SCC Court File No.

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

B E T W E E N:

PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.

APPLICANTS
(Appellants/Respondents)

- and -

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

RESPONDENT
(Respondent/Appellant)

APPLICATION FOR LEAVE TO APPEAL
VOLUME I of II (Tabs 1 – 3 (2))
(PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP., APPLICANTS)
(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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> *"These appeals were complex, raising a number of important and some novel issues respecting corporate law, bankruptcy law, oil and gas regulation, contracts, and procedure."*
>
> — *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 92 at para 7[1]

PART I. STATEMENT OF FACTS

A. Overview

1. This application addresses two of the important and novel issues referred to above. These issues are of public importance. They relate to the interpretation of federal bankruptcy legislation, the powers of bankruptcy trustees across the country, and the scope of the oppression remedy in federal and all provincial corporate legislation.

2. First, when and how can the presumption in the *Bankruptcy and Insolvency Act* (the ***BIA***) that related parties are not dealing at arm's length be rebutted?

3. Parliament amended the *BIA* in 2007 to make the presumption of non-arm's length dealings between related persons rebuttable. This Court and the Federal Court of Appeal have held that when interpreting "arm's length" in the *Income Tax Act* (***ITA***), Courts should consider all relevant circumstances, including whether the transaction was a step in a multi-step transaction between arm's length parties. The Court of Appeal in this case interpreted "arm's length" under the *BIA* differently, disregarding that the overall multi-step transaction was negotiated at arm's length and instead focusing on one step of the transaction in isolation. The Court of Appeal treated Parliament's 2007 amendment to the *BIA*—never addressed by this Court—as meaningless. There are now inconsistent interpretations of "arm's length" across Parliament's statute book.

4. Second, can a trustee in bankruptcy bring an oppression claim on behalf of a select few creditors of a bankrupt estate?

5. Until now, a fundamental principle of bankruptcy law was that a trustee might pursue collective claims on behalf of the estate or all its creditors, but not the claims of only some creditors. Yet the Court of Appeal granted the trustee complainant status to pursue an oppression

[1] Memorandum of Judgment Regarding Costs, dated March 15, 2021.

claim—a personal claim—in the name of the bankrupt, but on behalf of a select few of its creditors. This radically expands trustees' powers, allowing them to bring claims on behalf of select creditors.

6. The Court of Appeal's decision on these issues is inconsistent with appellate authorities across Canada. Supreme Court intervention can resolve these inconsistencies and clarify key issues at the intersection of Canada's bankruptcy and corporate law.

B. Statement of Facts

1. The Goodyear Assets and the third party sale process

7. In 2016, Perpetual Energy Inc. (**Perpetual Energy**), a public company, decided to sell a large number of gas wells and related lands and infrastructure (the **Goodyear Assets**).[2]

8. Perpetual Energy held the beneficial interests of the Goodyear Assets through the Perpetual Operating Trust (**POT**). The legal interests and licenses for the Goodyear Assets were held by Perpetual Energy's wholly-owned subsidiary, Perpetual Energy Operating Corp. (**PEOC**), as trustee for POT.[3]

9. An extensive sales process culminated in an offer from Kailas Capital Corp. (**Kailas**),[4] a stranger to the Perpetual Energy group.[5] It desired a "turn-key" operating entity on closing.[6] Its offer "stipulated that PEOC was to hold the legal and beneficial interest in the Goodyear Assets".[7]

2. The Aggregate Transaction and the Asset Transaction

10. After extensive negotiation regarding which specific wells and associated facilities would comprise the Goodyear Assets, the sale of the Goodyear Assets was accomplished by a negotiated multi-step transaction, described collectively as the **Aggregate Transaction**.[8] In short:

(a) Perpetual Energy sold the shares of PEOC to 1986114 Alberta Inc. (**198Co**), a

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[2] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6 (**QB Reasons**) at paras 9, 11.
[3] QB Reasons at para 10.
[4] QB Reasons at paras 11-17.
[5] Affidavit of Susan Riddell Rose filed October 19, 2018 (**Rose Affidavit**) at para 35.
[6] Rose Affidavit at para 20.
[7] QB Reasons at para 56.
[8] QB Reasons at para 17; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 (**Appeal Reasons**) at para 7.

corporation incorporated by Kailas (the **Share Transaction**), pursuant to a share purchase and sale agreement dated September 26, 2016 (the **Share Purchase Agreement**).[9]

(b) The Share Transaction required that PEOC combine the legal and beneficial interest in the Goodyear Assets by purchasing POT's beneficial interest in the Goodyear Assets (the **Asset Transaction**) and required the inclusion of a gas marketing contract providing price protection for the production from the Goodyear Assets. The consideration in the Asset Transaction mirrored that in the Share Transaction. The Asset Transaction was effected through an agreement between PEOC and POT dated October 1, 2016, scheduled to the Share Purchase Agreement (the **Asset Purchase Agreement**).[10]

11. On October 1, 2016, the Share Transaction closed two minutes after the Asset Transaction, as required by the Share Purchase Agreement.[11]

3. Sequoia's initial success and then bankruptcy

12. 198Co renamed PEOC "Sequoia Resources Corp" (**Sequoia**).[12] It operated the Goodyear Assets for 18 months, executing on its "aggressive abandonment and reclamation program" and reporting "some initial success".[13] It acquired more wells and related assets from others.[14] Sequoia increased its production and reduced its environmental obligations, ranking fifth in Alberta for reclamation certificates.[15] However, by the fall of 2017, gas prices fell. Sequoia's cash flow declined and Sequoia could not complete its abandonment program or continue to operate without significant losses.[16] On March 23, 2018, Sequoia assigned itself into bankruptcy. PricewaterhouseCoopers Inc., LIT, was appointed as Sequoia's bankruptcy trustee (the **Trustee**).[17]

