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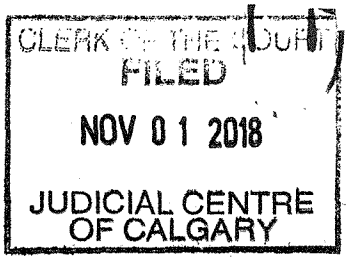

COURT FILE NUMBER	1801-10960
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
DOCUMENT	**BRIEF OF THE RESPONDENT PRICEWATERHOUSECOOPERS INC., LIT** For the Commercial List hearing on November 8, 2018 at 10:00 a.m. before Mr. Justice D.B. Nixon

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT

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INTRODUCTION

1. The Plaintiff is the trustee in bankruptcy (the "**Trustee**") of the estate of Sequoia Resources Corp. ("**SRC**", "**Sequoia**" or "**PEOC**"), formerly known as Perpetual Energy Operating Corp.

2. The Trustee commenced an action against Perpetual Energy Inc. ("**PEI**"), Perpetual Operating Trust ("**POT**") and Perpetual Operating Corp. ("**POC**") (jointly, the "**Perpetual Defendants**") and against Ms. Susan Riddell Rose ("**Rose**"). The Trustee filed an application for substantially the same relief (the "**Trustee's Application**").

   2.1. The Trustee seeks an order declaring a sale and transfer of assets by POT to PEOC (the "**Asset Transaction**") void as against the Trustee. Alternatively, the Trustee seeks judgment against the Defendants for the difference between the consideration given and received by PEOC.

   2.2. The claim is based on s. 96 of the *Bankruptcy and Insolvency Act* (the "***BIA***") as a transfer at undervalue, on the breach by Rose of her duties as the sole director of PEOC at the time of the Asset Tansaction, on the oppression provisions of the *Alberta Business Corporations Act* (the "***ABCA***") and on public policy, statutory illegality and equitable grounds.

3. In response, the Defendants filed two separate Statements of Defence – one by the Perpetual Defendants and one by Rose. They say, *inter alia,* that the Asset Transaction was only "an imbedded step" in a larger transaction, in which PEI sold all the shares in PEOC to an arm's length purchaser (the "**Share Transaction**") after the legal and beneficial interests in the assets had been combined in PEOC through the Asset Transaction.

4. At the same time, each of the Defendants also filed two essentially similar applications. These four applications (the "**Defendants' Applications**") are the subject-matter of the hearing scheduled for November 8, 2018.

5. In the "**Stay Applications**", the Defendants seek an order:

5.1. directing that their summary dismissal application be heard before the Trustee's Application; and

5.2. permanently or temporarily staying the Trustee's Application pursuant to Rule 7.1(c).

6. In the "**Summary Dismissal and Striking Applications**", the Defendants seek an order:

6.1. striking various claims made by the Trustee, including the Trustee's oppression claims and its claims against Rose, pursuant to Rule 3.68; and

6.2. summarily dismissing the Trustee's s. 96 claim, its oppression claims and its claims against Rose, pursuant to Rule 7.3.

7. The two Stay Applications are essentially similar, except that Rose also alleges that:

> the pleadings and proceedings establish good grounds to conclude that the Plaintiff's claim against Rose personally is a vexatious litigation tactic that is abusive of the process of this Honourable Court and injurious to Rose. Rose deserves the opportunity to demonstrate that the claim against her should be dismissed at an early stage.[1]

8. The two Summary Dismissal and Striking Applications are also essentially similar, except that Rose also alleges that:

> the Plaintiff has no authority or standing to maintain the allegations of breaches of fiduciary duty and duty of care, and the allegations disclose no reasonable cause of action[2]

and that:

> by virtue of the Resignation and Mutual Release Agreement, PwC is barred and estopped from making the claims against Rose in this proceeding.[3]

9. The Defendants' Applications rely on the same evidence. Both Stay Applications rely only on the affidavit of Mr. Mark Schweitzer ("**Schweitzer**"), the CFO of PEI, and both Summary Dismissal and Striking Applications rely on the affidavit of Rose.

[1] Rose's Stay Application, at para. 3.
[2] Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 3(a).
[3] Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 3(b).

10. For practical purposes, we will address the Stay Applications and the Summary Dismissal and Striking Applications together.

PART I – STATEMENT OF FACTS

11. The relevant facts are simple. We do not propose to repeat the facts set out in the affidavit of Paul Darby, sworn on August 2, 2018, which are undisputed.

12. Until October 1, 2016, PEOC was the trustee of POT. It had no assets or operations and existed solely to act as trustee for POT. All the shares of PEOC were held by PEI, the beneficiary of POT. Rose was a director and shareholder of PEI. She was also the sole director of PEOC.

13. Sometime in the first or second quarter of 2016, PEI decided to sell "its" shallow gas wells in Eastern Alberta (the "**Goodyear Assets**").

    13.1. The Goodyear Assets were "mature legacy assets" of PEI.[4] They had been "operating on a negative cash flow basis for a long time", not just as a result of the drop in natural gas prices in 2016 and were subject to high fixed operating costs including "extremely high municipal property taxes". The Goodyear Assets were also associated with high future asset retirement obligations ("**ARO**").

    13.2. However, the legal interests and licenses for the Goodyear Assets were held by PEOC, in its capacity as trustee for POT, which owned the beneficial interests in the Goodyear Assets. As a result, the sale by POT of the beneficial interests in the Goodyear Assets to PEOC required no transfers and no regulatory process or approval.

14. The sale of the Goodyear Assets was effected in steps, through a restructuring of the Perpetual corporate group and a number of agreements.

    14.1. First, POT sold its beneficial interest in the Goodyear Assets to PEOC pursuant to the Asset Transaction.

[4] Transcript of Cross-Examination of S. Rose, Exhibit 7.

14.2. Then, PEOC transferred legal title to all the remaining POT assets, except 1% of the legal title to four strong producing East Edson wells (the "**Retained Interests**") to POC, as the new trustee for POT.

14.3. Finally, PEI sold all the shares in PEOC pursuant to the Share Sale to a numbered company ("**198**"). Rose resigned as the sole director of PEOC, PEOC changed its name to Sequoia Resources Corp. and POC demanded transfer of the Retained Interests.

15. Approximately 18 months later, PEOC, then known as Sequoia, assigned itself into bankruptcy.

16. Where required, the facts will be referred to in more detail in the context of the discussion of specific topics below.

PART II – ISSUES

17. The Stay Applications raise two issues.

17.1. The first of the two issues raised by both Stay Applications (that the Defendants' Summary Dismissal and Striking Applications be heard before the Trustee's Application), is moot – both Summary Dismissal and Striking Applications are in fact being heard before the Trustee's Application.

17.2. The remaining issue in both Stay Applications is whether the Trustee's Application should be permanently or temporarily stayed pursuant to Rule 7.1(c) ("**Issue 1**").

18. The Defendants' Summary Dismissal and Striking Applications also raise a number of issues. Although the Defendants state that they seek to strike various claims under Rule 3.68 "in the alternative" to summary dismissal under Rule 7.3,[5] the threshold Rule 3.68 issues should be dealt with first. These issues include:

[5] Perpetual Defendants' Application for Summary Dismissal, at para. 1(b); Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at para. 1(b).

18.1. whether a trustee in bankruptcy can have standing to pursue oppression claims ("**Issue 2**"); and

18.2. whether a trustee in bankruptcy can have standing to pursue claims against a director for breaches of his or her director's duties ("**Issue 3**").

19. The Rule 7.3 issues raised by the Defendants' Summary Dismissal and Striking Applications are:

19.1. whether the parties were dealing with each other at arm's length, within the meaning of the *BIA* ("**Issue 4**")

19.2. whether the Trustee is a proper "complainant" entitled to seek oppression relief under s. 242 of the *ABCA* ("**Issue 5**")

19.3. whether the Trustee's claims against Rose should be dismissed, including on the basis that it is "barred and estopped" from making claims against Rose by the Resignation and Mutual Release Agreement ("**Issue 6**").

20. Finally, although it is not a threshold issue, the Defendants' Summary Dismissal and Striking Applications raise the further issue of whether the Trustee's claim for relief on grounds of public policy, statutory illegality and equitable rescission should be struck ("**Issue 7**").

PART III – ARGUMENT

Issue 1: Whether the Trustee's Application Should be Permanently or Temporarily Stayed Pursuant to Rule 7.1(c)

1. The Rule does not provide for a permanent stay

21. The Defendants seek an order "permanently or temporarily staying the Plaintiff's Application pursuant to rule 7.1(c)".[6]

22. Rule 7(1)(c) provides:

> **Application to resolve particular questions or issues**
>
> 7.1(1) On application, the Court may
> (a) order a question or an issue to be heard or tried before, at or after a trial
> …
> (b) …
> (c) stay any other application or proceeding *until the question or issue has been decided* …[7][Emphasis added.]

23. Accordingly, Rule 7.1(c) does not provide for a permanent stay of an application.

2. It makes no sense to stay the application pending trial

24. Because the Trustee's Application and the action concern the same questions or issues, it makes no sense to stay the Trustee's Application *until* the action has been decided.

3. The arguments for a stay relate to the merits of the Trustee's Application

25. The Stay Applications:

25.1. argue that the Trustee seeks to set aside "a complex commercial transaction", seeks "a significant monetary award based on complex issues concerning the value of assets and liabilities and relies on not only s. 96 of the *BIA* but the oppression remedy"; and

[6] Perpetual Defendants' Stay Application, at para. 1(b); Rose's Stay Application, at para. 1(b).
[7] *Alberta Rules of Court*, AR 124/2010, s. 7.1(c) **[Trustee's Authorities, Tab 1]**

25.2. conclude that the Trustee's Application's should stayed on the basis that "it is inconceivable that the Plaintiff's Application could be determined summarily" as "both questions raise complex and disputed issues of fact and law requiring a trial."

