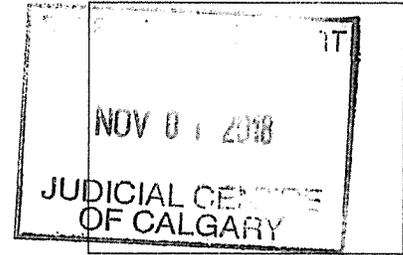


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JUDICIAL CENTRE CALGARY



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

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

DOCUMENT **BRIEF OF THE DEFENDANTS, PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP. (the Perpetual Defendants)**

Application to Resolve Particular Questions and to Stay the Plaintiff's Application

Application for Summary Dismissal and to Strike

before The Honourable Justice D.B. Nixon on November 8, 2018

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I. FACTS¹

A. Introduction

1. The relevant facts are set out in detail in the Perpetual Defendants' Statement of Defence and the Affidavit of Susan Riddell Rose sworn October 19, 2018. To avoid unnecessary repetition, only a brief summary of the facts, the claims and the defences, and the procedural history is included in this Brief.

2. The Perpetual Defendants adopt the summary of the facts and the submissions of Ms. Rose, to the extent those facts and submissions relate to claims against the Perpetual Defendants.

B. The Transaction and the Sequoia Bankruptcy

3. Perpetual is a Calgary based energy company that sold some of its shallow gas properties in Alberta to 198, an unrelated third party, in October 2016 after extensive marketing and negotiations. The consideration included a marketing contract that ensured a minimum natural gas price for almost two years on 90% of the natural gas production sold. Perpetual held the properties in PEOC, a wholly owned subsidiary, which in turn held them in trust for POT.

4. The Transaction was negotiated between Perpetual and 198 in arm's length negotiations, each acting in its own best interests. It was structured as the sale of the shares of PEOC. As part of the Transaction, PEOC was required to first combine the beneficial interest with the legal interest in the properties (referred to in the Statement of Claim as the Asset Transaction).

5. After 198 purchased PEOC's shares, 198 renamed the purchased company Sequoia. Sequoia successfully pursued its business plan, which involved producing the assets, purchasing assets from other companies, recompleting wells, and abandoning and reclaiming certain wells, facilities and pipelines. A year and a half later, a combination of events, including a dramatic decline in natural gas prices, led to Sequoia's bankruptcy. The Transaction was not the cause of the bankruptcy.

¹ The abbreviations and defined terms in the Perpetual Defendants' Statement of Defence are used in this Brief.

C. The Claims and Defences

6. PwC is Sequoia's bankruptcy trustee. It sued the Perpetual Defendants and Ms. Rose, Perpetual's CEO, in August 2018. The Statement of Claim makes three claims against the Perpetual Defendants:

(a) **the BIA claim:** The Asset Transaction should be set aside or declared void as against the Trustee, or alternatively, judgment should be granted against the Perpetual Defendants and Ms. Rose jointly and severally for \$217,570,800 under section 96 of the *BIA*;

(b) **the oppression claim:** By causing PEOC to enter into the Transaction, the conduct of Perpetual, POC and Ms. Rose was oppressive and disregarded the interests of PEOC's creditors; and

(c) **the public policy claim:** The "Transactions" (meaning the Share Transaction, the Asset Transaction and the Retained Interests Agreement) are void and should be set aside on the basis of public policy, statutory illegality and equitable rescission.

7. The Perpetual Defendants' Statement of Defence addresses each claim:

(a) **the BIA claim:** The Trustee ignores the fact that the Transaction was with an arm's length purchaser at fair market value, and mischaracterizes an embedded step that involved the combination of the legal and beneficial interests in the properties (the Asset Transaction) as a reviewable transaction under the *BIA*. None of the essential conditions for a declaration or a monetary award under the *BIA* have been met: there was no transfer at undervalue; the parties were dealing at arm's length; the Transaction occurred more than one year before Sequoia's bankruptcy; and Sequoia was not insolvent at the time of the Transaction nor rendered insolvent by the Transaction.

(b) **the oppression claim:** The Trustee is not a complainant under section 242(1) of the *ABCA*. At all material times, Perpetual and POC, to the extent their conduct affected PEOC, acted in the best interests of PEOC with a view to PEOC's stakeholders, and did not engage in any conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interest of PEOC's stakeholders.

(c) **the public policy claim:** The "Transactions" were fully compliant with the Regulatory Regime, public policy reflected in the Regulatory Regime, and the law. The vague and unparticularized allegations that the Transactions are void on grounds of public policy, statutory illegality or equitable rescission do not disclose a cause of action.

D. The Procedural History

8. Sequoia filed a Notice of Intention to Make a Proposal pursuant to the *BIA* on March 2, 2018 and assigned itself into bankruptcy on March 23, 2018.

9. On August 2, 2018, the Trustee filed the Statement of Claim against the Perpetual Defendants and Ms. Rose. At the same time, the Trustee filed an Application for judgment, supported by an Affidavit of Paul J. Darby, seeking to set aside the Asset Transaction or, alternatively, seeking judgment jointly and severally against all Defendants for \$217,570,800.

10. On August 27, 2018, the Perpetual Defendants and Ms. Rose filed separate Statements of Defence and each filed two applications:

(a) Applications to Resolve Particular Questions and to Stay the Plaintiff's Application (the **Stay Applications**) seeking orders pursuant to Rule 7.1:

(i) that the Defendants' Summary Dismissal Applications be heard before the Plaintiff's Application; and

(ii) permanently or temporarily staying the Plaintiff's Application.

(b) Applications for Summary Dismissal and to Strike (as amended) (**Summary Dismissal Applications**) seeking an order summarily dismissing the action pursuant to Rule 7.3 or striking the action pursuant to Rule 3.68. The Perpetual Defendants' Summary Dismissal Application raises three threshold issues:

(i) were the parties dealing at arm's length with each other within the meaning of the *BIA*?

(ii) is the Plaintiff a "complainant" entitled to bring an oppression claim under section 242 of the *ABCA*?

(iii) should the claim made on the grounds of "Public Policy, Statutory Illegality and Equitable Rescission" in paragraph 24 of the Statement of Claim be struck?

11. At the first appearance in this action on August 30, 2018, Justice Jeffrey ordered that:

1. The parties are to consult the Honourable Madam Justice Horner, Co-Chair of the Commercial Practice Group, and, if necessary, the Honourable Mr. Justice Rooke, Associate Chief Justice, in respect of appointing a justice of the Calgary Commercial List to hear all the applications file, and which may be filed, by the Plaintiff and Defendants respectively.
2. The Defendants' respective applications filed August 27, 2018, both to Resolve Particular Questions and to Stay the Plaintiff's Application, shall be heard as soon as possible and before the Plaintiff's application filed August 2, 2018.
3. Scheduling of the Plaintiff's application filed August 2, 2018, and any other applications shall be directed by any Justice that is appointed for that purpose pursuant to paragraph 1 of this Order. ...²

12. On September 18, 2018, Justice Horner directed the Defendants' applications be heard before Justice Nixon on Thursday, November 8, 2018.

13. The Defendants have filed the Affidavit of W. Mark Schweitzer in support of the Stay Applications and the Affidavit of Ms. Rose in support of the Summary Dismissal Applications. The Plaintiff relies only on Mr. Darby's August 2, 2018 Affidavit. The Plaintiff did not file evidence responding to the Defendants' evidence. All witnesses have been questioned on their affidavits with respect to matters relevant to the first two threshold issues.

14. Under Rule 3.68(3), no evidence may be submitted on the application to strike, that is, on the third threshold issue.

15. By agreement between the parties, the Stay Applications and the Summary Dismissal Applications will all be heard on November 8, 2018.

² Order [Procedural Matters and Sequencing of Applications] of the Honourable Mr. Justice Jeffrey, granted August 30, 2018, filed September 18, 2018.

II. ISSUES

16. There are two issues on the Stay Applications:

Issue 1: Should the Summary Dismissal Applications be heard before the Plaintiff's Application?