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[9] QB Reasons at para 17(c); Rose Affidavit at para 41, Exhibit H (Share Purchase Agreement, September 26, 2016).
[10] QB Reasons at para 17(a); Rose Affidavit at para 44, Exhibit J (Asset Purchase Agreement, October 1, 2016)
[11] QB Reasons at paras 58, 92.
[12] QB Reasons at paras 17(e), 19.
[13] Appeal Reasons at para 12; Affidavit of Mark Schweitzer filed October 4, 2018 (**Schweitzer Affidavit**) at paras 24-25, Exhibit A (Sequoia Letter to Stakeholders, March 26, 2018).
[14] Schweitzer Affidavit at Exhibit B (Trustee's Preliminary Report, April 11, 2018).
[15] Schweitzer Affidavit at Exhibit A (Sequoia Letter to Stakeholders, March 26, 2018), Exhibit B (Trustee's Preliminary Report, April 11, 2018).
[16] Schweitzer Affidavit at para 24, Exhibit A (Sequoia Letter to Stakeholders, March 26, 2018).
[17] QB Reasons at paras 19-20.

4. The Statement of Claim and the Applications to Strike and Dismiss

13. On August 2, 2018, the Trustee sued Perpetual Energy, POT, Perpetual Operating Corp. (the **Perpetual Entities**) and Ms. Rose, alleging:

(a) the Asset Transaction was a non-arm's length transfer at undervalue within the meaning of s. 96 of the *BIA* (the ***BIA* Claim**);

(b) the business of PEOC had been operated in a manner that was oppressive within the meaning of the (Alberta) *Business Corporations Act* (the **Oppression Claim**);

(c) the Aggregate Transaction was contrary to public policy, was illegal, or otherwise a violation of equitable principles (the **Public Policy Claim**); and

(d) Ms. Rose, the sole director of PEOC at the time of the Asset Transaction, had breached her statutory duties under the *Business Corporations Act* (the **Director Claim**).[18]

14. The Perpetual Entities and Ms. Rose applied to strike and summarily dismiss each claim.[19]

15. The Perpetual Entities' application to summarily dismiss the *BIA* Claim addressed only whether the parties to the Asset Transaction were dealing at arm's length. An arm's length transfer is reviewable if it occurred within one year before the initial bankruptcy event and requires the trustee to establish that the debtor intended to defraud, defeat or delay a creditor. A non-arm's length transfer is reviewable if it occurred within five years before the initial bankruptcy event and the trustee does not need to establish an intent to defraud, defeat or delay a creditor. The Aggregate Transaction occurred 18 months before Sequoia's bankruptcy. There is no allegation of an intent to defraud, defeat or delay a creditor.

5. The Decision of the Chambers Judge

16. The Chambers Judge declined to strike or dismiss the *BIA* Claim on the arm's length issue, but struck the Oppression Claim and the Public Policy Claim.

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[18] Appeal Reasons at para 13(a)-(d).
[19] Appeal Reasons at para 13.

17. The Chambers Judge found that the Kailas group were "at arm's length with all members of the Perpetual Energy group of entities".[20] He also found that the Kailas group, on one side, and the Perpetual Energy group, on the other side, negotiated the Asset Purchase Agreement:

(a) the Kailas group, with its own counsel, negotiated "the Aggregate Transaction (as a whole) and the Asset Purchase Agreement (on its own);"[21]

(b) "198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate Transaction with the assistance of experienced legal counsel".[22]

18. Despite those findings, the Chambers Judge declined to summarily dismiss the Trustee's *BIA* Claim. He found that the record was not "robust" enough to draw the necessary inferences and that the determination of the "arm's length issue" would turn on the credibility of individuals who were directly involved in the negotiation of the Asset Transaction.[23]

19. The Chambers Judge struck the Oppression Claim. He found that the Trustee was not a "proper person" entitled to standing as a "complainant" because the Oppression Claim was not pursued as a "collective action", a fundamental principle of Canada's bankruptcy regime.[24] Rather, it was brought on behalf of two subsets of alleged creditors: the Alberta Energy Regulator (allegedly owed abandonment and reclamation obligations (**ARO**) associated with the Goodyear Assets) and municipalities (allegedly owed property taxes at the time of the Asset Transaction).[25]

20. The Chambers Judge correctly held that there was no creditor of ARO.[26] The Chambers Judge found the outstanding municipal property tax was $1,560,890 at the time of the Asset Transaction,[27] owed to three municipalities. In contrast, the Trustee reported that the claims filed by Sequoia's creditors against the estate totalled $244,501,718 at the time of bankruptcy.[28] None

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[20] QB Reasons at para 55. See also QB Reasons at para 314.
[21] QB Reasons at para 57.
[22] QB Reasons at para 314. See also QB Reasons at para 324.
[23] QB Reasons at paras 97-102.
[24] QB Reasons at paras 204-211.
[25] QB Reasons at paras 210-211, 238.
[26] QB Reasons at paras 143, 225.
[27] QB Reasons at para 334.
[28] Schweitzer Affidavit at Exhibit B (Trustee's Preliminary Report, April 11, 2018).

of Sequoia's creditors, other than the three municipalities, were creditors at the time of the Asset Transaction as the Aggregate Transaction was structured as a debt-free transaction.[29]

6. The Decision of the Court of Appeal of Alberta

21. The Perpetual Entities appealed the dismissal of their application regarding the *BIA* Claim. The Trustee appealed the decision to strike the Oppression Claim and the Public Policy Claim. The Court of Appeal dismissed the Perpetual Entities' appeal and allowed the Trustee's appeal (the **Appeal Decision**).[30]

22. Regarding the *BIA* Claim, the Court of Appeal rejected the Perpetual Entities' submission that the Chambers Judge's finding about the arm's length negotiation of the Aggregate Transaction—including the Asset Transaction (on its own)—rebutted the presumption that the Asset Transaction was non-arm's length.[31] The Court of Appeal agreed with the Chambers Judge that the Aggregate Transaction was at arm's length,[32] but stated: "None of that… 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".[33] There was nothing "on this record" to support that conclusion. The record was that Kailas negotiated all aspects of the Aggregate Transaction, including the Asset Transaction on its own.

