiness)

Kevin P. McGuinness

CHAPTER 14 — DIRECTOR AND OFFICER DUTIES

3. The Fiduciary Duties of Directors

(a) Overview

(ii) Duty to Act Honestly and in Good Faith

(5) Directors—Sale of the Corporation's Business

§14.131 When a board decides to undertake the process of selling the corporation it directs, the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise. There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end. Moreover, the board has the burden of proving that it acted reasonably. It has a duty to seek the highest value reasonably available for the company's shareholders regardless of where that value comes from.[1] These are simply applications of the duty of loyalty and the general requirement that the directors of a corporation must act in the best interests of the corporation.

Footnote(s)

1 *In re Answers Corp. Shareholders Litigation,* Del. Ch. LEXIS 162 (Del. Ct. Ch. 2012), *per* Noble V.C.

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Court of Queen's Bench of Alberta

Citation: Manitok Energy Inc (Re), 2021 ABQB 227

Date:
Docket: B201 332583, B201 332610, B201 335351
Registry: Calgary

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Between:

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc.

Applicant

- and -

Prentice Creek Contracting Ltd. and Riverside Fuels Ltd.

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The sole issue in this application is whether end-of-life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

[2] In the specific circumstances of these proceedings, the respondent lien claimants, if their lien claims are valid, have priority to funds held in trust arising from the sale of certain property by the Receiver.

II. Facts

[3] On February 20, 2018, Alvarez & Marsal Canada Inc. was appointed receiver and manager (the "Receiver") of all of the assets and properties, including all proceeds of sale thereof, of Manitok Energy Inc. and its wholly owned subsidiary Raimount Energy Corp. pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended and section 13(2) of the *Judicature Act*, RSA 2000, c J-2.

[4] Concurrently, Manitok, Raimount and another subsidiary, Corinthian Oil Corp., were deemed bankrupt and Alvarez & Marsal became the trustee in bankruptcy of each of them.

[5] At the time of its insolvency, Manitok was an Alberta Energy Regulator licensee of 907 wells and 137 facilities and pipelines with an associated deemed liability for end-of-life obligations of $72.2 million.

[6] Subsequently, the Receiver entered into a purchase and sale agreement with Persist Oil & Gas Inc. for certain property of the debtors. The sale approval and vesting order, filed on January 18, 2019, discharged certain lien registrations, including those of the applicants Prentice Creek Contracting Ltd. and Riverside Fuels Ltd., and required the Receiver to establish separate holdbacks for Prentice and Riverside in the total amount of $581,778.48 to stand in the place and stead of their lien registrations pending further order of the Court. The lien claims arise from services provided prior to the receivership.

[7] The sale to Persist had not closed when the Supreme Court decision in ***Orphan Well Association v Grant Thornton Ltd.,*** 2019 SCC 5 ("***Redwater***") was released on January 31, 2019.

[8] The sale of Persist closed on April 15, 2019. Under the purchase and sale agreement, Persist assumed all environmental liabilities with respect to the assets that are the subject of the discharged liens.

[9] The purchase and sale agreement includes the following terms:

> 11. For the purposes of determining the nature and priority of Claims, and pending any further or other distribution Order of this Court.
>
> > (a) The net proceeds from the sale of the Purchased Assets (to be held in an interest bearing trust account by the Receiver) shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale...(emphasis added)

> 12 ... the amount to be [held in trust by the Receiver] shall include at least the following with respect to the following contingent or disputed claims:
>
> (a) $119,093.08 in relation to builders' lien claims filed by [Riverside] in relation to certain Purchased Assets;
>
> (b) $462,685.40 in relation to builders' lien claims filed by [Prentice] in relation to certain Purchased Assets; ...

[10] Although the agreement and the order have been amended, the parties are in agreement that the amendments do not impact the provisions relating to the lien holdbacks.

[11] In accordance with a Partial Discharge Order filed July 9, 2019, the Receiver renounced and disclaimed and was discharged over the majority of the remaining unsold oil and gas assets in the Manitok estate. Despite the Receiver's further efforts in collaboration with the AER, many of the retained assets had proved to be unsaleable.

[12] The AER issued abandonment and reclamation orders to Manitok on August 1, August 12, August 21 and August 30, 2019, including to its remaining working interest participants. Where there were no remaining responsible parties, the AER designated the sites as "orphan" to enable the abandonment and reclamation work to be conducted by the Orphan Well Association. It is anticipated that end-of-life obligations are in the neighbourhood of $44.5 million, substantially more than the proceeds of sale of the debtors' estates.

[13] According to the lienholders, the AER orders do not relate to any of the assets sold to Persist.

[14] The Receiver anticipates renouncing and disclaiming the remaining unsold assets. Total realizations from the receivership will be substantially less than the cost of satisfying the end-of-life obligations associated with the discharged assets.

[15] Although the parties have agreed to proceed with this application on the basis that the lien claims are valid, the Receiver has concerns about such validity, and reserved the right to dispute that issue if the lien claimants are found to have priority over end-of-life obligations.