Issue 2: Should the Plaintiff's Application be stayed?

17. There are three threshold issues on the Summary Dismissal Applications:

Issue 3: Were the parties dealing at arm's length with each other within the meaning of the *BIA*?

Issue 4: Is the Plaintiff a "complainant" entitled to bring an oppression claim under section 242 of the *ABCA*?

Issue 5: Should the claim made on the grounds of "Public Policy, Statutory Illegality and Equitable Rescission" in paragraph 24 of the Statement of Claim be struck?

III. ARGUMENT – STAY APPLICATIONS

Issue 1: Should the Summary Dismissal Applications be heard before the Plaintiff's Application?

18. The first part of the relief sought in the Stay Applications was that the Summary Dismissal Applications be heard before the Plaintiff's Application.

19. This application has been resolved by agreement. On October 16, 2018, counsel for the Plaintiff wrote to Justice Nixon advising that "[t]he parties have however now agreed to proceed as follows, subject to your directions... all four applications filed by the Defendants will proceed on November 8, 2018...".

Issue 2: Should the Plaintiff's Application be stayed?

20. This issue need be addressed only if any of the Trustee's claims survive the Summary Dismissal Applications. Submissions on this issue are therefore located at the end of this Brief following the arguments on the Summary Dismissal Applications.

IV. ARGUMENT – SUMMARY DISMISSAL APPLICATIONS

A. The Test for Summary Dismissal

21. As the Supreme Court of Canada has emphasized, summary judgment motions are a "legitimate alternative means for adjudicating and resolving legal disputes",³ and should be used more robustly by the courts as a less expensive and more expeditious manner of determining actions.⁴

22. Courts may summarily dismiss a case where there is no genuine issue requiring a trial. No trial is required where a judge is able to reach a fair and just determination on the merits on a motion for summary dismissal.⁵

23. While the persuasive burden is initially on the applicant, once satisfied, it shifts to the respondent.⁶ Parties to a summary dismissal application are expected to put their "best foot forward", meaning that gaps in the record do not necessarily prevent summary disposition.⁷

24. In recent years, the Alberta Court of Appeal has applied two different tests as to the level of proof necessary to succeed on summary dismissal.

25. One test is whether the record is such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities.⁸ Accordingly, a plaintiff cannot resist summary dismissal merely by raising a "doubt".⁹

³ *Hryniak v Mauldin*, 2014 SCC 7 (*Hryniak*) at para 36 [Tab 1].

⁴ *Hryniak* at paras 4 and 67 [Tab 1].

⁵ *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 (*Windsor*), at para 13 [Tab 2]; *Hryniak* at para 49 [Tab 1].

⁶ *Wood Buffalo Housing & Development Corp v Flett*, 2014 ABQB 537 at para 33 [Tab 3].

⁷ *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 (*Stefanyk*) at para 12 (citations omitted) [Tab 4].

⁸ *Stefanyk* at para 15 [Tab 4].

⁹ *Stefanyk* at para 16 [Tab 4].

26. The other test is whether the moving party's position was "unassailable", meaning that a claim has a very high likelihood of success.¹⁰ Under this test, summary judgment requires as a prerequisite an "incontrovertible factual foundation".¹¹

27. Which of the two competing tests should prevail is the subject of two cases currently before the Alberta Court of Appeal.¹² Regardless of which test stands, summary dismissal is warranted on Issues 3 and 4.

B. The Test to Strike Out Pleadings

28. Rule 3.68 sets out that a part of a claim may be struck if it discloses no reasonable claim:

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).¹³

¹⁰ See, e.g., *Whissell Contracting Ltd v Calgary (City)*, 2018 ABCA 204 at para 2 (**Whissell**) [Tab 5]; *Can v Calgary Police Service*, 2014 ABCA 322 at para 20 [Tab 6].

¹¹ *Whissell* at para 3 [Tab 5].

¹² *Brookfield Residential (Alberta) LP v Imperial Oil Limited*, Appeal No. 1703-0111 AC; *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd et al*, Appeal No. 1703-0218 AC.

¹³ *Alberta Rules of Court*, Alta Reg 124/2010 (**Rules of Court**), Rule 3.68 [Tab 7].

29. A claim should be struck if it has no reasonable prospect of success.¹⁴ The facts pleaded are assumed to be true,¹⁵ which favours the plaintiff as it chooses the facts to plead with a view to the causes of action it is asserting.¹⁶

30. Striking out claims that have no reasonable prospect of success "is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial."¹⁷ It promotes litigation efficiency, reducing time and cost, and contributes to better justice by permitting the parties and the court to focus on the serious claims.¹⁸

31. Striking claims is consistent with the underlying philosophy of the *Rules of Court* to identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense.¹⁹

Issue 3: Were the parties dealing at arm's length with each other within the meaning of the BIA?

A. The Pleadings

32. The Plaintiff claims the Asset Transaction should be viewed in isolation from the rest of the Transaction and that the parties were not dealing at arm's length. The Plaintiff does not assert that the Share Transaction was not at arm's length.

33. Specifically, paragraph 22 of the Statement of Claim alleges that the Asset Transaction 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 which:

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;

¹⁴ *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 (*Knight*) at para 17 [Tab 8].

¹⁵ *Rules of Court*, Rule 3.68(3) [Tab 7].

¹⁶ *Knight* at para 24 [Tab 8].

¹⁷ *Knight* at para 19 [Tab 8].

¹⁸ *Knight* at para 20 [Tab 8].

¹⁹ *Rules of Court*, Rule 1.2(2)(a)-(b) [Tab 7]; *Grenon v Canada Revenue Agency*, 2017 ABCA 96 at para 6 [Tab 9].

- 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. (emphasis added)

34. The Perpetual Defendants state that the Transaction as a whole is the proper subject of an analysis under section 96(1) of the *BIA* and that the combination of the legal and beneficial interests in PEOC (that is, the Asset Transaction) was a technical step required by 198 before it acquired PEOC's shares. Three essential conditions for a declaration or payment under section 96(1)(b) of the *BIA* are not satisfied:

- (a) there was no transfer at undervalue;
- (b) the parties were dealing at arm's length; and
- (c) PEOC/Sequoia was not insolvent at the time of the transfer nor rendered insolvent by it.²⁰

35. The Perpetual Defendants' state in the alternative that:

... even if the Asset Purchase Agreement, artificially viewed in isolation to the rest of the Transaction, is the subject of an analysis under s. 96 of the *BIA*, the same three essential conditions under s. 96(1)(b) of the *BIA* are still not satisfied.²¹

36. The first threshold issue addresses only the question of whether the parties were dealing at arm's length. If they were, the *BIA* claim was brought outside the one year period in section 96(1)(a)(i) and fails.

²⁰ Perpetual Defendants' Statement of Defence, paras 36-38.

²¹ Perpetual Defendants' Statement of Defence, para 39.

B. The *BIA*

37. Section 96 of the *BIA* addresses "Transfer at undervalue". It states in part:

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..²²

(emphasis added)

38. Section 4 of the *BIA* defines "related persons" and addresses whether such persons are dealing at arm's length. It states in part:

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,

²² *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (*BIA*), s 96 [Tab 10].

(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.²³ (emphasis added)

C. The Law

39. In 2013, the Alberta Court of Appeal addressed the meaning of "arm's length" in the *BIA* in *Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd.* After reviewing section 4 of the *BIA*, the Court stated:

20 The term "arm's length" is not defined in the *BIA*. ...

21 In our view, the jurisprudence under the *ITA* provides appropriate principles for determining whether two parties dealt at arm's length. As a starting point, we note that the definitions of "related persons" and "arm's length" are either similar or identical in ss 4, *BIA* and s 251(2), *ITA*.

...