23. Regarding the Oppression Claim, the Court of Appeal agreed that there is no creditor associated with ARO.[34] Yet it reversed the striking of the Oppression Claim and granted the Trustee standing to bring an oppression claim on behalf of all "creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy".[35] The only such creditors were the three municipalities,[36] each of which entered into agreements with Sequoia post-closing of the Aggregate Transaction to defer payments.[37] While those three municipalities' unpaid taxes represent less than one percent of the claims against the bankrupt

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[29] Rose Affidavit at paras 65-70, 72-76.
[30] Appeal Reasons.
[31] Appeal Reasons at para 104.
[32] Appeal Reasons at para 99.
[33] Appeal Reasons at para 109.
[34] Appeal Reasons at paras 137-140.
[35] Appeal Reasons at para 140.
[36] Rose Affidavit at para 70; QB Reasons at paras 205-206, 334, 368.
[37] Appeal Reasons at para 140.

estate, the Court reasoned that "the collective pursuit of all of those outstanding taxes in an oppression action would be 'collective' not 'selective'".[38]

PART II. STATEMENT OF ISSUES

24. The Appeal Decision raises questions of public importance that warrant guidance from the Supreme Court, specifically:

(a) When and how can the presumption in the *BIA* that related parties are not dealing at arm's length be rebutted?

(b) Can a trustee in bankruptcy bring an oppression claim on behalf of a select few creditors of a bankrupt estate?

PART III. STATEMENT OF ARGUMENT

A. When and how can the presumption in the *BIA* that related parties are not dealing at arm's length be rebutted?

1. The Appeal Decision makes the 2007 *BIA* amendment meaningless

25. Whether a transfer is at "arm's length" determines the number of years before bankruptcy that are subject to scrutiny under s. 96 of the *BIA*.[39] The *BIA* does not define "arm's length" or "dealing at arm's length".

26. Section 4 of the *BIA* defines "related persons" and addresses whether such persons are dealing at arm's length. Sections 4(2) and (3) define related persons to include two entities both controlled by the same person or group of persons, and state that if two entities are related to the same entity, they are deemed to be related to each other. Section 4(5) creates a rebuttable presumption that related persons do not deal 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.[40]

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[38] Appeal Reasons at para 133.
[39] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (***BIA***) s. 96.
[40] *BIA*, s 4 (emphasis added).

27. The italicized words were added to s. 4(5) by amendment in 2007. As the Chambers Judge noted, this change was introduced "to better ensure that legitimate agreements were not inadvertently captured by the avoidance transaction provisions of the *BIA*".[41]

28. The Appeal Decision defeats Parliament's intent in amending s. 4(5). It is a retreat to pre-2007 bankruptcy law, where transactions between related persons are deemed to be non-arm's length—full stop. The Supreme Court has never addressed the 2007 amendments to s. 4(5), which apply to claims under both ss. 95(1)(b) and 96(1)(b) of the *BIA*. Both are important statutory causes of action available to trustees in bankruptcy across Canada. As the Chambers Judge stated: "Because of its recency, this presumption has not been extensively considered in the context of the *BIA*".[42] The Appeal Decision makes this Court's involvement now necessary to clarify the interpretation of these federal statutory provisions.

29. The Chambers Judge found as a fact that arm's length parties[43] negotiated both "the Aggregate Transaction (as a whole) *and the Asset Purchase Agreement (on its own)*".[44] He found that Perpetual Energy's counterparty, Kailas/198Co, "was a sophisticated arm's length party" and "negotiated *all aspects* of the Aggregate Transaction with the assistance of experienced legal counsel".[45]

30. One of those "aspects" was the Asset Transaction, implemented through the Asset Purchase Agreement between PEOC and POT. The Share Purchase Agreement between Perpetual Energy and 198Co was executed five days earlier.[46] It included an unsigned form of the Asset Purchase Agreement (which lists the specific assets that had been negotiated to comprise the Goodyear Assets, including the gas marketing contract[47]) as a schedule[48] and bound Perpetual Energy to

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[41] QB Reasons at paras 66-69; *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007 c 36, s 2.
[42] QB Reasons at para 67.
[43] QB Reasons at para 55.
[44] QB Reasons at para 57 (emphasis added).
[45] QB Reasons at para 314 (emphasis added). See also QB Reasons at para 324.
[46] QB Reasons at para 17(c).
[47] Rose Affidavit at Exhibit J (Asset Purchase Agreement, October 1, 2016, Schedules A, B, C, D).
[48] Rose Affidavit at Exhibit H (Share Purchase Agreement, September 26, 2016, ss. 1.1(xxx), 1.2(xviii), Schedule Q).

have PEOC enter into it on those terms (with the negotiated value of the Goodyear Assets from the Share Transaction mirrored in the Asset Transaction).[49] The Share Purchase Agreement left no room for negotiation of the Asset Purchase Agreement within the Perpetual Energy group.