[16] The most significant stakeholders in the receivership are the National Bank of Canada and the Alberta Energy Regulator. The NBC continues to hold a first charge over all of the undistributed assets of the debtors and the proceeds therefrom. As a result of the ***Redwater*** decision, the AER is a significant stakeholder in the receivership even though it is not a "creditor" *per se* (***Redwater*** at para 122).

III. Analysis

A. Prentice Creek Contracting Ltd.

[17] Prentice Creek submits that it was not the intention of the decision in ***Redwater*** to extend the enforcement of end-of-life obligations against specific assets improved by a lienholder that are unrelated to the environmental condition or damaged properties of Manitok. Prentice Creek notes that its liens were registered against property that was sold to Persist, which has assumed all of the end-of-life obligations of that property.

[18] The work performed by Prentice Creek related to the reclamation and clean-up of specific oil and gas sites.

[19] The Receiver submits that, in accordance with Redwater, end-of-life obligations must be satisfied in preference to any builders' liens that may otherwise be first ranking.

B. Riverside Fuels Ltd.

[20] Riverside submits that the holdback funds should be used to satisfy the debt owing to Riverside on the basis of equity and unjust enrichment. It notes that the materials furnished and services provided enhanced the particular assets, and that the liened assets are unrelated to the environmental claims and end-of-life obligations for the remaining assets.

[21] Riverside's liens relate to the provision of fuels and lubricants on a periodic basis for use at specific production and operation sites. While Riverside continued to provide services after the commencement of the receivership, its lien claims relate to services provided before that time.

[22] The Receiver responds with the same submission as it made with respect to Prentice Creek: end-of-life obligations must be satisfied in preference to builders' liens that may otherwise be first ranking.

C. The Effect of the Redwater Decision on the Claims

[23] In order to determine whether the ***Redwater*** decision is dispositive of this application, it is necessary to analyze the decision.

[24] Counsel for the Receiver has provided a useful summary of the ***Redwater*** decision as follows:

- Trustees in bankruptcy are bound by and must act in compliance with valid provincial laws, provided the obligations thereunder do not constitute provable claims and no conflict engages the paramountcy doctrine.
- Regulatory laws governing abandonment and reclamation are valid provincial laws of general application. They do not conflict with the BIA or frustrate the purpose of the BIA, even though estate assets may have to be expended to comply with provincial regulatory laws.
- Abandonment and reclamation obligations are not provable claims because a regulator is not a creditor when enforcing a public duty. Further, any right of reimbursement in the circumstances of the case was too speculative to be accepted as a provable claim by the AER.
- In the result, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy (para 162).

[25] However, as submitted by the lien claimants, the facts and certain comments of the Court in ***Redwater*** are relevant to add context to the findings of the Court.

[26] Redwater was the AER licensee of about 84 oil and gas wells, seven facilities, and 36 pipelines. Of these, only 19 wells were producing: the remainder were inactive. Most of these were spent and burdened with abandonment and reclamation liabilities that exceeded their value (***Redwater***, para 48).

[27] Redwater was placed into receivership on May 12, 2015. Within two days, the AER advised the Receiver that it must fund its abandonment obligations before it distributed any funds or finalized a proposal to creditors. The AER warned that it would not approve a transfer unless both transferee and transferor would be in a position to fulfil all regulatory obligations (para 47).

[28] In response, the Receiver advised that it was only taking possession and control of the productive wells and, in its view, it had no obligation with respect to renounced assets (para 50). Almost immediately, the AER issued orders requiring Redwater to suspend and abandon the renounced assets, such work to be carried out within a short period of time (para 51).

[29] Soon after that, the AER and the OWA applied for an order declaring that the Receiver's renunciation of assets was void, requiring the Receiver to comply with the abandonment orders and requiring it to fulfill its statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of Redwater's licensed properties. The AER did not seek to hold the Receiver liable for these obligations beyond the assets in the Redwater estate.

[30] The Receiver cross-applied, seeking approval to pursue a sales process excluding the renounced assets and an order directing that the AER could not prevent the transfer of the licenses of the retained assets on the basis of, among other things, a failure to comply with the abandonment orders, refusal to take possession of the renounced assets or Redwater's outstanding debts to the regulator (para 52).

[31] The chambers judge approved the sale procedure. It appears that at the time of the hearing before the Supreme Court, Redwater's assets had been sold and the sale proceeds were being held in trust (para. 108).

[32] Chief Justice Wagner made certain comments in the majority decision that are relevant to this application.

[33] At para 75, on the issue of paramountcy, he noted that the result of a trustee's "disclaimer" of real property, "where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected."

[34] In interpreting section 14.06(4) of the *BIA*, the Chief Justice stated that "[u]nder s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee abandons, disposes of or otherwise releases any interest in any real property", thus making it clear that s.14.06(4)'s scope in limiting the personal liability of a trustee is not narrowed to disclaimer in the formal sense (para 87).