23 When the terms "control" and "arm's length" were incorporated into the *BIA*, they already existed in the *ITA: Duro Lam Ltd. v. Last* (1970), [1971] 2 O.R. 202, 17 D.L.R. (3d) 382 (Ont. S.C.). In that case, the court had to decide whether "control" had the same meaning as in the *ITA* context. Justice Houlden held that when Parliament chose to incorporate the term in the *BIA*, when its meaning had been well-established by case law, it "must have intended to adopt that definition when it used almost identical wording in the *Bankruptcy Act*": at 385. In our view, a similar logic applies to the term "arm's length". ...²⁴

40. The Court of Appeal then referred to *Canada v McLarty*. In that case, the Supreme Court of Canada discussed the term "not dealing at arm's length" within the meaning of the *Income*

²³ *BIA*, s 4 [Tab 10].

²⁴ *Piikani Energy Corp. (Trustee of) v 607385 Alberta Ltd.*, 2013 ABCA 293 (*Piikani*) at paras 20-23, 26 and 29 [Tab 11]; see also *Juhasz (Trustee of) v Codeiro*, 2015 ONSC 1781 (*Juhasz*) at paras 38-44 [Tab 12].

Tax Act (ITA), which like the *BIA* did not define arm's length but included provisions regarding related parties. The Court of Appeal 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...".²⁵

41. In *Canada v McLarty*, Rothstein J. started his analysis with the following:

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). ...²⁶

42. He continued:

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**

²⁵ *Piikani* at paras 29-30 [Tab 11].

²⁶ *Canada v McLarty*, 2008 SCC 26 (*McLarty*) at para 43 [Tab 13].

- **was there "de facto" control.**²⁷ (emphasis added)

43. The analysis of what constitutes dealing at arm's length under the *BIA* and *ITA* in many subsequent cases have adopted this or a similar analysis. See, for example, *Juhasz, National Telecommunications Inc v Stalt Telcom Consulting Inc*, and *Montor Business Corp v Goldfinger*.²⁸

44. A word of caution about earlier *BIA* cases. Before 2007, section 4(5) (or its predecessors) contained only the first sentence of the current version: "Persons who are related to each other are deemed not to deal with each other at arm's length". That is, related persons were conclusively deemed not to deal with each other at arm's length.

45. In 2007, Parliament amended the *BIA* by adding the second sentence to section 4(5): "... For the purpose of paragraphs 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."²⁹ Since 2007, when considering dealings between related parties for the purpose these sections, bankruptcy trustees and the courts must consider any "evidence to the contrary" to determine whether the presumption is rebutted, in addition of course to considering "all the relevant circumstances".

D. The Trustee's Position – the Asset Transaction was Non-Arm's Length

46. The Trustee's position is simple: The Asset Transaction should be viewed in isolation, not in context. PEOC and POT are the parties to the Asset Purchase Agreement. Perpetual controlled PEOC and POT, and PEOC was the trustee of POT. Ms. Rose signed the agreement on behalf of both parties. PEOC and POT are therefore "related persons". Persons who are related to each other are deemed not to deal with each other at arm's length while so related. Such a simplistic analysis may have been attractive before 2007.

²⁷ *McLarty* at paras 61-62 [Tab 13].

²⁸ *Juhasz* [Tab 12]; *National Telecommunications Inc v Stalt Telcom Consulting Inc*, 2018 ONSC 1101 (not reproduced); *Montor Business Corp v Goldfinger*, 2016 ONCA 406 (not reproduced).

²⁹ *An Act to amend Bankruptcy and Insolvency Act, the Companies' Credit Arrangement Act, the Wage Earner Protection Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007 c 36, s 2 [Tab 14].

47. Mr. Darby's evidence on this point is brief. His Affidavit described the corporate relationships, identified the parties to the Asset Purchase Agreement, and exhibited that agreement.³⁰

48. His approach to the question of whether the parties were dealing at arm's length was cavalier, as shown in his questioning:

Q. And then your communication to her [Ms. Rose] was on June 26th, when you sent the letter that we see when you turn over another page [Darby Affidavit, Exhibit B]; correct?

A. Yes.

Q. And you start: (as read)

"The trustee has now completed a preliminary review of the material the Perpetual Group have provided. From our review, it appears that on the values provided by the Perpetual Group, the transaction between POT and SRC [PEOC] was a non-arm's-length transfer at under value."

And you go on.

So is it fair to say that by June 26th you had reached a preliminary view that the asset purchase and sale agreement was a non-arm's-length transfer?

A. Yes.

Q. So what work did you do after that to come to a more definite view about whether it was a non-arm's-length transfer?

A. On the topic of non-arm's-length transfer, there was really no more work required.

Q. Okay. And was it because you concluded it was a non-arm's-length transfer because one party to the transfer was POT and the other party to the agreement was PEOC?

A. Yes.³¹

49. Mr. Darby should have known that all relevant circumstances must be considered and that related persons are deemed not to deal with each other at arm's length for the purposes of section 96 only *in the absence of evidence to the contrary*. He had a duty to consider all the facts before suing the Perpetual Defendants and Ms. Rose to set aside the Asset Transaction or for final judgment for \$217 million.

50. Mr. Darby had access to Sequoia's records, including records related to the negotiation of the Transaction, and spoke with Mr. Yang and Mr. Wang (Sequoia's principals).³² He also had

³⁰ Affidavit of Paul J. Darby sworn and filed August 2, 2018 (**Darby Affidavit**) at paras 5, 6, 21 and Exhibit D.

³¹ Transcript of October 22, 2018 Questioning of Paul J. Darby (**Darby Transcript**) at pg. 26, ln. 7 to pg. 27, ln. 7; see also pg. 29, ln. 13 to pg. 30, ln. 1; pg. 34, ln. 14 to pg. 35, ln. 4.

³² Darby Transcript at pg. 14, lns. 3-27; pg. 20, lns. 20-26.

records received from Perpetual as a result of his May 28, 2018 request for records pursuant to section 164 of the *BIA*.³³ He declined Ms. Rose's repeated requests to meet after providing those records.³⁴ As a result of Mr. Darby's erroneous conclusion that "it was a non-arm's length transfer" simply because the parties to the Asset Transaction were related, the evidence of the relevant circumstances will be examined for the first time in court when the Defendants are defending themselves from such an extraordinary claim.

51. This Brief now turns to a consideration of that evidence and the applicable law.

E. The Parties Were Dealing at Arm's Length with Each Other

(1) The evidence

52. The Transaction, involving the sale of shares of a subsidiary and including multiple steps to achieve the commercial objective, will be familiar to the Court and to experienced commercial lawyers, as it was to the Trustee.³⁵ It is beyond question an arm's length transaction. Mr. Darby acknowledged his "understanding was that they [Kailas] were an unrelated party" acting at arm's length.³⁶

53. Even if the Asset Transaction is analyzed in isolation, it too was an arm's length transaction. That is, the section 4(5) presumption is easily rebutted by the "evidence to the contrary".

54. Ms. Rose's Affidavit contains a comprehensive description of the commercial context and the relevant facts regarding whether the parties were dealing at arm's length:

(a) the Transaction is summarized in paragraphs 15 to 21 of the Affidavit;

³³ Darby Affidavit at paras 11, 12 and Exhibit A; Affidavit of Susan Riddell Rose sworn and filed October 19, 2018 (**Rose Affidavit**) at paras 59-63; and Darby Transcript at pg. 15, ln. 2 to pg. 17, ln. 17.

³⁴ Rose Affidavit, Exhibit X; Darby Transcript pg. 25, ln. 2 to pg. 26, ln. 24; pg. 30, ln. 15 to pg. 32, ln. 6; pg. 33, lns. 6-9.

³⁵ Mr. Darby acknowledged that he has negotiated relatively complex commercial agreements that involved multiple interrelated agreements required to achieve the end result of the transaction. As he stated: "most asset purchase agreements and share agreements have many components to them" (Darby Transcript at pg. 7, lns. 1-20).

³⁶ Darby Transcript at pg. 53, lns. 21-27; pg. 54, lns. 1-2.

(b) the sale process and the negotiations with Kailas/198 are described in paragraphs 25 to 40; and

(c) the Share Purchase Agreement dated and executed September 26, 2016 is discussed in paragraphs 41 to 43, the Asset Purchase Agreement dated October 1, 2016 in paragraphs 44 to 53, and the closing of the Transaction on October 1, 2016 (with the Asset Purchase Agreement being executed and closing two minutes before the Share Purchase Agreement) in paragraph 55.