31. The Court of Appeal ignored those facts, finding "no legally relevant evidence" to rebut the presumption that related parties dealt with each other at arm's length.[50] In considering whether the Asset Transaction was at arm's length, it held that the Aggregate Transaction was irrelevant.[51] It refused to even consider the arm's length negotiation of the Share Purchase Agreement (which set the assets, terms, and consideration of the Asset Transaction) and the arm's length negotiation of the Asset Purchase Agreement (on its own), as evidence rebutting the presumption in s. 4(5).

32. The Appeal Decision neuters Parliament's express direction in amending s. 4(5). In saying that the consideration was "apparently set" not at arm's length, the Court of Appeal presumably meant that the consideration was set by PEOC and POT, the related parties to the Asset Transaction. But there was no evidence that the consideration was set within the Perpetual Energy group. To the contrary, the finding of fact was that "all aspects" of the Asset Transaction were negotiated by Kailas/198Co. Yes, the parties to the Asset Purchase Agreement were related. But Parliament amended s. 4(5) to allow related parties to rebut the presumption of non-arm's length dealings with "evidence to the contrary". Instead, the Court of Appeal considered that evidence to be irrelevant and treated the relationship between the parties to the Asset Transaction as a complete answer.

2. The Appeal Decision interpreted dealing at "arm's length" under the *BIA* differently than under the *ITA*, contrary to appellate authority

33. Courts, including this Court, have considered the meaning of "arm's length" in the context of the *ITA*, including in cases involving multi-step transactions. But the Court of Appeal refused to apply that law, despite its own precedent stating that jurisprudence applies. The result is that there are now two judicial definitions of "arm's length", one for the *ITA* and another in the *BIA*.

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[49] Rose Affidavit at paras 42-47, Exhibit H (Share Purchase Agreement, September 26, 2016, ss. 1.1(xxx), 1.2(xviii), 8.1(a)(xiii), Schedule Q).
[50] Appeal Reasons at para 104.
[51] Appeal Reasons at para 105.

34. In the absence of a statutory definition of "arm's length" in the *BIA*, the Chambers Judge correctly considered the Alberta Court of Appeal's decision in *Piikani Nation v Piikani Energy Corp.*[52] *Piikani* holds that the factors the Supreme Court considered in *McLarty v R*[53] 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".[54] Cases defining "arm's length" in the *BIA* context, both before and after *Piikani*, have drawn from the *ITA* jurisprudence.[55]

35. The Appeal Decision held that tax jurisprudence is helpful only in determining "what, *as a matter of fact*, amounts to 'arm's-length' dealing",[56] but quickly substituted even that analysis with its own conclusory statement about the facts: "but there is no such factual dispute here: see *supra*, para. 99".[57] Paragraph 99 of the Appeal Decision says that while the Aggregate Transaction was at arm's length, "[t]he issue was that the Asset Transaction concerned only Perpetual Energy Operating Corp. (later Sequoia), the Perpetual Operating Trust and Perpetual Energy Parent", and that those related parties were presumed not to deal at arm's length under s. 4(5).[58] The Court of Appeal's reasoning is circular: the parties to the Asset Transaction were related, and therefore presumed to be dealing at non-arm's length, and the presumption is not rebutted because the parties to the Asset Transaction were related.

36. The Court of Appeal also chose not to follow the *ITA* jurisprudence interpreting arm's length in the context of multi-step transactions. It ignored that guidance, stating: "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".[59] That was the same argument the chambers judge

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[52] QB Reasons at paras 72-80; *Piikani Nation v Piikani Energy Corp.*, 2013 ABCA 293 (***Piikani***) at paras 20-23, 26, 29.
[53] *McLarty v R,* 2008 SCC 26 (***McLarty***).
[54] QB Reasons at para 76, quoting *Piikani* at paras 29-30.
[55] See for example: *Skalbania (Trustee of) v Wedgewood Village Estate Ltd.* (1989), 60 DLR (4th) 43 (BCCA), leave denied (1989) DLR (4th) vii (note) (SCC); *Re Tremblay* (1980), 36 CBR (NS) 111 (CS Que); *1085372 Ontario Limited v Kulawick*, 2019 ONSC 2344 at para 46; *Re Hofer*, 2019 ABQB 405 at para 22; *Montor Business Corp. (Trustee of) v Goldfinger*, 2016 ONCA 406 at para 68, leave denied (2016) 44 CBR (6th) 3 (SCC).
[56] Appeal Reasons at para 106 (emphasis in original).
[57] Appeal Reasons at para 106 (emphasis in original).
[58] Appeal Reasons at para 99.
[59] Appeal Reasons at para 106.

made in *Piikani*, reasoning that the *ITA* provisions dealing with arm's length differed in purpose from the *BIA* preference provisions. The Court of Appeal in *Piikani* rejected that reasoning.[60]

37. In *McLarty*, an *ITA* case, Rothstein J. addressed the circumstances that Courts now routinely consider to determine whether parties are dealing at arm's length. He noted that "[e]ach particular transaction *or series of transactions* must be examined on its own merits",[61] and adopted the following criteria to use in determining whether parties to a transaction are not dealing at arm's length: (1) Was there a common mind directing the bargaining for both parties? (2) Were the parties acting in concert without separate interests? (3) Was there "de facto" control?[62]

38. Rothstein J. also addressed the proper focus of the arm's length inquiry.[63] In *McLarty*, the question was whether the taxpayer, McLarty, and vendor, Compton, were dealing at arm's length. On its face, the impugned transaction was not between McLarty and Compton; rather, it was between Compton as vendor and Compton as agent for the acquiring taxpayer, and "[o]bviously, Compton was not dealing with itself at arm's length".[64] The Court held that "this does not end the analysis" and that "all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length", including "the entirety of the transactions".[65] The Court rejected the Minister's argument that the focus of analysis was on the relationship between Compton and itself, finding it too "restrictive".[66]