26. As pointed out earlier, the Rose Stay Application also argues that:

> [T]he pleadings and proceedings establish good grounds to conclude that the Plaintiff's claim against Rose personally is a vexatious litigation tactic that is abusive of the process of this Honourable Court and injurious to Rose. Rose deserves the opportunity to demonstrate that the claim against her should be dismissed at an early stage.

27. The complexity of a transaction or the amount involved does not, on its own, preclude the Trustee from proceeding by way of a summary application.

28. In any event, as is shown below, the facts are not complex or disputed. The Trustee's Application relies on the facts *as presented by the Defendants*.

4. The Defendants' application for a permanent stay is inconsistent with the current law on the summary disposition of claims

29. The law on the relevant issues is also not complex. In any event, there is no reason why complex *legal* issues require a trial and cannot be determined on an application.

30. The Defendants' Stay Applications are inconsistent with the guidance from our Court of Appeal in recent decisions considering Rule 7.3, including *Stefanyk v. Sobeys Capital Incorporated*[8] and *Angus Partnership Inc. v. Salvation Army (Governing Council)*.[9]

31. In both cases, the Court allowed appeals from decisions declining to dispose of issues summarily under Rule 7.3,[10] confirming that:

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[8] *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 125 (*Stefanyk*) **[Trustee's Authorities, Tab 2]**

[9] *Angus Partnership Inc. v. Salvation Army (Governing Council)*, 2018 ABCA 206 (*Angus Partnership*) **[Trustee's Authorities, Tab 3]**

[10] *Stefanyk*, *supra*, at paras. 1 and 34 **[Trustee's Authorities, Tab 2]**; *Angus Partnership*, *supra*, at paras. 43 and 80 **[Trustee's Authorities, Tab 3]**

31.1. The standard of proof on a summary disposition application is the "balance of probabilities".[11]

31.2. A respondent cannot resist summary disposition simply by raising a "doubt". It must put its "best foot forward" and the Court should not speculate about "future material evidence". [12]

31.3. Summary disposition is appropriate where "the chambers judge can make any required fact findings from the summary dismissal record in a fair and just manner."[13]

5. The Schweizer Affidavit does not address the question

32. The only evidence presented by the Defendants in support of the Stay Applications is the affidavit of Schweitzer.

33. Schweitzer's affidavit expressly sets out evidence relating to issues he believes must be addressed "if":

> the Defendants' summary dismissal applications are not heard and determined prior to the hearing of the Plaintiff's application for judgment on the Statement of Claim.[14]

34. The Defendants' Summary Dismissal and Striking Applications are in fact to be heard and determined prior to the Trustee's Application.

6. The Schweitzer Affidavit does not support a stay

35. Schweitzer is the CFO of Perpetual.[15] He has had access to and has reviewed the Perpetual records relating to the various transactions.[16] However, he presents no evidence to show that

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[11] *Stefanyk*, *supra*, at para. 14 **[Trustee's Authorities, Tab 2]**; *Angus Partnership*, *supra*, at para. 42 **[Trustee's Authorities, Tab 3]**
[12] *Stefanyk*, *supra*, at para. 16 **[Trustee's Authorities, Tab 2]**; *Angus Partnership*, *supra*, at para. 42 **[Trustee's Authorities, Tab 3]**
[13] *Stefanyk*, *supra*, at para. 15 **[Trustee's Authorities, Tab 2]**; *Angus Partnership*, *supra*, at paras. 44 and 79 **[Trustee's Authorities, Tab 3]**
[14] Affidavit of M. Schweitzer, at para. 9.
[15] Affidavit of M. Schweitzer, at para. 1.
[16] Affidavit of M. Schweitzer, at para. 5.

the Trustee's Application should not succeed.[17] Instead, his affidavit and his evidence in cross-examination only emphasizes the evidence that is allegedly *not available* to the Defendants.[18] He says, *inter alia*:

35.1. The Defendants do not know what the fair market value was of the consideration received by PEOC in the Asset Transaction, but the consideration received by PEOC was equivalent to the value given by PEOC in the Asset Transaction, because two parties negotiated and agreed on the terms of the agreement;[19]

35.2. The Defendants do not know what the fair market value was of the consideration given by PEOC in the Asset Transaction, but the consideration given by PEOC was "approximately equivalent" to the value received by PEOC in the Asset Transaction, again because the two parties negotiated and agreed on the terms of the Asset Purchase Agreement;[20] and

35.3. The Defendants will require evidence to address the solvency of PEOC before and after the Asset Transaction.[21]

36. Schweitzer confirmed that Perpetual had assigned some dollar value to the consideration given and received in the Asset Transaction, although he said he did not recall what those values were.[22]

37. As in *Stefanyk* and *Angus Partnership*, a respondent cannot avoid a Rule 7.3 application simply by saying it will "require factual and expert evidence" to address the allegations. There is no obvious reason why the Defendants should still not be able to put forward *any defence* in response to claims that were articulated as much as 5 months ago, on May 28, 2018, on the basis of their own information.

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[17] Affidavit of M. Schweitzer, at paras. 15, 20, 23, 28 and 32.
[18] Affidavit of M. Schweitzer, at paras. 15, 20, 23, 28 and 32.
[19] Affidavit of M. Schweitzer, at paras. 14-15; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-6, p. 7, lines 1-9.
[20] Affidavit of M. Schweitzer, at paras. 19-20; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-8, p. 9, lines 1-8.
[21] Affidavit of M. Schweitzer, at para. 23; Transcript of Cross-Examination of M. Schweitzer, at p. 9, lines 9-27, p. 10, p. 11, lines 1-19.
[22] Transcript of Cross-Examination of M. Schweitzer, at p. 4, lines 8-24.

7. There is no evidence of "a vexatious litigation tactic"

38. In her affidavit, Rose has presented no evidence to suggest that the Trustee's Application is "a vexatious litigation tactic" that is an abuse of the process of this Court. Schweitzer's affidavit also provides no evidence to support this allegation.

39. The Trustee's representative, Mr. Paul Darby was cross-examined extensively on this issue by counsel for the Perpetual Defendants and counsel for Rose. His evidence in cross-examination confirmed there is no merit to this allegation.

40. The Trustee submits that the Stay Application should be dismissed.

Issues 2 and 3: Whether a Trustee in Bankruptcy Can Have Standing to Pursue Claims for Oppression and Breaches of a Director's Duties

1. Rule 3.68(2)(b)

41. Although it is not clear from the Summary Dismissal and Striking Applications, it appears that the Defendants seek to strike the Trustee's oppression and breach of director's duties claims on the basis of Rule 3.68(2)(b). The Perpetual Defendants' Summary Dismissal and Striking Application states that:

> The oppression claim is bound to fail. Alternatively, the oppression claim does not disclose a cause of action and should be struck.[23]

42. Rose's Summary Dismissal and Striking Application states that:

> The Plaintiff has no authority or standing to maintain the allegations of breaches of fiduciary duty and duty of care, and the allegations disclose no reasonable cause of action; and
>
> […]
>
> Regarding the Plaintiff's claim against Rose for breach of fiduciary duty and oppression as pleaded in paragraphs 15-17 and 18-20 of the Statement of Claim, Rose applies to strike such pleadings pursuant to Rule 3.68.[24]

43. It appears that the Defendants seek to strike the Trustee's oppression and breach of director's duties claim pursuant to Rule 3.68(2)(b) on the basis that a trustee in bankruptcy cannot have standing to pursue such claims.

44. Rule 3.68(2)(b) provides that a Court may strike out "all or any part of a claim or defence" on the basis that it "discloses no reasonable claim or defence to a claim.[25] Rule 3.68(3) provides that the Court may not consider any evidence in determining whether a claim should be struck pursuant to Rule 3.68(2)(b).[26]

45. Our Court of Appeal considered Rules 3.68(2)(b) and 3.68(3) in *HOOPP Realty Inc. v. The Guarantee Company of North America*, which concerned an appeal from a chambers judge's

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[23] Perpetual Defendants' Summary Dismissal Application, at para. 9.
[24] Rose's Amended Amended Application for Summary Dismissal and Striking Pleadings, at paras. 3(a) and 4.
[25] *Alberta Rules of Court*, AR 124/2010, s. 3.68(2)(b) **[Trustee's Authorities, Tab 1]**
[26] *Alberta Rules of Court*, AR 124/2010, s. 3.68(3) **[Trustee's Authorities, Tab 1]**

decision declining to strike a claim under Rule 3.68(2)(b).[27] In dismissing the appeal,[28] the majority held that:

45.1. The chambers judge was required to determine whether the claim had a "reasonable prospect of success".[29]

45.2. Although the allegations in the Statement of Claim are assumed to be true, the wording must be placed "in the entire context of the pleading."[30]

45.3. The Court may also consider "the underlying litigation context of a claim, even one which does not give rise to a novel cause of action."[31]

46. Although Justice Wakeling, concurring in the result, disagreed with the majority's analysis, *HOOPP Realty* was cited with approval by this Court in *PR Construction Ltd. v. Colony Management Ltd.*, another Rule 3.68(2)(b) decision.[32]

2. The Trustee was not required to obtain a "Standing Order"

47. In her Statement of Defence, Rose suggests that the Trustee was required to obtain a "Standing Order" prior to seeking relief from oppression under s. 242:

> Insofar as PwC, in its capacity as trustee in bankruptcy of Sequoia, has the general authority to sue on behalf of the creditors of Sequoia, which is denied in the circumstances of this claim, it has no standing to sue Rose pursuant to s. 242 of the ABCA without first having obtained an order from this Court declaring that it is a proper person to do so (a Standing Order).