55. The Trustee ignored the commercial context. He decided (wrongly) that only the relationships, and not the context, were relevant to the question of arm's length.

56. Importantly, not only did the Trustee make that mistake when it filed the Statement of Claim, but it filed no reply evidence to the Summary Dismissal Applications and Ms. Rose's Affidavit. When faced with those applications, the Trustee had an obligation to "put his best foot forward". He put nothing forward.

57. The Court can confidently rely on Ms. Rose's uncontradicted evidence, which is the only evidence on the commercial context and relevant facts, to determine whether the parties were dealing at arm's length. Her evidence is exactly what the Supreme Court of Canada said must be considered, and is the "evidence to the contrary" contemplated by section 4(5) of the *BIA*.

(2) *The entire Transaction is the proper subject of the analysis*

58. The entire Transaction—Perpetual's sale of some of its shallow gas assets in Alberta to 198 in October 2016—not an isolated step in it, is the proper subject of analysis under section 96 of the *BIA*.

59. In *McLarty*, the Court held that the acquisition agreement between two related parties had to be considered within the context of the "entirety of the transactions". Rothstein, J. stated:

65 **The Minister states that "[i]t is the relationship between vendor and purchaser [two Compton companies] at the time of purchase that must be examined, and not the relationship at any other time or with respect to any other transaction" (Minister's factum on cross-appeal, at para. 26). I am unable to agree with such a restrictive approach.** Of necessity, where the acquisition is made by an agent of the purchaser, the purchaser's connection to the

acquisition transaction and to the question of whether the vendor and purchaser were dealing at arm's length will require that the agreement between the agent and the purchaser be considered. That agreement would normally precede the acquisition agreement (here all documents were signed on December 31, 1992). Indeed, even the Court of Appeal, which primarily focussed on the agreement between Compton as vendor and Compton as agent for the joint venture participants, also had regard for McLarty's involvement through the Subscription Agreement which incorporated the Offering Memorandum by reference. The Offering Memorandum contained restrictions on Compton as agent in respect of the price to be paid for the data. ...

72 **Had the trial judge found that McLarty had subordinated his entire decision making power to Compton as his agent, his dealings with Compton as vendor would not have been at arm's length.** He would not have been making an independent decision about the purchase but would have left that completely to Compton. But those are not the facts found or inferences drawn by the trial judge.

73 **It was appropriate for the trial judge to have considered the entirety of the transactions by which McLarty bound himself to purchase his interest in the seismic data and place limitations on Compton as his agent with respect to the purchase price of the data.** It was for the trial judge to draw inferences from these facts. The Federal Court of Appeal was in error in interfering with the conclusion of the trial judge.³⁷ (emphasis added)

60. The Transaction was initiated by Kailas' offer in the Letter of Intent.³⁸ Kailas offered to purchase shares of a company that would hold the legal and beneficial interest in the Goodyear Assets. It was therefore necessary to combine the beneficial interest with the legal interest in PEOC and to remove the legal interest to assets that were not to be sold.³⁹

61. By any commercial understanding, the Transaction was an arm's length sale of oil and gas interests, with related commercial consideration, negotiated between and consummated by Perpetual and Kailas/198 acting as self-interested adversaries, each represented by experienced representatives and each advised by separate legal counsel.

³⁷ *McLarty* at paras 65, 72 and 73 [Tab 13]; see also *Poulin v R*, 2016 TCC 154 at para 67 [Tab 15].

³⁸ Rose Affidavit, Exhibit E.

³⁹ Darby Transcript at pg. 39, ln. 11 to pg. 40, ln. 1; pg. 41, lns, 22-27; pg. 43, lns. 4-7.

62. It was only the trust structure under which Perpetual held the assets since 2002 that presented the Trustee with the opportunity to challenge the Transaction under section 96.⁴⁰ Without that structure, the Asset Transaction would not have been required.

63. It is also useful to consider why the *BIA* permits a non-arm's length transaction to be challenged. As stated in *McLarty*: "...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'".⁴¹

64. The Transaction unequivocally reflected ordinary commercial dealing between parties acting in their separate interests. Isolating an embedded step between related parties in the Transaction is contrived and opportunistic, and attempts to use the *BIA* for an unintended purpose.

65. The parties themselves considered the Transaction as a whole in their agreements. While there were many related steps and agreements, they were recognized as an "entire agreement". Specifically, the Share Purchase Agreement has an "entire agreement" clause, which states the Share Purchase Agreement, Asset Purchase Agreement, Office Sublease, Gas Marketing Contract and other documents "constitute the entire agreement between the Parties".⁴² Yet the Trustee only looks at part of the parties' agreement.

(3) The Asset Transaction was an arm's length transaction

66. The result is the same even if one isolates and focuses, as the Trustee did, on only one step in the Transaction.⁴³ The parties to the Asset Transaction were acting at arm's length.

⁴⁰ Rose Affidavit at para 10 and Rose Transcript at pg. 11, ln. 2.

⁴¹ *McLarty* at para 43 [Tab 13].

⁴² Rose Affidavit, Exhibit H (Share Purchase and Sale Agreement, clause 19.5); Darby Transcript at pg. 53, lns. 2-10.

⁴³ There is an Alberta Court of Queen's Bench decision that could be read to support the view that the Asset Transaction should be viewed in isolation. In *Visionwall Technologies Inc (Re)*, 2002 ABOB 993 [Tab 16], (a decision that pre-dated *Piikana* and *McLarty* and the 2007 amendments to the *BIA*), the Court commented that "how little there is in the way of reported cases defining the term arm's length as it relates to bankruptcy", but referred to the "most helpful, clear explanation" as the dissenting judgment of Doherty, JA in *Standard Trustco Ltd (Trustee) v Standard Trust Co.*, 36 CBR (3d) 1. The dissent disagrees with the argument presented in that case that a non-arm's length transaction becomes an arm's length transaction when it is driven by non-related third party forces (in that case, a regulator) who have a financial or other interest in the transaction between related parties. The *BIA* provisions considered in *Standard Trustco* were

67. When considering the evidence, it is useful to keep in mind the three criteria (cited in *Piikani* and *McLarty*) in Canada Revenue Agency Income Tax Bulletin IT419R2 (now Income Tax Folio S1-F5-C1⁴⁴):

(a) Was there a common mind which directs the bargaining for both parties?

No. Perpetual directed the bargaining of the Asset Transaction for POT. Kailas/198 directed it for PEOC.

(b) Were the parties to the transaction acting in concert without separate interests?

No. The parties who negotiated and consummated the entire Transaction, including the Asset Transaction, were self-interested strangers.

(c) Was there "*de facto*" control?

The *de facto* control of POT was exercised by Perpetual. The *de facto* control of PEOC regarding the Asset Transaction was exercised by Kailas/198.

68. Ms. Rose's uncontradicted evidence at paragraphs 44 to 53 of her Affidavit addresses each of these criteria. She states at paragraph 46:

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.

69. Ms. Rose describes in paragraph 54 of her Affidavit and illustrates with the records attached as **Exhibits M to W** the arm's length dealings between the parties concerning the Transaction as a whole and the Asset Transaction on its own. She states:

entirely different from those in the current *BIA*, and notably did not include the 2007 amendment to section 4(5).

⁴⁴ [Income Tax Folio S1-F5-C1, Related Persons and Dealing at Arm's Length – Canada.ca](#) [**Tab 17**].

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. ...

70. Three examples from **Exhibits M** to **W** illustrate the respective roles of the Purchaser Team and the Vendor Team:

(a) Scheduled to the Asset Purchase Agreement (**Exhibit J**) and the Share Purchase Agreement (**Exhibit H**) is the first page of the 103 page well list. **Exhibit Q** is an email exchange that includes Mr. Wang's (of Kailas) August 11, 2016 4:27 am email stating, among other things: "1) We performed a well-by-well comparison and found that over 50 wells which were included in the original June well list disappeared and over 130 new wells were added to the list." The exchange concludes with a member of the Vendor Team attaching a finalized well list to his August 22, 2016 email to Mr. Wang. The well list was an essential part of both agreements.