39. The Court of Appeal's attempt to distinguish *McLarty* was unconvincing, stating only that " 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".[67] It ignored the Supreme Court's direction to look at the "entirety of the transactions", including that, by the time of the Asset Transaction, Kailas/198Co were that "external party" that was already

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[60] *Piikani* at para 18.
[61] *McLarty* at para 62 (emphasis added).
[62] QB Reasons at para 78, quoting *McLarty* at paras 61-62.
[63] *McLarty* at para 65.
[64] *McLarty* at para 59.
[65] *McLarty* at paras 59, 61, 73.
[66] *McLarty* at para 65. See also *Poulin v R,* 2016 TCC 154 at para 67.
[67] Appeal Reasons at para 107.

contractually bound by the Share Purchase Agreement to acquire all of PEOC's shares and had negotiated the terms of the Asset Transaction to mirror those negotiated in the Share Transaction.

40. In another tax case, *Teleglobe Canada Inc v R*, the Federal Court of Appeal found a sale of shares similar to the Aggregate Transaction was the proper transaction to consider in determining whether there was an arm's length relationship. The federal government privatised a Crown corporation, Teleglobe Canada (Old Teleglobe), by selling its assets to a new entity, Teleglobe Canada Inc. (New Teleglobe) in return for shares of New Teleglobe, which it then sold to Memotec Data Inc. The Federal Court of Appeal stated:

> 7 As a result, an inquiry into the intentions of Old Teleglobe and New Teleglobe is somewhat artificial, as the relevant intentions were those of Canada and Memotec. *Given the fact that at all material times Canada wholly controlled both Old Teleglobe and New Teleglobe, it was in a position to dictate to both of these parties the terms of the transaction between them. However, those terms were within the ambit of negotiations between Canada and Memotec.* Consequently, the terms of the agreement between Old Teleglobe and New Teleglobe are to be found in the Purchase Agreement, and in the conveyances which give effect to that agreement.
>
> …
>
> 30 *Notwithstanding the fact that New Teleglobe and Old Teleglobe were not at arm's length, this was a single transaction negotiated between parties who were dealing at arm's length, Canada and Memotec. It was their agreement which fixed the values in question*. …[68]

41. The Court of Appeal strained to distinguish *Teleglobe*. It stated: "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".[69] As set out above, that was patently wrong.[70]

42. As a result of the Appeal Decision, "arm's length" is defined differently within two federal statutes. This is contrary to principles of statutory interpretation[71] and inconsistent with *Piikani*. *Piikani* explained that defining "arm's length" consistently in the *BIA* and *ITA* "minimizes the potential for unnecessary conflicts in interpretation" and accords with "the logical assumption that

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[68] *Teleglobe Canada Inc v R*, 2002 FCA 408 (***Teleglobe***) at paras 6-7, 30 (emphasis added).
[69] Appeal Reasons at para 108.
[70] QB Reasons at paras 57, 314.
[71] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed at 422-423.

Parliament knows what other statutes say when it passes an enactment, and perhaps even more so when it amends a statute (i.e. the *BIA*) to incorporate a term that has defined in the courts in another context (i.e. the *ITA*)".[72]

43. There is no principled reason for interpreting "arm's length" differently in two federal statutes. It is a problem this Court can solve so there is a uniform interpretation of "arm's length" across Parliament's statute book. Numerous other federal statutes also use the undefined term "arm's length".[73] Without guidance from this Court, there is conflicting judicial guidance on what arm's length means, especially in cases of multi-step transactions.

3. The policy problem created by the Appeal Decision

44. The Appeal Decision treats the relationship of the parties to a particular agreement as a complete answer under s. 96 and ignores *ITA* case law holding that Courts must consider the entirety of the transaction and all relevant circumstances. In doing so, it creates new risks, uncertainty, and costs in multi-step transactions.

45. Examining the step-transaction between related parties in isolation is artificial.[74] In the modern corporate world, multi-step transactions between arm's length parties, requiring an internal transaction as one element, are the norm. If each step of an arm's length multi-step transaction can separately be challenged under s. 96, and the entirety of the multi-step transaction is irrelevant to the question of arm's length, then the commercial reality is that many otherwise arm's length transactions could be challenged under s. 96. Such artificial scrutiny could not have been Parliament's intent in amending s. 4(5). The intervention of this Court is required.

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[72] *Piikani* at para 26.

[73] Section 2(5) of the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1, for example, contains a rebuttable presumption nearly identical to that in s. 4(5) of the *BIA*. See also: *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 2(2); *Excise Tax Act*, RSC 1985, c E-15, s 2(2.1); *Special Import Measures Act*, RSC 1985, c S-15, s 2; *Canada Cooperatives Act*, SC 1998, c 1, s 138; *Customs Act*, RSC 1985, c 1 (2nd Supp), s 97.29; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 6; *Softwood Lumber Products Export Charge Act*, 2006, SC 2006, c 13, s 6; *Foreign Publishers Advertising Services Act*, SCC 1999, c 23, s 3(6); and *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp), s 69.

[74] *Teleglobe* at para 7.