48. Leaving aside the case law to the contrary, Rose's novel interpretation of s. 242 is problematic because of s. 240 and s. 239, which applies to both s. 240 and 242.[33]

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[27] *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336 (*HOOPP*) **[Trustee's Authorities, Tab 4]**
[28] *Ibid*, at para. 23 **[Trustee's Authorities, Tab 4]**
[29] *Ibid*, at para. 13 **[Trustee's Authorities, Tab 4]**
[30] *Ibid*,at paras. 14 and 15 **[Trustee's Authorities, Tab 4]**
[31] *Ibid*, at para. 19 **[Trustee's Authorities, Tab 4]**
[32] *PR Construction Ltd. v. Colony Management Ltd.*, 2017 ABQB 600 (*Colony Management*), at para. 28 **[Trustee's Authorities, Tab 5]**
[33] *Business Corporations Act*, RSA 2000, c. B-9, Part 19 **[Trustee's Authorities, Tab 6]**

49. If a party is required to first obtain a "Standing Order" in order to commence a Part 19 proceeding, as Rose contends, then a party seeking leave to commence a derivative action under s. 240 would be required to make two Originating Applications:

49.1. First, it would have to apply for a "Standing Order" confirming that it is a proper "complainant" within the meaning of s. 239 and authorizing it "to make an application" under Part 19.

49.2. Then, having obtained a "Standing Order", it would apply pursuant to s. 240(1) for leave to bring a derivative action "on behalf of a corporation or any of its subsidiaries".

50. Part 19 expressly states any requirement that a party obtain leave prior to commencing a proceeding, as in s. 240. The interpretation advanced by Rose would lead to an absurd result by, in effect, introducing a leave application into s. 242 and a second leave application into s. 240, which would be inconsistent with the principle of statutory interpretation that:

> Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature.[34]

51. Rose's proposed "Standing Order" is also inconsistent with the existing case law on Part 19.

52. In *Chen v. Sumwa Trading Co. Ltd.*, for example, Justice Dario recently considered an application under s. 240 for leave to commence a derivative action.[35] Having considered the facts, Justice Dario declared that the applicant was a "complainant" within the meaning of s. 239 and then granted leave to commence a derivative action under s. 240.[36] There was no suggestion that the applicant was somehow required to obtain a "Standing Order" pursuant to s. 239 prior to bringing her s. 240 leave application.

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[34] *Regent Resources Ltd. (Re)*, 2018 ABQB 669, at para. 22, citing *R. v. Canadian Pacific Ltd*, [1995] 2 S.C.R. 1031, at para. 66 **[Trustee's Authorities, Tab 7]**

[35] *Chen v. Sumwa Trading Co. Ltd.*, 2018 ABQB 269 (*Sumwa Trading*), at para. 1 **[Trustee's Authorities, Tab 8]**

[36] *Ibid*, at paras. 47-50 **[Trustee's Authorities, Tab 8]**

53. Similarly, in *AMFAM Trust v. Tallahassee Petroleum Inc.*, Master Robertson recently granted interim relief from oppression in favour of trust beneficiaries who were "not directors and not shareholders",[37] stating that:

> However, the definition of "complainant" in section 239(b) of the *ABCA* is not limited to minority shareholders, or directors who do not control the board of directors. A complainant may be another person who, in the discretion of the Court is found to be a proper person to make an application for oppression remedies – even if that person does not fit neatly into the defined categories. And a "complaint" might be a beneficial owner of a corporation or any of its affiliates, not just a shareholder or a director.
>
> That would seem to allow the application to be brought here at least by the beneficiaries of AMFAM Trust, some of whom are named as plaintiffs. They are not directors and not shareholders. They are not in the same position as Mr. English in *Sylvan Lake Developments*.

54. As in *Sumwa Trading*, there is no suggestion that the plaintiffs in *Tallahassee Petroleum* were required to obtain a "Standing Order" prior to commencing a Part 19 proceeding.

55. Rose's proposed "Standing Order" requirement is inconsistent with the wording of Part 19, in particular sections 239 and 240, and would lead to absurd results. It is also inconsistent with the case law interpreting Part 19, including s. 242.

56. There is no merit to this ground for striking the Trustee's oppression claims.

3. A Trustee can be a proper "complainant" within the meaning of s. 239

(a) The Defendants' argument

57. In their Statement of Defence, the Perpetual Defendants plead that:

> The Plaintiff could only have standing to become a complainant if leave of the Court was granted pursuant to s. 239(b)(iv) of the ABCA. The Plaintiff has not sought and would not be entitled to leave because:
>
> (a) the Plaintiff, as Sequoia's trustee in bankruptcy, could only be a complainant if Sequoia could have brought an oppression claim, which it could not;
>
> (b) an oppression claim under s. 242(1) of the ABCA is a personal remedy belonging to certain stakeholders of Sequoia;

[37] *AMFAM Trust v. Tallahassee Petroleum Inc.*, 2017 ABQB 16 (*Tallahassee Petroleum*), at paras. 39, 40, 57, 58 **[Trustee's Authorities, Tab 9]**

(c) the Plaintiff, by reason of Sequoia's bankruptcy, is not in a better position to advance the claims of Sequoia's creditors; and

(d) none of Sequoia's creditors on bankruptcy, including the AER or municipalities, were creditors of PEOC with provable claims at the time of the Transaction.[38]

58. These allegations are mirrored in Rose's Statement of Defence, with the additional reference to the Resignation and Mutual Release Agreement (the "**Release**"), discussed below.[39]

59. The Defendants attempt to rely on the argument rejected by the Ontario Superior Court of Justice in *Dylex* and the Ontario Court of Appeal in *Olympia & York* and *Essar Global*, as discussed below.

(b) A Trustee can be a "proper person" entitled to be a "complainant"

60. Like the Defendants in the present action, the defendants in *Dylex* argued that the trustee had no legal capacity to pursue an oppression remedy. Their argument mirrors the argument advanced by the Defendants:

(a) A trustee can only bring a claim as a representative of Dylex where Dylex itself would have been entitled to bring the claim, except where statutory provisions otherwise allow;

(b) The right to obtain relief from oppression is a personal remedy, belonging only to the individuals who have been oppressed; and

(c) By reason of a bankruptcy, the trustee is not in a better position to advance the claim.[40]

61. The Court's Reasons in *Dylex* provide additional detail regarding the defendants' argument:

> [11] With respect to the first, Mr. Lax submits that as the trustee in bankruptcy *stands in the shoes of the company and has no greater rights than the bankrupt company* had except where legislation confers greater rights, the trustee's capacity to assert a claim *therefore depends on whether Dylex could have brought a claim*

[38] Perpetual Defendants' Statement of Defence, at para. 55.
[39] Rose's Statement of Defence, at paras. 18-22.
[40] *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (ONSCJ), at para. 10 **[Trustee's Authorities, Tab 10]**

> *prior to its bankruptcy*. The moving parties submit that Dylex, prior to its bankruptcy, could not have applied for the oppression remedy against them.
>
> [12] Mr. Lax argues that *Dylex itself could not have brought a claim under the oppression remedy provisions prior to bankruptcy* as the directors had approved the conduct. Once the directors have acted, those acts become the acts of the company; and the company itself cannot apply to bring an Oppression Remedy Claim because the impugned acts are acts of the company, not the directors. [Emphasis added.]

62. The Court in *Dylex* rejected the defendants' argument,[41] citing with approval the following passage from Justice Farley's Reasons in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*:

> It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt. While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person". It should be noted that s. 248(2) talks of act or omission that "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation or any of its affiliates…" (emphasis added). *Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the Margaritis characterization of the trustee in bankruptcy as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case*.[42] [Emphasis added.]

63. The Court in *Dylex* concluded its analysis of the issue by stating that:

> In this action, the Trustee pleads that the conduct and transactions at issue were oppressive and unfairly prejudicial to the interests of the creditors. The harm suffered allegedly arises as a result of the disastrous financial impact of the share acquisition on Dylex, thereby affecting the creditors as a whole. *The Trustee as the creditors' appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, in conjunction with the other claims it is asserting, all arising out of the same facts*. This is consistent with the *long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to bankrupt person or the creditors) shall vest exclusively in the trustee*.[43][Emphasis added.]

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[41] *Ibid*, at para. 16-17 **[Trustee's Authorities, Tab 10]**

[42] *Ibid*, at para.15, citing *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (*Olympia & York*), at para. 30 **[Trustee's Authorities, Tab 11]**

[43] *Ibid*, at para. 17 **[Trustee's Authorities, Tab 10]**

64. In *Olympia & York*, decided after *Dylex*, the Ontario Court of Appeal considered an appeal, *inter alia*, from Justice Farley's determination that the trustee was a proper complainant under s. 248, Ontario's equivalent to s. 242.[44] The Court dismissed the appeal.[45]

65. In reaching its conclusion, the Court found that:

65.1. The trustee is "neither automatically barred from being a complainant nor automatically entitled to that status" where the bankrupt corporation was a party to the allegedly oppressive transaction.[46]

65.2. Section 245(c), equivalent to *ABCA* s. 239(b)(iv), "confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings" and is "designed to provide the court with flexibility in determining who should be a complainant in a particular case".[47]

65.3. The "overall flexibility provided for is essential for the broad remedial purpose of these oppression provisions to be achieved".[48]

66. More recently, in *Ernst & Young Inc. v. Essar Global Funds Limited*, the Ontario Court of Appeal considered an appeal, *inter alia*, from the trial judge's finding that a *CCAA* monitor had standing as a "complainant" to seek relief from oppression.