(b) **Exhibit S** is an email exchange between Mr. Jin, counsel for Kailas/198, and Ms. Wright, counsel for Perpetual, providing comments on a blacklined version of the draft Asset Purchase Agreement. A similar email and draft agreement is found at **Exhibit T**.

(c) **Exhibits V** and **W** are email exchanges between counsel on September 25 and 26, 2016, providing final comments on the Share Purchase Agreement and Asset Purchase Agreement.

71. These illustrations unequivocally support Ms. Rose's statement quoted above and the defence set out in paragraph 46 of the Perpetual Defendants' Statement of Defence:

46. The Asset Purchase Agreement did not exist, and would not have occurred, except as part of the Transaction. Like the Share Purchase Agreement, it too was the product of arm's-length negotiation between the Purchaser Team on the one hand, and the Vendor Team on the other. At the relevant time, 198 exercised *de facto* control of PEOC prior to the Transaction:

- (a) the terms of the Asset Purchase Agreement, including the consideration, were negotiated between the Purchaser Team and the Vendor Team, dealing at arm's-length; and
- (b) as the purchaser of all of the shares of PEOC as part of the Transaction, 198 (and only 198) had a commercial interest in the terms of the Share Purchase Agreement as they affected PEOC.

72. Once again, the Court, experienced commercial lawyers and even the Trustee will be familiar with the types of records shown by these exhibits. The party that negotiated for and was commercially interested in the terms upon which PEOC would acquire the Goodyear Assets was the party that would, and did, acquire all of PEOC's shares two minutes after the Asset Purchase Agreement was executed and closed. It is difficult to conceive of better "evidence to the contrary".

73. Even Mr. Darby reluctantly agreed with the obvious when questioned. He agreed that Kailas, 198, Mr. Wang and Mr. Yang had an "interest" in knowing what assets were in PEOC and exercised "influence" in the form of the Asset Purchase Agreement:

- (a) "I agree they had an interest, for sure"⁴⁵ and "I agree they had an interest, yes";⁴⁶
- (b) 198 was "acquiring" the Goodyear Assets;⁴⁷
- (c) "I could say they [the Purchaser Team] had influence [in the negotiations of the Asset Transaction] because they were trying to negotiate the purchaser -- the purchase of PEOC, and PEOC was trying to negotiate the purchase of POT assets."⁴⁸

74. An additional argument, unnecessary given the strength of the above, arises from section 4(3)(c) of the *BIA*, which states:

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation

⁴⁵ Darby Transcript at pg. 23, Ins. 6-20.

⁴⁶ Darby Transcript at pg. 23, Ins. 13-19.

⁴⁷ Darby Transcript at pg. 48, Ins. 8-18.

⁴⁸ Darby Transcript at pg. 59, Ins. 23-26.

to the control of the entity as if the person owned the ownership interests;⁴⁹

75. Article 4 of the Share Purchase Agreement, entitled Interim Provisions, effectively gave 198 control over PEOC following the execution of the Share Purchase Agreement on September 26, 2016. As a result, as of that date 198 had "a right under a contract ... to acquire, ownership interests... or to control the voting rights" of PEOC and is "deemed to have the same position in relation to the control of [PEOC] as if [198] owned the ownership interests". This provides further support that 198 had not only *de facto* control of PEOC for the purposes of the Asset Purchase Agreement, but *de jure* control by operation of section 4(3)(c) after execution of the Share Purchase Agreement.

Issue 4: Is the Plaintiff a "complainant" entitled to bring an oppression claim under section 242 of the ABCA?

76. The Perpetual Defendants rely on the written submissions of Ms. Rose on this issue.

77. In summary, the Perpetual Defendants submit that the oppression claim should be dismissed against them because:

- (a) the Trustee is not, without leave, a "complainant" under section 239(b) of the *ABCA*;
- (b) the Trustee has not applied for leave under section 239(b) of the *ABCA*;
- (c) the Trustee could only be entitled to leave to bring an oppression claim on behalf of PEOC's creditors at the time of the Transaction—and PEOC had no creditors on closing;
- (d) even if the three municipalities or the AER were creditors of PEOC on closing and if amounts owing to them prior to closing remain unpaid on bankruptcy, it would be the municipalities and the AER themselves who could seek leave to bring their own personal oppression claims; and

⁴⁹ *BIA*, s 4(3)(c) [Tab 10].

(e) this is not a case where collective action in the form of an oppression claim on behalf of all creditors of Sequoia—none of whom had any reasonable expectations of the Defendants—is appropriate.

Issue 5: Should the claim made on the grounds of Public Policy, Statutory Illegality and Equitable Rescission in paragraph 24 of the Statement of Claim be struck?

A. The Allegations in the Statement of Claim

78. This claim is pleaded in one paragraph of the Statement of Claim under the heading "Public Policy, Statutory Illegality and Equitable Rescission". The Trustee claims only that the "Transactions" (which are defined as the Asset Transaction, the Share Transaction and the Retained Interests Agreement) are "void", presumably meaning not valid or legally binding, but without any other relief claimed.

79. Paragraph 24.1 claims the Transactions are contrary to a public policy that is not described in any way, but is said to be "reflected" in a statute, a regulation and three directives referred to as the "Regulatory Regime".

80. Paragraph 24.2 claims the Transactions are illegal as they are "expressly or impliedly" prohibited by the Regulatory Regime. There is no explanation of what in the Share Purchase Agreement or the Asset Purchase Agreement is prohibited by what in the Regulatory Regime.

81. Paragraph 24.3 is not a claim for "Equitable Rescission" (those words only appear in a heading) but a claim based on "equitable grounds", without any explanation of what that means but simply a reference to the "reasons" and "circumstances" in the Statement of Claim.

B. "Public Policy" and "Statutory Illegality" Are Not Causes of Action

82. An illegal contract or a contract contrary to public policy are not causes of action.⁵⁰

83. In *Brooks v Canadian Pacific Railway*, the Saskatchewan Court of Queen's Bench held that the doctrine of illegality is a defence, not a cause of action:

⁵⁰ G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, ON: Thomson Reuters Canada Limited, 2011) (Fridman) at 338 [Tab 18].

As can be seen from the above references, the real nature of the doctrine of illegality is to preclude a cause of action, not provide the foundation for one. ...

The doctrine of illegality, where properly invoked, goes simply to the enforceability of rights that a plaintiff may otherwise have. It is clear, on the basis of the authorities, that the doctrine of illegality is applicable only in disputes involving the enforcement of rights on the part of a plaintiff, and in particular contracts.

... In short, there is no allegation in the pleadings of a breach of contract. The absence of such an allegation removes the doctrine of contractual illegality as a potential cause of action...⁵¹

84. Citing the Supreme Court's decision in *Canada v. Saskatchewan Wheat Pool*, the Court in *Brooks* dismissed the argument that breach of a statutory duty is a cause of action:

A further allegation in the claim is that the settlement agreements are in breach of a statutory duty imposed by the CAA. No specific breaches of the CAA statute are pled. But even if they were pled, it is clear that no reasonable cause of action would be made out on that basis.⁵²

85. The Court also held that an allegation that a contract is contrary to public policy could "not be used to establish a cause of action, but rather to refuse to grant relief on policy grounds".⁵³

86. Professor Fridman in *The Law of Contract in Canada* includes part of the above quote from *Brooks* and also states under the heading "The Consequences of Illegality":

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

⁵¹ *Brooks v Canadian Pacific Railway*, 2007 SKQB 247 (*Brooks*) at paras 116-18 [Tab 19].

⁵² *Brooks* at para 119 [Tab 19], citing *Her Majesty the Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205 [Tab 20].