B. Can a trustee in bankruptcy bring an oppression claim on behalf of only some creditors of a bankrupt estate?

1. Bankruptcy trustees cannot bring claims on behalf of only some creditors

46. If permitted to stand, the Appeal Decision would be contrary to a core principle underlying the *BIA* of collective pursuit of claims on behalf of all creditors. The *BIA* provides a regime for "collective" action by a trustee on behalf of creditors,[75] but the trustee is not an agent of the creditors.[76] It is a creature of statute and has only those rights or powers given to it by statute.[77] It represents the debtor and "*all the general creditors* to the extent that [it] can even act on their behalf against the debtor".[78] It has certain rights to challenge transactions under the *BIA* and under provincial legislation. But it *cannot* pursue the individual claims of certain creditors against a third party on behalf of those creditors.[79] The Appeal Decision fundamentally altered the law by permitting the Trustee to do so.

47. In *Principal Group (Trustee of) v Alberta*, the bankruptcy trustee brought a claim against the government for damages sustained by *certain* creditors of the bankrupt.[80] Berger J. (as he then was) held that the *BIA* does not authorize a trustee to bring actions to recover the property of select creditors of the bankrupt who suffered harm as a result of the same conduct that harmed the bankrupt.[81] Berger J. relied on the Nova Scotia Court of Appeal in *Clarkson Co v Muir*, which held that a trustee "does not function as an agent of the creditors in the ordinary sense but as an administrative official required by law to gather in and realize on the assets of the bankrupt and then divide the proceeds in accordance with the [*BIA*]".[82]

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[75] Lloyd W. Houlden, Geoffry B. Morawetz & Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th ed* (Toronto, Ontario: Thomson Reuters, 2009) (current to release 2021-3) (**Houlden & Morawetz**) at A§2.
[76] *Clarkson Co v Muir*, (1982) 43 CBR (NS) 259 (***Clarkson***) at para 11; Frank Bennett, *Bennett on Bankruptcy, 22nd ed* (Toronto, Ontario: LexisNexis Canada Inc, 2020) (**Bennett**) at p 85.
[77] *BDO Canada Limited v Dorais*, 2015 ABCA 137 (***Dorais***) at para 8; Bennett at p 91.
[78] *A. Marquette & Fils Inc v Mercure*, [1977] 1 SCR 547 (SCC) at para 9 (emphasis added).
[79] *Toyota Canada Inc v Imperial Richmond Holdings Ltd* (1997) 202 AR 274 (QB) at para 20
[80] *Principal Group (Trustee of) v v Principal Savings & Trust Co* (1990), 111 AR 81 (QB), aff'd ABCA, leave to appeal to SCC denied by (1991), 119 AR 160 (note) (***Principal I***).
[81] *Principal I* at para 25.
[82] *Principal I* at para 25, quoting *Clarkson* at para 11.

48. In a subsequent decision concerning *Principal*, Virtue J. held that the trustee seeking to pursue an action on behalf of *certain* creditors had failed to "recognize the fundamental difference between an action brought on behalf of [the bankrupt], for damages sustained by it, and an action brought on behalf of individual creditors of [the bankrupt], for damages sustained by them".[83] He further held that "[t]he confusion stems from… the fundamental difference between an action brought by the Trustee to recover a claim of the bankrupt, and an action brought by the Trustee to advance a claim of the individual creditors of the bankrupt against a third party".[84]

49. The Alberta Court of Appeal in *BDO Canada Limited v Dorais* affirmed the ratio of the *Principal* cases that "a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors… Personal claims do not 'relate to the property of the bankrupt' under s. 30(1)(d)" of the *BIA* under which a trustee has the power to institute proceedings.[85] The issue in *Dorais* was whether a trustee could take over the prosecution of actions started by individual creditors and pursue them on behalf of the bankrupt estate.[86] The Court observed that "[t]here are sound public policy reasons for preventing a trustee from pursuing personal claims on behalf of individual creditors"[87] and concluded that the trustee could pursue the collective claims brought on behalf of all creditors, but not the personal claims.[88]

50. The reasoning in *Dorais* is reinforced by s. 38 of the *BIA*, which allows a creditor to apply to bring a proceeding that would benefit the estate where the trustee in bankruptcy refuses to do so. Section 38(3) provides that any benefit derived from the proceeding then belongs to the creditor, with any surplus going to the estate. There is no reverse mechanism in the *BIA* that allows the *trustee* to seize itself of a proceeding that a *creditor* does not commence, and then re-direct the benefit (which otherwise belongs to the creditor) to the estate.

51. The Court of Appeal recognized that the Trustee had to pursue collective action, stating the Chambers Judge "failed to appreciate the collective nature of the role of a trustee in bankruptcy".[89]

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[83] *Principal Group (Trustee of) v Alberta* (1993) 139 AR 26 (QB) (***Principal II***) at para 12.
[84] *Principal II* at para 15.
[85] *Dorais* at para 8; QB Reasons at para 137; *BIA*, s. 30(1)(d); Houlden & Morawetz at C§57.
[86] *Dorais* at para 1.
[87] *Dorais* at para 16.
[88] *Dorais* at para 23.
[89] Appeal Reasons at para 127.

Yet it granted the Trustee complainant status to pursue personal claims belonging to only some creditors. This was not a mere error but a deliberate decision that upends tenets of bankruptcy law.

52. The Court of Appeal stated that the collective nature of the claim was "that the oppression action was being brought by the Trustee… on behalf of the estate… not on behalf of individual creditors".[90] But then it confirmed that the Trustee's oppression claim was "*on behalf of all other creditors* who were owed money at the time of the alleged oppressive conduct".[91] This statement acknowledges that the oppression remedy is a "personal claim":[92] it is predicated on the particular complainant, the complainant's relationship to the person alleged to have acted oppressively, and its reasonable expectations flowing from that relationship.