67. The Court cited *Olympia & York* with approval[49] and analyzed the monitor's suitability to advance oppression claims by comparing its role with that of a trustee:

> Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.
>
> Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The

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[44] *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2003] O.J. No. 5242 (*Olympia & York CA*), at paras. 39-45 **[Trustee's Authorities, Tab 12]**
[45] *Ibid*, at para. 46 **[Trustee's Authorities, Tab 12]**
[46] *Ibid*, at para. 45 **[Trustee's Authorities, Tab 12]**
[47] *Ibid*,at para. 45 **[Trustee's Authorities, Tab 12]**
[48] *Ibid* **[Trustee's Authorities, Tab 12]**
[49] *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, at para. 115 **[Trustee's Authorities, Tab 13]**

> appellants did not direct us to any authority saying that a monitor could not be a complainant.[50]

68. The Court concluded that the trial judge did not err in finding that the monitor was a proper complainant in the circumstances.[51]

69. As in *Olympia & York*, the Trustee is a "proper person" entitled to be a "complainant" under s. 239.

70. The Trustee pleads that "it is a proper complainant within the meaning of Part 19 of the ABCA, including sections 239 and 242".[52] In its Statement of Claim, the Trustee seeks an Order under Part 19 of the ABCA, which would include a s. 239(b)(iv) Order that it is a "proper person" entitled to be a complainant.

71. There is no merit to this ground for striking the Trustee's oppression claims.

4. The Trustee has standing to advance claims against Rose for breaches of her duties as PEOC's sole director

72. Beyond the repeated use of the word "standing", it is unclear from Rose's Statement of Defence and the Amended Amended Application for Summary Dismissal and Striking Pleadings on what basis the Trustee's entitlement to assert claims on behalf of PEOC is being challenged.

73. Section 30(1)(d) and (f) of the *BIA* provide, *inter alia*, that "with the permission of the inspectors", the Trustee may:

> bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;
>
> […]
>
> employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors; […].[53]

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[50] *Ibid*, at para. 116-117 **[Trustee's Authorities, Tab 13]**
[51] *Ibid*, at para. 120 **[Trustee's Authorities, Tab 13]**
[52] Statement of Claim, at para. 18.
[53] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 30 **[Trustee's Authorities, Tab 16]**

74. In *Dylex*, discussed above, the Ontario Superior Court of Justice considered, *inter alia*, an application to strike for lack of standing claims brought by a corporation's trustee in bankruptcy against its former officers, directors and shareholders.[54]

75. The Court declined to strike the trustee's oppression and breach of fiduciary duty claims on the basis of any lack of standing.[55] The Court stated that:

> In this action, the Trustee pleads that the conduct and transactions at issue were oppressive and unfairly prejudicial to the interests of the creditors. The harm suffered allegedly arises as a result of a disastrous financial impact of the share acquisition of Dylex, thereby affecting the creditors as a whole. The Trustee as the creditors' appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, *in conjunction with the other claims it is asserting, all arising out of the same facts. This is consistent with the long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to the bankrupt person or the creditors) shall vest exclusively in the trustee*.[56] [Emphasis added.]

76. In *Peoples*, decided in 2004 after *Dylex*, the Supreme Court of Canada considered claims brought by the trustee of a bankrupt wholly-owned subsidiary against its former directors for breach of the fiduciary duty and duty of care they owed to the corporation.[57] The Court noted that the trustee's standing to sue was not questioned:

> This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. *The standing of the trustee to sue was not questioned*.[58] [Emphasis added.]

77. Our Court of Appeal has also confirmed the broad scope of the trustee's s. 30(1)(d) power to initiate proceedings on behalf of the bankrupt's estate.

78. In *BDO Canada Ltd. v. Dorais*, the Court allowed the trustee's appeal from a case management judge's decision that the trustee was not entitled to pursue claims assigned to it by certain individual creditors.[59] In holding that the trustee was entitled to pursue the

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[54] *Dylex*, *supra*, at para. 1 **[Trustee's Authorities, Tab 10]**
[55] *Ibid*, at paras. 22 and 35 **[Trustee's Authorities, Tab 10]**
[56] *Ibid*, at para. 17 **[Trustee's Authorities, Tab 10]**
[57] *Peoples Department Store Ltd. (1992) Inc., Re*, 2004 SCC 68 (*Peoples*), at para. 2 **[Trustee's Authorities, Tab 14]**
[58] *Ibid*, at para. 30 **[Trustee's Authorities, Tab 14]**
[59] *BDO Canada Ltd. v. Dorais*, 2015 ABCA 137 (*Dorais*), at paras. 7 and 17 **[Trustee's Authorities, Tab 15]**

"collective claims" that would accrue to the benefit of the general body of creditors, the Court stated that:

> One of the core duties of the trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets form the bankrupt to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. *If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these types of claims on behalf of the general body of creditors is consistent with the Trustee's overall duties*. In that respect he is pursuing legitimate claims of the estates, and is not impermissibly "stepping into the shoes" of individual plaintiffs.[60] [Emphasis added.]

79. As the above authorities establish, s. 30(1)(d) confers on the Trustee the power to step into the shoes of the bankrupt and advance any claims the bankrupt may have had, for the benefit of the general body of creditors. As in *Dylex* and *Peoples*, this includes the bankrupt corporation's claims against its former directors for breaches of the fiduciary duty and duty of care they owed to the corporation.

80. There is no merit to this ground for striking the Trustee's claims.

[60] *Ibid*, at para. 13 **[Trustee's Authorities, Tab 15]**

Issue 4: Whether the parties were dealing with each other at arm's length within the meaning of the *BIA*

1. The Defendants' argument

81. The Perpetual Defendants plead that the Asset Transaction was an arm's-length transaction on the following basis:

> 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 negotiations 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 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.[61]

82. It appears that the Defendants view the determination of the arm's-length/non-arm's length issue as being governed by s. 4(4) of the *BIA*,[62] which provides that:

> **Question of fact**
>
> 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.[63] [Emphasis added.]

83. However, as discussed below, the Parties at issue, PEOC and POT, were "related persons" within the meaning of s. 4(2) of the *BIA*. They are *deemed not to deal with each other at arm's length* pursuant to s. 4(5) of the *BIA*, which provides that:

> **Presumptions**
>
> 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.[64]

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[61] Perpetual Defendants' Statement of Defence, at paras. 46-46.
[62] Transcript of Cross-Examination of P. Darby, p. 27.
[63] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(4) **[Trustee's Authorities, Tab 16]**
[64] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(5) **[Trustee's Authorities, Tab 16]**

2. Sections 4(2) and 4(3) of the *BIA*

84. Section 4(2) of the *BIA* provides that "related persons" include "an entity" and "a person who controls the entity, if it is controlled by one person".[65]

85. The *BIA* defines "person" broadly and simply provides that it "includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization […]". The definition does not exclude a trust like POT.

86. Section 4 defines an "entity" as a "person other than an individual.

87. Section 4(3)(a) provides that:

> If two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other.[66]

88. Section 4(3)(c) provides that:

> *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 to the control of the entity as if the person owned the ownership interests*. [Emphasis added.]

89. Deemed ownership pursuant to s. 4(3)(c) is not exclusive: the Court in *Green Gables Manor Inc., Re* held that two parties can be the owners of the same shares at the same time for the purposes of s. 4.

90. *Green Gables* concerned a trustee's application to set aside a GSA granted by the bankrupt corporation in favour of an individual and a corporation.[67]

91. The bankrupt corporation was the wholly-owned subsidiary of a numbered company, which was wholly-owned by another numbered company.[68] The individual respondent was a 30%

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[65] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(2) **[Trustee's Authorities, Tab 16]**
[66] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 4(3) **[Trustee's Authorities, Tab 16]**
[67] *Green Gables Manor Inc., Re*, 1998 CarswellOnt 2498, at paras. 1-8 **[Trustee's Authorities, Tab 17]**
[68] *Ibid*, at para. 6 **[Trustee's Authorities, Tab 17]**

shareholder in this ultimate parent company and the respondent corporation was solely owned and controlled by the 50% shareholder in this ultimate parent company.[69]

92. The Court found that the bankrupt corporation and the respondents were "related persons" within the meaning of s. 4(2) of the *BIA*.

92.1. The individual respondent and the individual controlling the corporate respondent were president and secretary-treasurer of the bankrupt and two of the three directors of each corporation.[70] They were not related to each other by blood, marriage or adoption.[71]

92.2. However, the shareholder agreement between the shareholders of the holding company provided each shareholder could buy the other's shares.[72]

93. Pursuant to s. 4(3)(c) of the *BIA*, each shareholder was deemed to own the shares it was entitled to purchase under the shareholder agreement for the purposes of s. 4(2). [73] Accordingly, both shareholders were deemed to control the holding company and therefore had *de jure* control over the bankrupt corporation, the wholly-owned subsidiary of its wholly-owned subsidiary.[74]

94. The bankrupt and the individual respondent were a "corporation" and a "person who controls the corporation, if it is controlled by one person" making them "related persons" under s. 4(2). Similarly, the bankrupt and the corporate respondent were two corporations controlled by the same person, making them "related persons" under s. 4(2).

95. Having found that the respondents were "related persons", the Court proceeded to conclude that the GSA was a fraudulent preference within the meaning of, *inter alia*, s. 95 of the *BIA*.

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[69] *Ibid* **[Trustee's Authorities, Tab 17]**
[70] *Ibid*, at para. 16 **[Trustee's Authorities, Tab 17]**
[71] *Ibid*, at para. 18 **[Trustee's Authorities, Tab 17]**
[72] *Ibid*, at paras. 23-25 **[Trustee's Authorities, Tab 17]**
[73] *Ibid*, at para. 25 **[Trustee's Authorities, Tab 17]**
[74] *Ibid*, at para. 27 **[Trustee's Authorities, Tab 17]**

96. The Court in *Green Gables* confirmed that a single share can be in several places at once for the purposes of s. 4: the shareholder agreement gave both shareholders deemed control even though the same shares could never be owned by both shareholders at the same time.

97. The same reasoning applies where a corporation is wholly-owned by one shareholder who has agreed to sell its shares to another shareholder: both the existing shareholder and future shareholder would be "related persons" because they are both "persons who control" the corporation.