⁵³ *Brooks* at para 122 [Tab 19].

saying the same thing, that rights or claims may not be founded upon illegality.⁵⁴

87. And the authors of "The Doctrine of Public Policy in Canadian Contract Law" also cite *Brooks*, stating:

[W]hile illegality may have a preclusive effect upon the enforceability of an agreement, it appears that illegality (and the contravention of public policy) cannot, when standing alone in the absence of any contractual breach, ground a cause of action for damages.⁵⁵

88. Courts have an aversion to concluding that a contract is prohibited by statute:

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...⁵⁶ (emphasis added)

89. Extending the doctrine of public policy beyond the well-established categories would improperly push the courts into the realm of the Legislature.⁵⁷ As learned authors have noted:

In declining to enforce a contract which is contrary to a value of public policy, the courts are not engaged in a balancing of distributive interests or social preferences that requires empirical study, or is by rights the domain of Parliament. Rather, they are attempting to preserve values which are necessary preconditions of justice in a modern liberal democracy.⁵⁸

There is a grave risk in permitting judges to strike down contracts at will, whenever in their opinion some jealously guarded tenant which they

⁵⁴ *Fridman* at 406-407 [Tab 18].

⁵⁵ *Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", Annual Review of Civil Litigation 2007 (Kain and Yoshida) at note 183 [Tab 21].*

⁵⁶ As put by Sulyma J. in *Alberta Turkey Producers v Leth Farms Ltd*, 1999 ABQB 887 at 16-17 [Tab 22], quoting *St John Shipping Corp v Joseph Rank Ltd*, [1956] 3 ALL ER 683 (Eng QB) (not reproduced).

⁵⁷ *LE Shaw Ltd v Berube-Madawaska Contractors Ltd* (1982), 40 NBR (20) 374 (NBCA) (*LE Shaw*) [Tab 23].

⁵⁸ *Kain and Yoshida* at A.V [Tab 21].

favour and approve is under attack, whether or not the public generally would agree with their assessment of the potential consequences.⁵⁹

90. Even assuming everything in the Statement of Claim is true, there is nothing alleged about the Transactions in the Statement of Claim that:

- (a) is prohibited by the Regulatory Regime;
- (b) expressly or by necessary implication renders the Transactions 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—within any of the recognized categories of agreements that are contrary to public policy.⁶⁰ If what is intended as being illegal or contrary to public policy is the alleged objective of the Retained Interests Agreement pleaded in paragraph 11—to support the LLR rating for PEOC to allow the Transaction to be completed without regulatory intervention—that objective is neither expressly nor by necessary inference, prohibited.

C. "Equitable Rescission" or "Equitable Grounds" Are Not Causes of Action

91. Similarly, "equitable rescission" (assuming it was pleaded rather than just words in a heading) is "a remedy, not a cause of action".⁶¹ It is predicated on the plaintiff alleging the contract resulted from some fraud (and as a result, the plaintiff mistakenly entered into the contract), was mistakenly entered into on the basis of a misrepresentation, or was obtained by some unconscionable acts.⁶² The Trustee has not made any of those claims or alleged any facts that would support such claims.

⁵⁹ Fridman at 363 [Tab 18].

⁶⁰ These categories are contracts injurious to state, injurious to the system of justice, encouraging immorality, affecting marriage, in restraint of trade and restrictive of personal liberties: see Kain and Yoshida [Tab 21].

⁶¹ Fridman at 761 [Tab 18].

⁶² See Swan City Taekwon-Do Club v Podolchuk, 2017 ABPC 244 at paras 141-143 [Tab 24], citing: "Jeffrey Berryman, *The Law of Equitable Remedies 2/e*, (Toronto: Irwin Law, 2000); Jeff Levy, *Contract Law: Rescission anyone?* (not reproduced). See also Fridman at 762 [Tab 18].

92. In any event, to obtain equitable rescission, "it must be possible to restore the parties substantially to their pre-contract position".⁶³ Or as Fridman put it:

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.**⁶⁴ (emphasis added)

93. Here it is not possible to return the shares in PEOC to Perpetual. The Trustee does not have them. 198 owns them. Further, the shares are now shares in a bankrupt corporation. Nor is it possible to return the beneficial interest in the Goodyear Assets over two years after the Transaction to POT. Finally, it is not possible for the Trustee to seek partial rescission as "No such remedy is known at common law or equity."⁶⁵

94. There is another fatal bar to the Trustee seeking rescission of the "Transactions". Sequoia was not a party to the Share Purchase Agreement. 198, which is not a party to this action, was. As the British Columbia Court of Appeal stated: "rescission is only available between parties to a contract."⁶⁶ If the Trustee intended to claim relief that would affect 198, then 198 is an essential party to this action.⁶⁷

V. ARGUMENT – RETURNING TO THE STAY APPLICATIONS

95. This issue need only be addressed if any of the Trustee's claims survive the Summary Dismissal Applications.

A. The Test to be Applied

96. The Plaintiff's Application, which seeks final judgment on the entire claim based only on Mr. Darby's Affidavit, is not suitable for a summary procedure. Any further steps the parties take

⁶³ *Kingu v Walmer Ventures Ltd* (1986), 10 BCLR (2d) 15 (CA) (*Kingu*) at para 18(g) (C.A. per McLachlin JA) [Tab 25].

⁶⁴ Fridman at 771 [Tab 18].

⁶⁵ *Kingu* at para 18 [Tab 25].

⁶⁶ *Topgro Greenhouses Ltd v Houweling*, 2006 BCCA 183 (*Topgro*) at para 81 [Tab 26].

⁶⁷ *Topgro* at paras 82 and 92 [Tab 26].

prosecuting or responding to that application, including affidavits, cross-examinations, or written and oral submissions would be a waste of the parties' time and money and judicial resources.

97. As stated previously, summary judgment may be granted where "there is no defence to a claim or part of it".⁶⁸ It is appropriate where there is no genuine issue requiring a trial and the judge is able to reach a fair and just determination on the motion for summary judgment. In *Stefanyk v Sobeys Capital Incorporated*, the Court of Appeal recently stated:

... 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...⁶⁹

98. While a section 96 application under the *BIA* is technically not a summary judgment application,⁷⁰ the same principles apply:

(a) in *Royal Bank of Canada v Racher*, Eamon J. applied the *Hryniak* test to determine whether a trial was required of such a claim, stating: "Nevertheless, the court is obliged to resolve legal disputes in the most cost-effective and timely method available, provided the process ensures fairness between the parties."⁷¹ He held that the court may determine some claims are "not suitable for summary determination" and noted that "[t]he *BIA* also authorizes trials of issues";⁷² and

(b) in *Re National Telecommunications Inc*, the Ontario Superior Court held that a judge hearing an application for a claim under section 96 of the *BIA* "has discretion to order a trial where appropriate"⁷³ drawing an analogy to the principles set out in *Hryniak*. The Court reasoned that a trial is not required if the parties' complete evidence is before the Court, credibility issues could be resolved without a trial, and proportionality given the amount of money in issue.⁷⁴

⁶⁸ *Rules of Court*, Rule 7.3 [Tab 7].

⁶⁹ *Stefanyk* at para 12 [Tab 4].

⁷⁰ *Royal Bank of Canada v Racher*, 2017 ABQB 181 (*Royal Bank*) at paras 9-10 [Tab 27]; *Re National Telecommunications Inc*, 2017 ONSC 1475 (*National Telecom*) at paras 34-35 [Tab 28].

⁷¹ *Royal Bank* at para 11 [Tab 27].

⁷² *Royal Bank* at para 17 [Tab 27].

⁷³ *National Telecom* at para 37 [Tab 28].

⁷⁴ *National Telecom* at para 38 [Tab 28]; see also *Juhasz* at paras 5, 75 [Tab 12].

B. The Reasons the Plaintiff's Application Should be Stayed

99. Unlike the Defendants' Summary Dismissal Applications, which can be decided on a motion for summary dismissal by answering three discrete (and dispositive) threshold questions, the Plaintiff's Application engages contentious questions of fact that demand discovery, additional evidence, and a full trial.