53. The Court then explained why it understood such a claim to nonetheless be "collective". First, it stated: "[T]rustees in bankruptcy, by definition, represent all of the creditors of the bankrupt".[93] Surely a claim by a trustee is not collective merely by virtue of the trustee's role. If that were true, trustees would always be deemed to be acting collectively. Second, it stated: "The aggregate claims in a bankruptcy always consist of a number of individual claims".[94] This ignores the difference between creditor claims against the estate and personal claims belonging to creditors *of the estate* against third parties.

54. Third, it stated: "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… municipal taxes. Nevertheless, the collective pursuit of all of those outstanding taxes in an oppression action would be 'collective' not 'selective'".[95] The record was clear. PEOC acquired the beneficial interest in the Goodyear Assets on a debt-free basis, subject to customary closing adjustments.[96] The only

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[90] Appeal Reasons at para 127.
[91] Appeal Reasons at para 140 (emphasis added).
[92] *Rea v Wildeboer*, 2015 ONCA 373 at para 19; *1043325 Ontario Ltd v CSA Building Sciences Western Ltd*, 2016 BCCA 258 at para 54; *Shefsky v California Gold Mining Inc*, 2016 ABCA 103 at para 40.
[93] Appeal Reasons at para 131.
[94] Appeal Reasons at para 131.
[95] Appeal Reasons at para 133.
[96] Rose Affidavit at paras 46, 48(a), 65-76.

creditors of PEOC at the time of the Asset Transaction were three municipalities owed $1,560,890 in outstanding taxes.[97] This is less than 1% of the $244,501,718 creditor claims against the estate.[98]

55. This third point reveals a further upending of bankruptcy principles. The Court of Appeal appears to have reasoned that because the Trustee was seeking to recover damages for the benefit of the estate as a whole, an oppression claim would be a collective claim (presumably this is what the Court of Appeal meant when it said the claim was "brought by the Trustee in Bankruptcy on behalf of the estate… not on behalf of individual creditors").[99] If the Trustee's Oppression Claim successfully recovered the unpaid property taxes owed to the three municipalities, the funds would then be distributed among all the creditors of the bankrupt. But as Virtue J stated in *Principal*, "This concept neglects altogether… that monies recovered in personal actions brought on behalf of the [certain creditors] belongs to [those creditors] personally and have nothing to do with the bankruptcy".[100] Alternatively, if the Court of Appeal contemplated that, contrary to bankruptcy rules, any recovered funds would be paid over to the allegedly oppressed municipalities rather than the estate as a whole, the Trustee would be using the estate's funds (belonging to all the creditors) to pursue a claim for the sole benefit of three municipalities.

56. Permitting a trustee in bankruptcy to sue on behalf of a subset of creditors is a radical and unworkable expansion of the trustee's powers. These new powers are both absent from and contrary to the principles in the *BIA*. On what basis can a bankruptcy trustee take up a claim—or worse, usurp a claim—belonging to a handful of creditors, when the relief would benefit the bankrupt estate (and all its creditors) as a whole? How does a defendant avoid double exposure to both a creditor (on its own behalf) and a trustee (on behalf of the creditor) if both can bring claims for the same conduct? These questions are ripe for this Court's guidance.

2. Bankruptcy trustees are only entitled to pursue oppression claims, if at all, on behalf of *all* creditors

57. There are two lines of authorities regarding whether a trustee in bankruptcy can be a proper person to bring an oppression claim. The Appeal Decision is inconsistent with both.

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[97] QB Reasons at para 334; Rose Affidavit at para 70.
[98] Schweitzer Affidavit at Exhibit B (Trustee's Preliminary Report, April 11, 2018).
[99] Appeal Reasons at para 127.
[100] *Principal II* at para 16.

58. The first line of authority is that a trustee cannot sue in oppression. In *Canada (AG) v Standard Trust Co*, Houlden JA held that a trustee "takes the property of a bankrupt as he finds it… he only succeeds to the rights of the bankrupt and has no higher or greater rights" and therefore cannot challenge "as oppressive a transaction which was unanimously approved by the board of directors of the bankrupt corporation".[101] McDonald J. in *Gainers Inc v Pocklington* agreed with Houlden JA: "I do not question the correctness of that decision, which concerned proceedings against another party which had contracted with the corporation: the corporation itself could not complain that another contracting party's conduct had been oppressive".[102]

59. The other line of authority permits a trustee to sue for oppression on behalf of all the bankrupt's creditors. The leading case is *Olympia & York*.[103] Farley J. declined to follow *Standard Trust*.[104] He held that a trustee, as the creditors' representative, should be permitted "to bring a 'representative' oppression action on behalf of the creditors in a proper case".[105] Goudge JA affirmed, holding that a trustee "is neither automatically barred from being a complainant nor automatically entitled to that status".[106] Goudge JA agreed that the trustee was a proper person to be a complainant "in effect on behalf of the creditors of [the bankrupt],"[107] noting "[t]his conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative".[108]

60. Before his appointment, Geoffrey Morawetz noted that *Olympia & York* "extends the role of the trustee to a party that can pursue an oppression remedy *where the objective is to ensure* pari passu *treatment for creditors*".[109] In *Patheon Inc v Frank*, Wilton-Siegel J. distinguished *Olympia*

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[101] *Canada (AG) v Standard Trust Co* (1991), 84 DLR (4th) 737 (***Standard Trust***) at paras 14-15.
[102] *Gainers Inc. v Pocklington* (1992), 132 AR 35 at 65 (QB) at para 6, supplemental reasons to 132 AR 35 (QB).
[103] *Olympia & York Developments Ltd (Trustee of) v Olympia & York Realty Corp* (2001), 16 BLR (3d) 74 (Ont SCJ Com List) (***Olympia & York QB***), aff'd by (2003), 68 OR (3d) 544 (CA) (***Olympia & York CA***).
[104] *Olympia & York QB* at para 30; *Standard Trust*.
[105] *Olympia & York QB* at para 30.
[106] *Olympia & York CA* at para 45.
[107] *Olympia & York CA* at para 46.
[108] *Olympia & York CA* at para 46.
[109] Geoffrey B. Morawetz, "Under Pressure: Governance of the Financially Distressed Corporation" in Janis Sarra, ed. *Corporate Governance in Global Capital Markets*, (Vancouver: UBC Press, 2011) at 282 (emphasis added).