3. PEOC, POT, PEI *and* 198 were all "related persons" within the meaning of s. 4

98. The relevant facts are not in dispute:

98.1. PEOC was the wholly-owned subsidiary of PEI;[75]

98.2. PEOC was the trustee of POT;[76]

98.3. PEOC executed the Asset Purchase PSA on its own behalf and as trustee for POT;[77] and

98.4. 198 entered into the Share Purchase Agreement on September 26, 2016, to purchase all of PEI's shares in PEOC.[78]

99. In accordance with s. 4 of the *BIA*, PEOC, POT, PEI and 198 were all "related persons" at the time of the Asset Transaction:

99.1. POT was an "entity" and PEOC, its trustee, was "a person who controls the entity, if it is controlled by one person";

99.2. PEOC was an "entity" and PEI, the holder of 100% of its shares until the closing of the Share Purchase Transaction, was "a person who controls the entity if its controlled by one person";

[75] Rose Affidavit, at para. 12-13.
[76] Rose Affidavit, at paras. 10 and 13.
[77] Asset Purchase Agreement, p. 28, Rose Affidavit, Exhibit J.
[78] Rose Affidavit, at para. 40 and Exhibit H, p. 55.

99.3. 198 had "a right under a contract" to acquire 100% of PEOC shares from PEI, and was deemed to control PEOC after September 26, 2016; and

99.4. From September 26, 2016 to the closing of the Share Purchase Transaction, PEI and 198 were "two entities related to the same entity", PEOC.

4. The effect of the deeming provision in s. 4(5)

100. There are a number of decisions dealing with the tripartite test under s. 4(4) for determining whether "persons *not related* to one another" were nonetheless in a non-arm's length relationship: for example *Piikani Energy v. Piikani Energy Corp.*[79] *and Montor Business Corp. (Trustee of) v. Goldfinger*[80]:

100.1. Was there a common mind which directs bargaining for both parties to a transaction;

100.2. Were the parties to a transaction acting in concert without separate interests; and

100.3. Was there *de facto* control.[81]

101. The s. 4(4) test derived from *McLarty v. R*[82] is not applicable to "related persons", which are deemed not deal with each other at arm's length pursuant to s. 4(5).

102. The Court in *PricewaterhouseCoopersInc. v. Legge* confirmed that s. 4(5) creates a rebuttable presumption that "related persons" were not dealing with each other at arm's length.[83] The onus was on the parties seeking to uphold the transaction:

> To rebut the presumption in favour of the Trustee those seeking to oppose are required to show that the transaction was one with appropriate consideration, in the normal course of business and with no view to insolvency".[84]

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[79] *Piikani Energy v. Piikani Energy Corp.*, 2013 ABCA 293, at para. 29-30 **[Trustee's Authorities, Tab 18]**
[80] *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 **[Trustee's Authorities, Tab 19]**
[81] *Ibid*, at para. 29-30 **[Trustee's Authorities, Tab 19]**
[82] *McLarty v. R*, 2008 SCC 26 **[Trustee's Authorities, Tab 20]**
[83] *PricewaterhouseCoopers Inc. v. Legge*, 2011 NBQB 255, at para. 15 **[Trustee's Authorities, Tab 21]**
[84] *Ibid*, at para. 15 **[Trustee's Authorities, Tab 21]**

103. In the present case, the Defendants cannot rebut the presumption that the Asset Transaction, between PEOC and itself, as the trustee for POT, was a non-arm's length transaction.

104. The Defendants fall at the first hurdle as they cannot show that "the transaction was one with appropriate consideration":

104.1. The Trustee's evidence is that the difference between the consideration given and received by PEOC in the Asset Transaction was *at least* $217,570,800;[85]

104.2. The Trustee's evidence on this point is uncontradicted.[86] It was also confirmed by the Trustee's representation in cross-examination:

> Q. MR. LEITL: Mr. Darby, going back to my questioning about the personal benefit that you opine on in your affidavit, the alleged personal benefit of Ms. Rose. Do you remember we talked about that?
> A. Yes.
> Q. And I think you said -- I'm obviously paraphrasing -- that it was just so obvious to you, you didn't need to ask Ms. Rose anything about it; right?
> A. Yes.
> Q. And if I heard you correctly, my notes are sketchy -- if I heard you correctly, you said in so many words that PEI was able to offload what you see as $250 million in obligations; right?
> A. 220 million.
> Q. Okay.
> A. Call it.
> Q. And you'll agree with me that if a company was able to offload a company like PEI, $220 million in obligations for no consideration, that would be material?
> A. Yes.
> Q. And you would expect that to have a positive impact on the share price?
> A. Unless the shares were overvalued to start with.
> Q. Unless they were overvalued to start with? Is that what you said?
> A. Markets don't nationally make sense, so...
> Q. But you do, all of -- other things being equal, assume and expect that the announcement by a company of an ability to offload $220 million in debt at no cost would have a material positive impact on its share price?

[85] Affidavit of Paul Darby, at para. 44.
[86] Affidavit of Mark Schweitzer, at paras. 14 and 19; Transcript of Cross-Examination of M. Schweitzer, at p. 3, lines 5-27, pp. 4-6, p. 7, lines 1-9.

A. It is positive for the company, yes.[87]

105. Accordingly, the Defendants cannot rebut the presumption that the Asset Transaction was a non-arm's length transaction.

[87] Transcript of Cross-Examination of Paul Darby, at pp. 95-96.

Issue 5: Whether the Trustee is a proper "complainant" entitled to seek oppression relief under s. 242 of the *ABCA*

1. The Defendants' argument

106. The Defendants make various legal arguments attacking the Trustee's standing to seek relief under s. 242. These are without merit, as discussed above.

107. The Defendants also make the factual allegation that:

> *none of Sequoia's creditors on bankruptcy*, including the AER *or municipalities, were creditors of PEOC* with provable claims *at the time of the Transaction*.[88][Emphasis added.]

108. This allegation is mirrored in Rose's Statement of Defence, which alleges that:

> PWC does not qualify for standing as a complainant for the purposes of its claim against Rose because, *at the time of the closing of the Transaction*:
>
> [22.1] *Sequoia's current creditors were not creditors with provable claims against PEOC*;
>
> [22.2] specifically, neither the AER *nor the municipalities* to whom PEOC paid property taxes from time to time *were creditors of PEOC* with provable claims against PEOC; […][89] [Emphasis added.]

2. PEOC had creditors at the time of the Asset Transaction

(a) PEOC's municipal tax liabilities

109. The allegations above are inconsistent with the Defendants' own evidence, provided by Rose in her October 19, 2018 affidavit. Rose states that:

> [68] The provisions detailed above had the combined effect of assuring 198 that PEOC would be acquired without any debts at the time of closing, *with the exception of certain amounts expected to be paid in the fourth quarter of 2016 with respect to municipal property taxes that were identified in Schedule I to the Share Purchase Agreement* and materially offset by prepaid expenses related to periods after closing and deferred payment obligations to Perpetual related to recover of the Crown royalty deposit and Crown royalty credit.
>
> […]
>
> [70] I understand that all 2016 municipal taxes associated with the Goodyear Assets were paid in full by either Perpetual or Sequoia, *with the exception of three*

[88] Perpetual Defendants' Statement of Defence, at para. 55 **[Trustee's Authorities, Tab X]**
[89] Rose's Statement of Defence, at paras. 22, 22.1 and 22.2. **[Trustee's Authorities, Tab X]**

municipalities (Athabasca County, Lamont County, and the Municipal District of Opportunity #17) which I understand voluntarily agreed with Sequoia at some time *after closing to permit Sequoia to pay its 2016 municipal taxes without penalty in multiple payments over an extended payment period.*

[71] While I do not have access to all of Sequoia's records relating to these municipalities, I am attaching at **Exhibit Z** copies of Perpetual's analysis of 2016 property tax payments associated with the Goodyear Assets. It shows total 2016 property taxes owing in the amount of $6,374,201 which was paid either by Sequoia or Perpetual *with the exception of voluntary deferred payment amounts. With respect to the three municipalities referred to in the previous paragraph*:

(a) I am attaching a copy of a letter from Sequoia to the Municipal District of Opportunity No. 17 dated October 20, 2016 as **Exhibit AA** outlining Sequoia's request of the Municipal District of Opportunity #17 to defer 2016 property tax payments, and Municipal District of Opportunity #17's letter to Sequoia *dated January 26, 2018 confirming the agreement to establish an extended payment plan for the 2016 municipal tax invoice as* ***Exhibit BB***; and

(b) I do not have copies of Sequoia's communications with Athabasca County or Lamont County but am advised by others that those counties stated that payment plans were also established for 2016 municipal tax invoices and that all payments were made according to the payment plans *with exception of payments due after 2016*.[90] [Emphasis added.]

110. Schedule I to the Share Purchase Agreement is also included as an Exhibit to the Rose Affidavit. Schedule I lists the following "Current Liabilities" of PEOC on October 1, 2016:

Current Liabilities

Payable to Municipalities on behalf of Perpetual Operating Trust (reimbursed through the statement of adjustments under the purchase and sale agreement dated September 30, 2016)	$ (4,256,585)
Payable to municipalities on acquired assets – 2016 property taxes	$(1,476,116)
TOTAL PAYABLE TO MUNICIPALITIES	$(5,732,701)
Total Current Liabilities	**$(5,732,701)**

[90] Affidavit of Susan Riddell Rose, sworn October 19, 2018, at para.68-71.

111. Schedule I to the Share Purchase Agreement, referenced in the Rose Affidavit and included as an Exhibit is directly inconsistent with the Defendants' allegation that PEOC had no creditors with provable claims when the Asset Transaction closed on October 1, 2018.

112. In fact, Schedule I lists an amount of $5,732,701 as a "current liability" that was "payable to the municipalities" as of October 1, 2016.