(1) The Defendants' evidence to answer the Plaintiff's claim

100. Mr. Schweitzer's Affidavit sets out the evidence the Defendants will require to address the claims in the Statement of Claim. The Trustee has declined to confirm whether all of its evidence on its application is before the Court.

101. Turning first to the Plaintiff's evidence, hearsay evidence of value may be used for the section 96 claim. Section 96(2) of the *BIA* requires the Trustee to state its opinion as to the fair market value of the actual consideration given and received:

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

102. The Trustee's opinion as to value merely creates a rebuttable presumption.⁷⁵ As this Court has held:

In my view, the starting point is that the transferee is not obliged to rebut the presumption on a balance of probabilities. Rather, once some contrary evidence is adduced, the presumption has 'no more than its own weight' (Sopinka, p. 152, para 4.46). **The effect of the contrary evidence in effect, makes the presumption vanish: *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602 (S.C.C.), at 606, per Judson J., writing for the court. In a manner of speaking, the contrary evidence is the wand that makes the magician's assistant disappear. The evidence from both sides then competes on equal terms and the question becomes, 'what value is proved on the balance of probabilities'? **To this end, the court is obliged to weigh competing factors and consider****

⁷⁵ *Royal Bank* at paras 92, 96-97 [Tab 27].

expert opinion in order to gauge the extent of the disparity between fair market value and value received.⁷⁶ (emphasis added)

103. Section 96(2) does not assist the Trustee with any of the other elements of proof required under section 96, nor with any of the other causes of action. Hearsay is not admissible to support the Plaintiff's Application.⁷⁷ Rule 13.18(3) requires that an affidavit used in support of an application that may dispose of all or part of a claim—including a summary judgment application—must be sworn on the basis of personal knowledge, not hearsay.⁷⁸

104. Yet much of Mr. Darby's Affidavit attempts to introduce hearsay fact and opinion evidence. Mr. Darby relies on:

- (a) an outdated 2015 reserve report reviewed by McDaniel;
- (b) a software model developed by XI Technologies Inc. to calculate asset retirement obligations in 2018; and
- (c) the Orphan Well Association's Annual Report for 2016/17.

105. Each of the claims is unsupported by admissible evidence. For example:

- (a) for the section 96 claim, Mr. Darby's opinion of value will be worthless in the face of contrary evidence, and that opinion of value regarding the other claims is inadmissible;
- (b) Mr. Darby offers no expert evidence on insolvency;
- (c) for any of the claims that depend on calculations of reserves or asset retirement obligations, there is no supporting admissible evidence;
- (d) there is no evidence of any creditors "reasonable expectations", an essential requirement of an oppression claim; and
- (e) without an affidavit and, to the extent opinion evidence is intended, an expert report from the Orphan Well Association, there is no evidence to support whatever is

⁷⁶ *Re Indarsingh*, 2015 ABQB 158 (*Indarsingh*) at para 18 (Master) [Tab 29]

⁷⁷ *Jarrett v Flannery*, 2016 ABQB 565 at para 32 [Tab 30]; *C(L) v Alberta*, 2016 ABQB 512 at paras 27-28, 34-37 [Tab 31].

⁷⁸ *Rules of Court*, Rule 13.18(3) [Tab 7].

sought to be proven by the Orphan Well Association's Annual Report (perhaps tendered in relation to the public policy, statutory illegality and equitable grounds claim).⁷⁹ The better evidence in the record regarding that claim is the public statement from the Chief Executive Officer of the AER addressing Sequoia's bankruptcy stating:

...a gap in the system has been identified... our governing legislation did not provide us the necessary flexibility to do what is needed...⁸⁰

106. Further, Mr. Darby's failure to attach the full reserve report, the XI Technologies Inc. model, or the Orphan Well Association's Annual Report offends Rule 13.21 requiring records to be used with an affidavit to be exhibited.⁸¹ The reserve report and software model would undoubtedly illustrate that they are of no use in calculating fair market values generally, let alone effective October 1, 2016.

107. Despite these fatal deficiencies in the Plaintiff's evidence, the Defendants will not leave the claims unanswered and will be required to present fact and opinion evidence to address all elements of the Plaintiff's claims.

(2) *Discovery is required*

108. A trial procedure would be a proportionately more fair and just procedure than the Plaintiff's Application in a complex commercial lawsuit seeking, among other things, over \$217 million jointly and severally from the Defendants.

109. The Defendants require record production and questioning of the Trustee and of Sequoia's principals.⁸² In contrast, the Trustee has all of Sequoia's records.⁸³

⁷⁹ Plaintiff's Application at para 10.

⁸⁰ Affidavit of W. Mark Schweitzer sworn October 3, 2018, filed October 4, 2018 (**Schweitzer Affidavit**) at para 31 and Exhibit C.

⁸¹ *Rules of Court, Rule 13.21 [Tab 7]*.

⁸² Under Part 5 of the *Rules of Court*, the Trustee's records are due November 27, 2018. The Perpetual Defendants' records will be due January 27, 2018 (they have already started collecting and reviewing records for production). See Schweitzer Affidavit at para 33.

⁸³ Darby Transcript at p. 14, Ins. 3-6.

110. The Trustee has already used its powers under section 164 of the *BIA* to obtain records from the Perpetual Defendants regarding the Transaction.⁸⁴ The Perpetual Defendants need reciprocal discovery to make the process fair.

111. The cause of Sequoia's insolvency is a material part of the Trustee's section 96 claim and the defences. This information is solely within the knowledge of the Trustee and Sequoia's management. The Defendants had no involvement with Sequoia after October 1, 2016. In addition to the relevant records, the Defendants will also require oral discovery of the Trustee and officers and employees of Sequoia.

(3) *Conflicting evidence*

112. There will be conflicting factual and expert evidence on countless issues (to name a few—value of consideration paid, value of consideration received, calculation of asset retirement obligations, insolvency before the Transaction, what rendered Sequoia insolvent a year and a half after the Transaction, reasonable expectations, identity and amount of claims of creditors, and whether any conduct was oppressive).

113. *Viva voce* evidence will be required. Weight of evidence, resolution of conflicts in the evidence, and credibility must be assessed. Three examples are discussed below.

(a) *Value of the consideration received by PEOC*

114. The determination under section 96 of the "value of the consideration received by the debtor and the value of the consideration given by the debtor" requires expert evidence.

115. In *Royal Bank of Canada v Racher*, Eamon J. stated: "Section 96 of the *BIA* does not explicitly require appraisal evidence, though such evidence would normally be expected and provided."⁸⁵ And as this Court held in *Re Indarsingh*, even for claims under section 96 of the *BIA*, unsworn opinion evidence has little to no weight:

I appreciate that a certain informality is required under the Act but unsworn opinion evidence, or opinion evidence that is merely exhibited to an affidavit of someone other than the expert, is in my view, is inadmissible or virtually weightless. The Act provides that where a specific

⁸⁴ Darby Affidavit at para 11.

⁸⁵ *Royal Bank* at paras 114-118 [Tab 27].

matter of procedure is not dealt with in the Act or the Rules, the rules of practice in the jurisdiction apply. (Rule 3) In Alberta, ARC Rule 6.11 permits opinion evidence in support of an application, but only if it is sworn; and presumably, without the strict necessity of having to prove the qualifications of the expert.⁸⁶

116. The Trustee's opinion as to value received by PEOC is based solely on an outdated reserve report. There is already evidence to the contrary—evidence that the reserve report does not accurately represent the value of the consideration received by PEOC:

- Q. I think my question was a fair market value of the assets, but whichever you would prefer.
- A. The engineering report does not state the fair market value of the assets.
- Q. Nor, in your experience, do engineering reports purport to provide an opinion on a fair market value of the assets; correct?
- A. No.
- Q. Sorry. I'm right or I'm wrong?
- A. They do not state the fair market value of the asset in an engineering reserve report.⁸⁷

117. In addition:

(a) the reserve report was not prepared with an effective date at the time of the Transaction (year-end 2015 vs October 1, 2016) and did not reflect data and assumptions valued at that date;⁸⁸

(b) the reserve report excludes other valuable assets, including pipelines, other surface facilities, prospect drilling inventory and undeveloped acreage;⁸⁹

(c) the reserve report is based on numerous assumptions⁹⁰ that Mr. Darby does not mention, nor whether he considers them to have been correct or even fair assumptions as of the date of the Transaction or why they would represent market value of the reserves;⁹¹

⁸⁶ *Indarsingh* at para 28 [Tab 29].