& York on the ground that the trustee in bankruptcy in *Olympia & York* "was acting as a representative of *all* of the creditors".[110] In *Dylex Ltd v (Trustee of) v Anderson*, Lederman J. concluded that it was premature to decide whether a trustee could be a complainant because the law was not "fully settled".[111] Yet in that case, it was clear that the alleged oppressive conduct had "affect[ed] the creditors as a whole".

61. This Court has not addressed the issue of whether a trustee in bankruptcy can bring an oppression remedy, and if so, in which circumstances. How can permitting a trustee to bring an oppression claim on behalf of certain creditors be reconciled with the trustee's representative role as stepping into the shoes of the bankrupt estate on behalf of all creditors and the priority scheme for the distribution of a bankrupt's assets under the *BIA*? There is now conflicting appellate authority and academic commentary on these points. These are important questions of law and questions of public importance at the intersection of two vital and long-standing business statutes, including the *BIA* and uniform federal and provincial statutes in effect throughout the country.

C. Another concern about the Appeal Decision

62. The Court of Appeal held that the Public Policy Claim did not disclose a cause of action. Yet it granted the Trustee leave to amend its claim. What is the purpose of an application to strike, and what is the legacy of the *Hryniak* and *Atlantic Lottery* culture shift,[112] if courts refuse to strike plainly bad claims? What is the utility of a strike application if a defendant first needs to ponder whether the plaintiff's claim *might* disclose a cause of action if improved with amendments? Should a strike application be decided on the basis of the pleadings before the Court, not on suppositions about what might be pleaded, as on an application for summary dismissal?[113]

D. Conclusion

63. The Appeal Decision throws the law interpreting "arm's length" in the *BIA* into a state of confusion. Which approach should courts follow—the decision here or the precedents of the Supreme Court and the Federal Court of Appeal decided under the *ITA*? And what does s. 4(5) of the *BIA* mean in the case of step-transactions between related parties that are part of multi-step

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[110] *Patheon Inc v Frank*, 2009 CarswellOnt 9046 (SCJ) at para 125 (emphasis added).
[111] *Dylex Ltd (Trustee of) v Anderson*, 2003 CarswellOnt 819 at para 18 (SCJ Commercial List).
[112] *Hryniak v Mauldin*, 2014 SCC 7; *Atlantic Lottery Corp v Babstock*, 2020 SCC 19 at para 18.
[113] *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 19.

transactions negotiated at arm's length? Can the presumption ever be rebutted? If not, what meaning is given to Parliament's 2007 amendment? If so, what evidence is required? Is a finding by the trial court that all aspects of the transaction were negotiated by sophisticated, unrelated, arm's length parties with the assistance of legal counsel, sufficient?

64. The Appeal Decision also leaves bankruptcy trustees unclear as to whether they can pursue the claims of individual creditors against third parties. Creditors, in turn, face the possibility of their personal claims being appropriated by the trustee. And the counterparties to those claims will potentially have two actions to defend.

65. These unresolved questions have significant consequences for the parties, corporations, business people, commercial lawyers, the bankruptcy bar, and bankruptcy trustees across the country. These important statutory provisions, in force across Canada, require consideration and clarification by this Court.

PART IV. COSTS

66. The Perpetual Entities request that costs of this Application be in the cause.

PART V. ORDER REQUESTED

67. The Perpetual Entities seek an Order granting leave to appeal from the Order of the Court of Appeal to the Supreme Court of Canada; and awarding costs of this Application in the cause.

All of which is respectfully submitted this 26th day of March, 2021

D.J. McDonald, Q.C.
Co-counsel for the Applicants

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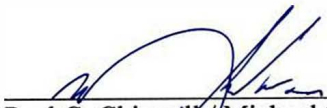

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PART VI. TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

Jurisdiction	***Act (including citation)***	***Provision***	***Cited At***
Federal (Canada)	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3	ss. 4, 30, 95, 96	25, 26, 28, 49

	Loi sur la faillite et l'insolvabilité (L.R.C. (1985), ch. B-3)	a. 4, 30, 95, 96	
	Wage Earner Protection Program Act, SC 2005, c 47 *Loi sur le Programme de protection des salariés* (L.C. 2005, ch. 47, art. 1)	s. 1 a. 1	43
	Companies' Creditors Arrangement Act, RSC 1985, c C-36 *Loi sur les arrangements avec les créanciers des compagnies* (L.R.C. (1985), ch. C-36)	s. 2(2) a. 2(2)	43
	Excise Tax Act, RSC 1985, c E-15 *Loi sur la taxe d'accise* (L.R.C. (1985), ch. E-15)	s. 2(2.1) a. 2(2.1)	43
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	Canada Cooperatives Act, SC 1998, c 1 *Loi canadienne sur les coopératives* (L.C. 1998, ch. 1)	s. 138 a. 138	43
	Customs Act, RSC 1985, c 1 (2nd Supp) *Loi sur les douanes* (L.R.C. (1985), ch. 1 (2e suppl.))	s. 97.29 a. 97.29	43
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