113. Rose's affidavit also confirms that at least $1,560,809 of this amount was never paid. The table excerpted below is included at Exhibit Z to the Rose Affidavit:

Municipality	Payment Due Date	2016 Gross Property Tax Associated with Properties Sold to Sequoia	Property Taxes Paid by Sequoia	Property Taxes Paid by Perpetual	Property Tax Balance Outstanding	Source of Payment Information
Municipal District of Opportunity	6/30/2016	1,227,006	463,745	-	927,491	Sequoia 3-year payment plan – letter received from MD of Opportunity.
Lamont County	6/30/2016	902,319	303,553	-	605,689	Sequoia 3-year payment plan – receipt from Lamont County.
Athabasca County	7/31/2016	41,442	13,814	-	27,628	Sequoia 3-year payment plan – phone call to Athabasca County.
	TOTAL	**6,374,201**	**4,182,960**	**2,608,767**	**1,560,809**	

114. Contrary to the allegations in the Defendants' Statements of Defence, the table included as Exhibit Z to Rose's affidavit confirms that:

114.1. Municipal tax amounts payable by PEOC to the above three municipalities and totalling at least $2,170,767 were "due" *by July 31, 2016, two months prior* to the closing of the Asset Transaction on October 1, 2016; and

114.2. At least $1,560,809 of those amounts were never paid and remain "outstanding".

115. In cross-examination, Rose was asked about Exhibit Z to her affidavit:

> So that's Exhibit Z. And the first three entries have payment due dates of prior to October 2016. You see those?
> A. Mm-hm.
> Q. Yes?
> A. Yes.
> Q. So these were all due prior to closing of the asset transaction?
> A. No. They were not.
> Q. So what does "payment due date" mean if it does not mean payment due?
> A. Well, there's a provision, when you have your property tax, that you can choose to elect to pay it at a later date subject to a penalty.
> …
>
> Q. All right. Is it fair to say that the penalty then applies to amounts that were due but not paid on the due date, and then because there's an extension, there's an accommodation, the penalty is the price that you pay for that?
> A. Could you repeat the question?
> Q. Yes. The penalty situation applies where an amount is due on a particular date, and you then reach an accommodation or an agreement to extend that, and as a result, you have to pay a penalty. That's what I understand you to say.
> A. Yes.[91]

116. It is respectfully submitted that an arrangement for late payment of a tax due, subject to penalty, does not mean that the municipality involved is no longer a creditor with a provable claim against the estate of the taxpayer

(b) PEOC's ARO

117. Both the Perpetual Defendants and Rose plead that:

> None of Sequoia's creditors on bankruptcy, including the AER or municipalities were creditors of PEOC with provable claims at the time of the Transaction.[92]

118. The shift from "Sequoia's creditors" to "creditors of PEOC" in the above allegation is without legal significance: there is no dispute that PEOC simply changed its name to Sequoia.[93]

119. The allegation that no municipalities had provable claims prior to the Asset Transaction is dealt with above. The similar allegation made in respect of the AER's provable claims is also without merit.

[91] Transcript of Cross-Examination of S. Rose, p. 50, lines 1-14, p. 51, lines 8-20.
[92] Perpetual Defendants' Statement of Defence, at para. 55(d); Rose Statement of Defence, at para. 22.2.
[93] Transcript of Cross-Examination of M. Schweitzer on October 26, 2018, at p. 11, lines 20-27, p. 12.

120. In *Redwater*, our Court of Appeal confirmed an insolvent entity's regulatory obligations to the AER were provable claims, satisfying the three-part test laid down by the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*[94]

> (a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a "creditor" in insolvency proceedings (at para. 27);
>
> (b) The debt, liability or obligations must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have commenced (CCAA, s. 11.8(9); BIA, s. 14.06(8)); and
>
> (c) It must be possible to attach a monetary value to the debt liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims. That depends on whether there is "sufficient certainty" that the regulatory body will ultimately perform remediation and crystallize the claim (at para. 36). In assessing the certainty of the claim, the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.[95]

121. Although the decision in *Redwater* has been appealed to the Supreme Court of Canada, Justice Wakeling dismissed the appellants' stay application on the basis, *inter alia*, that the "precedential effect of a Court of Appeal opinion" could not be stayed.[96]

122. Based on the Court of Appeal's findings in *Redwater*, there is ample evidence to support the existence of a provable claim by the AER prior to the Asset Transaction.

123. The Trustee's evidence is that the estimated "liabilities associated with the Goodyear Assets and assumed by PEOC as part of the Asset Transaction", excluding property taxes, were:

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[94] *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124 (*Redwater*), at paras. 60 and 73-91, citing *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 **[Trustee's Authorities, Tab 22]**

[95] *Ibid*, at para. 60 **[Trustee's Authorities, Tab 22]**

[96] *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, at para. 11 **[Trustee's Authorities, Tab 23]**

> [40.1] ARO of $192,127,274 for the Goodyear Wells (abandonment costs of $98,855,218 and reclamation costs of $93,272,056);
>
> [40.2] ARO of $26,831,000 for the facilities associated with the Goodyear Wells, calculated as the costs attributable to the Goodyear Assets, proportionate to the total ARO for all POT facilities; […].[97]

124. These figures were confirmed by the Trustee's representative in cross-examination.[98]

125. The Defendants include in their evidence a copy of the Proof of Claim submitted by the AER on April 11, 2018. Although Rose points out, on behalf of the Defendants, that "the alleged unsecured claim has a stated value as low as $1 as of the date of bankruptcy", Rose does not point out that the stated value of the same unsecured claim is *between $1 and $225,500,636.25*.[99]

126. In cross-examination, Rose's evidence on this issue was that:

    126.1. The "ARO obligation represented by the properties" on Perpetual's September 30, 2016 balance sheet was 133.6 million", but this was only "how it was represented" in Perpetual's financial disclosure to the market, not what they "believed to be the actual liability".[100] The $133.6 million figure did not "address the full context" of the future liabilities.[101]

    126.2. The actual ARO number that Perpetual "landed on for the ARO for Goodyear" was higher than the $52 million number estimated in June 2016 and was "about 87 million".[102] This $87 million ARO figure, however, "may still have been a good aspirational number" but was not an "auditable number".[103]

[97] Affidavit of P. Darby, at para. 40.
[98] Transcript of Cross-Examination of P. Darby, at p. 92, lines 8-7, p. 93, p. 94-95, p. 96, lines 1-20.
[99] Affidavit of S. Rose, para. 75 and Exhibit DD.
[100] Transcript of Cross-Examination of S. Rose, p. 21, lines 15-27, p. 22, line 1.
[101] Transcript of Cross-Examination of S. Rose, p. 23, lines 7-21, p. 24, lines 1-4.
[102] Transcript of Cross-Examination of S. Rose, p. 34, lines 22-27, p. 35-37, p. 38, lines 1-15.
[103] Transcript of Cross-Examination of S. Rose, p. 38, lines 18-26.

127. Notwithstanding Rose's opinion that ARO do not constitute a "creditor claim",[104] the Court of Appeal in *Redwater* confirmed that regulatory obligations are provable claims under the *BIA*.[105]

128. The Trustee estimates the ARO associated with the Goodyear Assets as $192,127,274 for the Goodyear Wells and $26,831,000 for associated facilities.

129. Although the Defendants' ARO figures vary widely, between $52 million and $133.6 million, and include an $87 million "aspirational number", they cannot deny that significant ARO were associated with the Goodyear Assets transferred to PEOC as part of the Asset Transaction.

130. Accordingly, per *Redwater*, the AER had a significant provable claim at the time of the Asset Transaction.

131. There is no merit to the Defendants' factual allegation that the Trustee lacks standing to pursue oppression because "none of Sequoia's creditors on bankruptcy, including the AER or municipalities were creditors of PEOC with provable claims at the time of the Transaction".[106]

3. The Trustee's s. 242 claim is a not a "personal claim" belonging to individual creditors

132. As discussed above, the Defendants' assertion that an oppression claim is a "personal remedy belonging to certain stakeholders"[107] was rejected by the courts in *Dylex* and *Olympia & York*.

133. The trial decision in *Olympia & York* and the decision in *Dylex* both recognized the important role of the trustee in advancing claims on behalf of the bankrupt's creditors generally. In *Olympia & York*, Justice Farley stated that:

> Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the *Margaritis* characterization of the trustee in bankruptcy

[104] Rose Affidavit, at para. 74.
[105] *Redwater*, *supra*, at paras. 73-91 **[Trustee's Authorities, Tab 22]**
[106] Perpetual Defendants' Statement of Defence, at para. 55(d); Rose Statement of Defence, at para. 22.2.
[107] Perpetual Defendants' Statement of Defence, at para. 55(b).

> as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case.[108]

134. The Court in *Dylex* stated that:

> The Trustee as the creditors' appointed representative may, therefore, be said to be eligible to qualify as a proper person to seek oppression remedy relief in these circumstances, in conjunction with the other claims it is asserting, all arising out of the same facts. This is consistent with the long-established policy that all proceedings that may be brought for the benefit of the estate (whether they belong to the bankrupt person or the creditors) shall vest exclusively in the trustee. [109]

135. Pursuant to s. 30(1)(d) of the *BIA*, the Trustee is empowered to bring claims that "relate to the property of the bankrupt". The Trustee, however, is not permitted to advance the "personal claims" of individual creditors.

136. Our Court of Appeal in *BDO Canada Ltd. v. Dorais* interpreted the scope of s. 30(d) in allowing a trustee's appeal from a case management judge's ruling that it was not permitted to pursue claims assigned to it by certain creditors.[110] The Court held that:

136.1. The trustee was not entitled to pursue claims for misrepresentations made to the creditors personally, rescission of their individual investment contracts or damages for their own personal losses.[111]

136.2. However, the trustee was entitled to pursue "collective components" in the claims assigned by the individual creditors, including that funds belonging to the insolvent corporation were diverted to a party related to its former principal and were held in trust for the corporation.[112]

137. The Court stated that:

> A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which be the general body of creditors [citation omitted.].