[35] He notes further that "the provision is clear that, where an environmental order has been made, the result of an act of 'disclaimer' is the cessation of personal liability" (para 86).

[36] In para 96, the Court noted that, prior to 1997, "it was unclear what effect 'disclaimers' might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee" (emphasis added) (see also para 97).

[37] Thus, the Court concluded, disclaimer by a trustee "has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage" (para 98). "[The trustee] continues to have the responsibilities and duties of a 'licensee' to the extent that assets remain in the Redwater estate" (para 114).

[38] In the majority's conclusion on whether end-of-life obligations are claims provable in bankruptcy, Wagner, CJ found that such obligations are not claims, and therefore do not conflict with the general priority scheme in the *BIA*. In support of this conclusion, he notes at para 159:

> In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s.14.06(7) was unavailable to the Regulator, the Abandonment Order and the LMR replicate s.14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* - rather, it facilitates them. (emphasis added)

[39] It is here that the distinction between the facts of Redwater and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control. This change in ownership occurred prior to any action by the AER, so that the orders a) do not apply to property over which the respondents claim a lien, and b) do not apply to contiguously owned property at the time.

[40] The Supreme Court in paragraph 159 finds support for the conclusion that requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA* by referring to section 14.06(7), which allows a regulator to place a charge on the real property of the debtor that is contaminated or affected by an environmental condition, but only on that property or contiguous property.

[41] The Court notes that abandonment orders "replicate s.14.06(7)'s effect". Clearly, the decision of the Court in ***Redwater*** expands the limited scope of section 14.06(7), but it does not appear to expand it to cover trust funds relating to the proceeds of sale of property to which the debtors no longer have the status of "owner, party in control, or licensee" at the time the orders were issued.

[42] Thus, the findings in ***Redwater*** do not extend to a situation, such as in this case, where property unrelated to property that is affected by an environmental condition is sold to a new licensee before any abandonment or reclamation orders are made, and where the new licensee assumes the inherent end-of-life obligations for that property. In this case, the AER is not at risk for any current costs of reclamation of the transferred property.

[43] The lien claimants were protected by the purchase agreement terms that were approved by court order. As the funds have been held in trust in accordance with the order and the purchase and sale agreement pending resolution of the claims, they are not property of the estate, and would not become part of the estate unless the claims are denied. As the Court in ***Redwater*** comments at para 114, a trustee, or Receiver/trustee in this case, has the responsibilities and duties of a licensee "to the extent that assets remain in the ... estate".

[44] Therefore, the decision in Redwater does not provide priority to the trust funds to the AER in these circumstances. Assuming that the liens are valid, and that they only refer to the Persist lands, there is no reason to deny the lien holders' claims to the proceeds in trust.

[45] It is not necessary to consider the claims of other creditors, as this application involves only the amounts held in trust.

D. Other Submissions

1. Unjust Enrichment

[46] Both Prentice Creek and Riverside submit that the release of the trust funds to satisfy end-of-life obligations of Manitok would be an unjust enrichment of the AER. However, whether or not the enrichment and corresponding deprivation requirements for a finding of unjust enrichment could be satisfied in this case, there would have been a juristic reason for the enrichment if I am incorrect in finding that the decision in ***Redwater*** does not extend to the facts in this case, arising from the statutory obligation. Therefore, if I am incorrect in my interpretation of ***Redwater***, I would not find a constructive trust arising from unjust enrichment to be an appropriate remedy.

2. Equity and Fairness

[47] Riverside submits that this Court could find for the lien claimants on the basis of equity and fairness. Neither the *Judicature Act* nor the *BIA* give the Court carte blanche to do what is fair despite binding authority. In any event, the same argument could be made on behalf of any creditor of the debtors that supplied goods or services, particularly secured creditors, who prior to the decision in ***Redwater*** had reason to think that they had done all that was necessary or possible to ensure the priority of their claims.

3. Status of Lien Claimants

[48] Riverside also submits that lien claimants are not creditors; that they have a proprietary claim that is not subject to the *BIA* priority scheme. This is incorrect. The essence of the lien provisions is that they create a lien over the property that was improved or remediated, and if the property is sold, the lien goes with the property, or, in this case the proceeds of sale held in trust. It is a security interest subject to the priority scheme of the *BIA* in the same way as other provable claims: *BIA* section 2, definition of "secured creditor".

IV. Conclusion

[49] In the specific circumstances of this case, I find that the ***Redwater*** decision does not affect the rights of Prentice Creek and Riverside to the trust funds arising from the Persist purchase of Manitok's property.

[50] If the parties are unable to agree on costs, they may make written submissions on that issue.

Dated at Calgary, Alberta this 24th day of March, 2021.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Howard A. Gorman, QC, D. Aaron Stephenson and Meghan Parker
for the Receiver/ Trustee

Glyn L. Walters
for Prentice Creek Contracting Ltd.

Garrett S.E. Hamilton
for Riverside Fuels Ltd.

Maria Lavelle
for the Alberta Energy Regulator