⁸⁷ Darby Transcript at p. 13 lns. 8-18.

⁸⁸ Schweitzer Affidavit at paras 11, 12(b). *Juhasz* at para 73 [Tab 12].

⁸⁹ Schweitzer Affidavit at para 12(c).

⁹⁰ Schweitzer Affidavit at para 12(a).

⁹¹ Schweitzer Affidavit at para 13.

(d) the reserve report does not consider various important factors relevant to market value;⁹² and

(e) Mr. Darby admits that there is contrary evidence on point: "the McDaniel Report... includes an estimate of abandonment costs... as well as estimates for salvage value. For this reason, the amount of ARO... may be overstated".⁹³ Mr. Darby's Affidavit wishes away such internally conflicting evidence with the self serving statement: "The Trustee does not consider this to be material".⁹⁴ He does not state the amount of the ARO included in the reserve report or why this amount is immaterial.

118. Where a Trustee's opinion relies exclusively on a report that is outdated, not an appraisal of fair market value, and relies on suspect methodology, it is not possible for the Court to determine the value of the consideration. A trial is required.⁹⁵

119. As the Trustee viewed the Asset Purchase Agreement in isolation, the Trustee ignored the value of the other consideration PEOC received on the Transaction, including the Gas Marketing Contract (that cost POT \$12.9 million⁹⁶), the free office lease and the licences for proprietary seismic data.

120. The Defendants will provide factual and expert evidence to show the fair market value of the consideration received by PEOC.⁹⁷

(b) Value of consideration given by PEOC

121. Mr. Darby's opinion on the value of the abandonment and reclamation obligations, being the alleged consideration given by PEOC as part of the Asset Purchase Agreement, is \$218,958,274, relying exclusively on a software model developed by XI Technologies Inc.

⁹² Schweitzer Affidavit at paras 12(d), (e), (f).

⁹³ Darby Affidavit at para 41.1.

⁹⁴ Darby Affidavit at para 41.1.

⁹⁵ *Juhasz* at paras 71-76 [Tab 12].

⁹⁶ Rose Affidavit at para 49.

⁹⁷ Schweitzer Affidavit at para 15.

122. First, Mr. Darby's opinion is easily rebutted. It appears to be nothing more than an output of a computer model, about which nothing (inputs, assumptions, methodology, qualifications, etc.) is known. As Mr. Darby admitted:

- (a) he has no formal training in calculating asset retirement obligations;⁹⁸ and
- (b) valuing asset retirement obligations "is a highly judgmental and nuanced process", "partly due to the complexity of environmental reporting and partly due to accounting standards that are open to interpretation" and "partly due to the uniqueness of every situation".⁹⁹

123. Second, the AER has already provided some evidence to rebut the presumption of the value of the consideration given by PEOC. The AER filed a proof of claim in Sequoia's bankruptcy valuing its unsecured claim as "\$1.00 – 225,500,636.25".¹⁰⁰ The AER's inability to calculate current asset retirement obligations is telling.

124. Third, on cross-examination, Mr. Darby admitted that asset retirement obligations are not "liabilities" (which is a present obligation) but "provisions" (which is a liability of uncertain timing or amount).¹⁰¹ As Ms. Rose's evidence makes clear, the asset retirement obligations associated with the Goodyear Assets "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".¹⁰² This was consistent with Mr. Darby's admissions in questioning.¹⁰³

125. Fourth, it is inexplicable why Mr. Darby opined on an undiscounted value¹⁰⁴ for asset retirement obligations given such obligations were not due at the time of the Transaction, yet compared that undiscounted provision with the discounted numbers in the reserve report (and disregarded the fact that there was already a deduction for the asset retirement obligations associated with the wells).

⁹⁸ Darby Transcript at pg. 5-6.

⁹⁹ Darby Transcript at pg. 92, lns. 16-27.

¹⁰⁰ Rose Affidavit, Exhibit DD.

¹⁰¹ Darby Transcript at pg. 91, ln. 19 to pg. 92, ln. 8.

¹⁰² Rose Affidavit at para 74.

¹⁰³ Darby Transcript at pg. 94.

¹⁰⁴ Darby Affidavit, Exhibit N.

126. Finally, Ms. Rose testified that the actual future abandonment and reclamation costs were expected to be significantly lower than those opined by Mr. Darby.¹⁰⁵

127. At the time of the Transfer, Mr. Darby estimated there were \$10,047,733.20 in property taxes "payable with respect to the Goodyear Assets".¹⁰⁶ The Defendants' evidence is that only \$6,376,323 in 2016 property taxes relates to the Goodyear Assets,¹⁰⁷ and the taxes were either paid in full or Sequoia and certain municipalities entered into payment arrangements.¹⁰⁸

128. The Defendants will provide factual and expert evidence to show the fair market value of the consideration given by PEOC.¹⁰⁹

(c) Conflicting evidence of insolvency

129. Mr. Darby states that PEOC may have been insolvent and by acquiring the Goodyear Assets "PEOC was immediately rendered insolvent",¹¹⁰ ignoring that Sequoia continued to operate for 18 months following the Transaction.

130. Sequoia's directors and the Trustee both recognized that the cause of Sequoia's insolvency was other than the Transaction:

(a) in a March 2, 2018 letter to stakeholders, Sequoia's directors and management attributed Sequoia's insolvency to a natural gas price collapse following the Transaction:

These strategies were successful and on target through to the end of the summer of 2017. SRC [Sequoia] 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... Unfortunately, the turn in prices did not appear to be just a short term anomaly. ...

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

¹⁰⁵ Rose Transcript at pg. 37, lns 14-21, pg. 38, lns. 9-23.

¹⁰⁶ Darby Affidavit at para 40.3.

¹⁰⁷ Rose Affidavit at para 71, Exhibit Z; Schweitzer Affidavit at note 1.

¹⁰⁸ Schweitzer Affidavit at note 1; Rose Affidavit at para 70.

¹⁰⁹ Schweitzer Affidavit at para 15.

¹¹⁰ Darby Affidavit at para 46.

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.¹¹¹

- (b) the Trustee's Preliminary Report states Sequoia acquired approximately 25% of its wells, "some at close to the end of their life cycle" after the Transaction,¹¹² and that:

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.

...

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.

...

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.¹¹³

131. In *Indarsingh*, this Court held that the debtor's insolvency "might equally be explained by the downturn in the economy that coincided with the timing of the transfer".¹¹⁴

132. The Defendants will provide factual and expert evidence to address solvency before and after the Transaction and the causes of Sequoia's ultimate insolvency and bankruptcy.¹¹⁵

¹¹¹ Schweitzer at para 24, Exhibit A.

¹¹² Schweitzer Affidavit, Exhibit B, pg. 1.

¹¹³ Schweitzer Affidavit, Exhibit B, pg. 1-2.

¹¹⁴ *Indarsingh* at para 44; see also para 21 [Tab 29].

¹¹⁵ Schweitzer Affidavit at para 23.

VI. ORDER REQUESTED

133. The Perpetual Defendants seek:

- (a) summary dismissal of all or part of the Statement of Claim;
- (b) alternatively, a permanent stay of the Plaintiff's Application;
- (c) costs of this application; and
- (d) such further and other relief as the Court deems appropriate.

November 1, 2018

RESPECTFULLY SUBMITTED.

BURNET, DUCKWORTH & PALMER LLP

Per: 

Daniel J. McDonald, Q.C.

Per: 

Paul G. Chiswell

Counsel for the Perpetual Defendants

AUTHORITIES

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