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[108] *Dylex*, *supra*, at para.15, citing Olympia & York, at para. 30 **[Trustee's Authorities, Tab 10]**
[109] *Ibid*, at para. 17 **[Trustee's Authorities, Tab 10]**
[110] *Dorais*, *supra*, at paras. 7 and 23 **[Trustee's Authorities, Tab 15]**
[111] *Ibid*, at para. 10 **[Trustee's Authorities, Tab X]**
[112] *Ibid*, at paras. 3, 4, 5 and 11.

> One of the core duties of a trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupts to the respondents are void. If those claims are successful, those asserts would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these claims on behalf of the general body of creditors is consistent with the Trustee's overall duties. In that respect he is pursuing individual claims of the estates, and is not improperly "stepping into the shoes" of individual plaintiffs.[113]

138. As in *Dorais*, the Trustee is seeking relief from oppression "on behalf of the general body of creditors". Like the relief referred to by our Court of Appeal, any relief obtained by the Trustee under s. 242 would benefit the general body of creditors and not result in the preferential treatment of any particular creditor.[114]

4. The Defendants' conduct was oppressive within the meaning of s. 242

139. Section 242(2) provides that:

> If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards *the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.*[115] [Emphasis added.]

i. The evidence

140. As discussed above, the Defendants' own evidence confirms that:

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[113] *Ibid*, at paras. 12-13 **[Trustee's Authorities, Tab X]**
[114] *Ibid*, at para. 13
[115] *Business Corporations Act*, RSA 2000, c. B-9, s. 242(2) **[Trustee's Authorities, Tab 6]**

140.1. PEOC had at least three creditors at the time of the Asset Transaction, the Municipal District of Opportunity No. 17, Lamont County and Athabasca County, to which payments of $2,170,767 were due by end of July 2016.

140.2. $1,560,809 of those amounts were never paid by Sequoia following the Asset Transaction and remain "outstanding". The Proofs of Claim filed by these three municipalities total $3,622,305.48.

141. Rose's affidavit also confirms that Rose owned shares in PEI at the time of the closing of the Asset Transaction and still owns those shares.[116]

142. The Trustee's evidence included that:

> [48] As sole director of PEOC, which was the trustee for POT at the time of the Asset Transaction, Rose acted on behalf of both parties to the Asset Transaction.
>
> [49] At the time, Rose was the President, CEO and a shareholder of PEI, which controlled POT through its trustee PEOC. Rose personally benefited from the Goodyear Restructuring and allowed POT and PEI to benefit from the Goodyear Restructuring, all to the prejudice of PEOC. The Trustee has seen no disclosure in writing by Rose to PEOC, in the PEOC minute book or elsewhere, of her interest in the Asset Transaction or in any party to the Asset Transaction.
>
> [50] Rose executed a written resolution as director of PEOC on October 1, 2016 to approve the Asset Transaction and to execute the Asset PSA. A copy of the Certified Resolution is attached, as Exhibit Q. Although the preamble to the resolution states that "the directors" believed it was in the best interests of PEOC to execute the Asset PSA and to accept the transfer of the Goodyear Assets, the Trustee has not identified any aspect of the Asset Transaction which benefited or was in the best interests of PEOC.
>
> […]
>
> [57] As a result of the Asset Transaction, PEOC became liable for the municipal property taxes with respect to the Goodyear Assets, with no right to claim reimbursement from POT or anyone else. *As these assets were cash flow negative, PEOC has no ability to pay the taxes*.[117]

143. The Trustee's evidence that PEOC was unable to pay the municipal taxes outstanding at the time of Asset Transaction because PEOC was only left with the "cash flow negative" Goodyear Assets was not challenged in cross-examination, by any of the Defendants.[118]

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[116] Affidavit of Susan Riddell Rose, at para. 79.
[117] Affidavit of Paul Darby, at paras. 48-50, 57.
[118] Transcript of the Cross-Examination of P. Darby on October 22, 2018.

144. The Trustee's evidence regarding the benefit received by Rose personally was confirmed repeatedly in cross-examination, first by counsel for the Perpetual Defendants:

> Q. You never said, "Ms. Rose, did you receive a personal benefit," did you?
> A. No, but the benefit's clear because she owns shares in an entity which was cleaned up by removing liabilities --
> Q. I see.
> A. -- and increasing its asset base. So any stakeholder received a benefit --
> Q. So you were so --
> A. -- for that transaction.
> Q. -- resolute in your determination about the personal benefit that you saw zero value in asking Ms. Rose if she had an explanation? Is that right?
> A. The removal of the liabilities, the increase of the asset base to all stakeholders of Perpetual was a benefit.[119]
>
> […]
>
> Q. So sitting here today, you can't tell me why you didn't ask her?
> A. The benefit she received as a stakeholder of Perpetual as a significant shareholder is clear in the increase in the asset base; the removal of the high, mature, negative cash-flowing assets and a significant portion of their liabilities. The benefit is clear.[120]

145. The Trustee's representative was cross-examined on the same issue by counsel for Rose, and again confirmed his evidence:

> Q. MR. LEITL: Mr. Darby, going back to my questioning about the personal benefit that you opine on in your affidavit, the alleged personal benefit of Ms. Rose. Do you remember we talked about that?
> A. Yes.
> Q. And I think you said -- I'm obviously paraphrasing -- that it was just so obvious to you, you didn't need to ask Ms. Rose anything about it; right?
> A. Yes.
> Q. And if I heard you correctly, my notes are sketchy -- if I heard you correctly, you said in so many words that PEI was able to offload what you see as $250 million in obligations; right?
> A. 220 million.
> Q. Okay.

[119] Transcript of Cross-Examination of P. Darby, at p. 71, lines 7-22.
[120] Transcript of Cross-Examination of P. Darby, at p. 72, lines 8-14.

A. Call it.
Q. And you'll agree with me that if a company was able to offload a company like PEI, $220 million in obligations for no consideration, that would be material?
A. Yes.
Q. And you would expect that to have a positive impact on the share price?
A. Unless the shares were overvalued to start with.
Q. Unless they were overvalued to start with? Is that what you said?
A. Markets don't nationally make sense, so...
Q. But you do, all of -- other things being equal, assume and expect that the announcement by a company of an ability to offload $220 million in debt at no cost would have a material positive impact on its share price?
A. It is positive for the company, yes.
Q. Yes. Did you study the share trading -- the share price history of PEI over the period?
A. No.
Q. You didn't even look at it?
A. No.
Q. So you just assumed it happened?
A. I didn't assume it went up at all.
Q. I see. Can you look at Exhibit EE to Ms. Rose's affidavit? Do you have that in front of you?
A. Yeah.
Q. And you'll see -- it's printed small, but if you look at the dates, under "9/26," September 26, the day before the Deal was announced, PEI's share price closed at $1.78. Do you see that?
A. Yeah.
Q. And 30 days later you'll see at the very top it closed at $1.57?
A. Yeah. That's a short-term window that you're looking at.
Q. Is that -- do you think --
A. And clearly --
Q. -- you're answering a question of mine now? Sir, do you think you're answering a question of mine? You're not, are you? My question was, do you see that 30 days later it closed at $1.57, and you agree with me; right?
A. I can see what you're pointing to me, but I don't agree with --
Q. And now you're trying to --
A. -- the timeframe --
Q.
-- advocate a position for your client, and I would ask you to just answer the questions, okay? If your counsel has questions on re-examination, they can do it. I'm asking you not to be an advocate. Is that fair?
A. Yes.[121]

[121] Transcript of Cross-Examination of P. Darby, at p. 95-98.

ii. The law

146. The foundational decision on personal liability for creditor oppression is the Ontario Court of Appeal's decision in *Downtown Eatery*, which concerned asset-stripping by directors carried out for their personal benefit.[122]

146.1. A wrongfully dismissed employee obtained a substantial judgment against the corporation but was unable to enforce his judgment because the corporation had ceased operations in advance of the wrongful dismissal trial. The employee commenced a second action against the corporation's directors and affiliates, seeking, *inter alia*, relief from oppression under the Ontario *Business Corporations Act* (the "***OBCA***"). [123]

146.2. The trial judge in the second action dismissed the employee's oppression claim on the basis that the directors had not reorganized the corporations "for the purpose of" rendering his former employer judgment proof.[124]

147. The Ontario Court of Appeal allowed the employee's appeal on the oppression issue:

147.1. The trial judge erred in failing to appreciate that oppressive conduct "need not be undertaken with the intention of harming the complainant."[125]

147.2. A creditor has status to seek relief from oppression under the *OBCA*.[126]

147.3. As a judgment creditor, the employee had a reasonable expectation that the directors would retain sufficient assets in the corporation to satisfy his claim.[127]

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[122] *Downtown Eatery (1993) Ltd. v Ontario*, 54 OR (3d) 161 (*Downtown Eatery*) (ONCA) **[Trustee's Authorities, Tab 24]**
[123] *Ibid*, at paras. 3, 49 and 55 **[Trustee's Authorities, Tab 24]**
[124] *Ibid*, at para. 16 **[Trustee's Authorities, Tab 24]**
[125] *Ibid*, at para. 56 **[Trustee's Authorities, Tab 24]**
[126] *Ibid*, at para. 57 **[Trustee's Authorities, Tab 24]**
[127] *Ibid*, at para. 61 **[Trustee's Authorities, Tab 24]**

147.4. The directors and shareholders benefitted directly from their oppressive conduct: they stripped assets from the entity facing a judgment and transferred the assets to other entities they controlled.[128]

147.5. The Court granted judgment against the directors personally, as well as the related corporations they controlled.[129]

148. *Downtown Eatery* stands for the proposition that a director can be personally liable for oppression where he or she benefits personally from the oppressive conduct and that a creditor can be entitled to oppression relief where there is asset-stripping by the debtor

149. *Downtown Eatery* was cited with approval by this Court in *864789 Alberta Ltd. v. Haas Enterprises*, a decision concerning an application for oppression relief in the context of non-arm's length transactions between related corporations.[130] The facts relating to the allegedly oppressive transaction, as found by the Court, were that:

149.1. The corporate complainant ("**869**") was a minority shareholder in a corporation ("**Leasing**") and the complainant's principal was an employee of both Leasing and its wholly owned subsidiary, the operating entity ("**ACT**"). The director of Leasing and ACT also controlled the majority shareholder in Leasing, ("**Enterprises**").[131]

149.2. There was a USA in place, providing that upon termination of employment, there would be a compulsory buyout of 869's shares in Leasing.[132]

149.3. The employment of 869's principal was terminated and 869 was unwilling to accept the price tendered for its shares in Leasing.[133]

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[128] *Ibid*, at paras. 60 and 62 **[Trustee's Authorities, Tab 24]**
[129] *Ibid*, at para. 64 **[Trustee's Authorities, Tab 24]**
[130] *864789 Alberta Ltd. v Haas Enterprises*, 2008 ABQB 555 (*Haas*) **[Trustee's Authorities, Tab 25]**
[131] *Ibid*, at paras. 5-7, 40 **[Trustee's Authorities, Tab 25]**
[132] *Ibid*, at para. 8 **[Trustee's Authorities, Tab 25]**
[133] *Ibid*, at para. 10-12 **[Trustee's Authorities, Tab 25]**

149.4. The respondents took the position that the buyout was no longer proceeding, on the basis that the USA did not apply because the employee was employed by ACT, not Leasing.[134]

149.5. When another claim against ACT arose, ACT and Leasing transferred their assets and employees to another entity controlled by Enterprises, in which the Applicants had no interest. ACT and Leasing were then dissolved.[135]

150. Justice Shelley found it was oppressive for the respondent director to terminate the business and transfers the assets of the parent and subsidiary in the face of the applicants' claims, "without maintaining any reserve for this potential liability."[136] Her Ladyship held that:

> The effect of not maintaining such a fund is itself oppressive, regardless of whether, as the Applicants claim, the Respondents deliberately planned to impede successful recovery on a judgment.[137]

151. In determining the proper remedy, Justice Shelley noted that the applicant's shares in Leasing had been rendered worthless and that Leasing would be unable to pay any judgment made against it.[138] Although the applicants had sought to appoint a receiver in respect of ACT and Leasing, they had been wound up before the motion could be heard.[139]

152. The Court determined that the most appropriate remedy was to grant judgment against Leasing and its director personally for the full value of the corporate complainant's Leasing shares prior to the asset-stripping transactions.[140] In deeming those transactions to have been set aside for the purposes of valuing the shares, Justice Shelley stated that:

> The most appropriate remedy in the case before me is to restore [the complainant corporation] to the same position it would have been in had the oppressive conduct not occurred. Had [the director] not used his position as director to cause Enterprises to breach its contract obligation to purchase the [corporate complainant's] shares, and had the corporation not then been stripped of its assets and wound up, [the corporate complainant] would have been in a position to

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[134] *Ibid*, at para. 13 **[Trustee's Authorities, Tab 25]**
[135] *Ibid*, at para. 14 **[Trustee's Authorities, Tab 25]**
[136] *Ibid*, at para. 51 **[Trustee's Authorities, Tab 25]**
[137] *Ibid* **[Trustee's Authorities, Tab 25]**
[138] *Ibid*, at para. 61 **[Trustee's Authorities, Tab 25]**
[139] *Ibid* **[Trustee's Authorities, Tab 25]**
[140] *Ibid*, at paras. 63-66 **[Trustee's Authorities, Tab 25]**

receive the full purchase price of the shares as at August 15, 2005, as originally contemplated by and required under the 2000 USA.[141]

[141] *Ibid*, at para. 63 **[Trustee's Authorities, Tab 25]**

Issue 6: Whether the Trustee's Claims against Rose should be Dismissed on some Basis

1. The Release has no effect on the Trustee's claims against Rose

153. In her Statement of Defence, Rose pleads a clause from the Release, highlighting certain passages:

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

154. Rose pleads that "Claim" is defined broadly in the Share Purchase Agreement and therefore the Trustee is "barred and estopped" from making the claims against Rose set out in its Statement of Claim.[142]

155. Rose also pleads that the Trustee "has no standing" under s. 96 of the BIA "to ask this Court to review the Resignation and Mutual Release Agreement."[143]

156. In its Statement of Claim, the Trustee pleads that Rose took steps to cause PEI to obtain from 198:

> [R]eleases executed by PEOC's new directors, *purporting to release Rose* from any claims by PEOC related to her conduct as a director of PEOC, *contrary s. 122(3) of the ABCA*.[144] [Emphasis added.]

157. Section 122(3) of the *ABCA* provides that:

> Subject to section 146(7), *no provision in a contract*, the articles, the bylaws or a resolution *relieves a director or officer from the duty to act in accordance with this Act* or the regulations *or relieves the director or office from liability for breach of that duty*.[145] [Emphasis added.]

158. This Court considered the effect of s. 122(3) in *Tongue v. Vencap Equities Alberta Ltd.*, which concerned, *inter alia*, claims for breach of fiduciary duty brought against a

[142] Rose's Statement of Defence, at paras. 27-29.
[143] Rose's Statement of Defence, at para. 26.
[144] Statement of Claim, at para. 16.5.
[145] *Business Corporations Act*, RSA 2000, c. B-9, s. 122(3) **[Trustee's Authorities, Tab 6]**

corporation's directors.[146] In finding in favour of the plaintiffs, the Court rejected the directors' argument that they were entitled to rely on releases given by the plaintiffs.[147]

159. Among the various grounds precluding the fiduciaries from relying on the releases was s. 122(3)'s *CBCA* equivalent, which the Court interpreted as follows:

> Therefore, no provision in a contract, *including the Releases*, can relieve Negin, Schwartz, Siebel, Lindseth, Whittle and Edmond from their duty to act in accordance with the C.B.C.A. *or their liability for a breach of the C.B.C.A.* Directors cannot obtain a valid release from liability for future breaches of the C.B.C.A. These directors breached s. 131 of the C.B.C.A. thinking they were immune from liability because of the Releases. *They thought that directors could contract out of their duties under the C.B.C.A. in this manner. They were wrong.*[148] [Emphasis added.]

160. The Trustee is not seeking "to review the Resignation and Mutual Release Agreement pursuant to s. 96", as Rose contends.

161. As in *Vencap*, s. 122(3) simply precludes Rose from relying on the Release to relieve her "from liability for breach" of her directors' duties, including her fiduciary duty and duty of care. Like the directors in *Vencap*, Rose could not "contract out" of her directors' duties by purporting to obtain a release from PEOC.

162. As Rose cannot rely on the Release, there is no merit to this ground for dismissing the Trustee's claims against her.

2. Section 122(4) of the *ABCA* is of no assistance to Rose

163. Although Rose's Statement of Defence makes no reference to s. 122(3), it does refer to s. 122(4), which provides that:

> In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, *if the director is elected by or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors*, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.[149]

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[146] *Tongue v. Vencap Equities Alberta Ltd.*, [1994] 5 W.W.R. 674 (*Vencap*), at paras. 1-2 **[Trustee's Authorities, Tab 26]**
[147] *Ibid*, at paras. 138-141
[148] *Ibid*, at para. 139.
[149] *Business Corporations Act*, RSA 2000, c. b-9, s. 122(4)

164. It is unclear from Rose's Statement of Defence how s. 122(4) is alleged to be applicable in the circumstances, or of assistance to her, if is applicable. Rose simply pleads that:

> Rose's fiduciary duty to PEOC concerned the best interests of PEOC, and Rose fulfilled her duty in that regard. PEI ratified and affirmed the conduct of Rose as a director of PEOC. PwC, as trustee in bankruptcy of Sequoia appointed 18 months after Rose's resignation, has no standing to assert otherwise. Rose pleads s. 122(4) of the ABCA.[150]

165. Section 122(4) applies only where (i) there are multiple directors and (ii) one or more directors is elected or appointed:

165.1. by the holders of "a class or series of shares"; or

165.2. by "employees or creditors or a class of employees or creditors".[151]

166. It is common ground that PEOC was a wholly-owned subsidiary of PEI and that Rose was the sole director of PEOC until her resignation on October 1, 2016.[152]

167. Rose was the *sole director* of PEOC, appointed by its *sole shareholder*, PEI. There is no suggestion that:

167.1. PEOC had more than one class or series of shares, each of which was entitled to elect or appoint a director.

167.2. The employees or creditors of PEOC were entitled to elect or appoint a director.

168. Accordingly, s. 122(4) has no application to Rose.

169. In any event, even where s. 122(4) is applicable, a director elected or appointed by the holders of a particular class or series of shares is required to act in the best interests of the corporation and may not act in a way detrimental to the corporation.

170. In *Horsehead Holding Corp., (Re)*, the Ontario Superior Court of Justice considered an application brought by the Canadian subsidiary of a U.S. parent company in the *CCAA*

[150] Rose's Statement of Defence, at para. 32.
[151] *Business Corporations Act*, RSA 2000, c. B-9, s. 122(4).
[152] Statement of Claim, at paras. 3 and 15.1; Rose's Statement of Defence, at paras. 6, 7, 10.1 and 10.2

context.[153] Three of the subsidiary's four directors were U.S. residents and also directors of related U.S. corporations.[154] The only Canadian director was a partner of the Canadian law firm representing the corporate group.[155]

171. The Court reminded the directors of the Canadian subsidiary that their fiduciary duties were owed to the Canadian subsidiary:

> The directors of Zochem [the Canadian subsidiary] *have fiduciary duties to Zochem*. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.* [citation omitted] Justice Farley stated clearly that the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:
>
> > It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. *However, the role that any director must play (whether or not a nominee director) is that the must act in the best interests of the corporation*. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, it must be the way that he conscientiously believes after a reasonable review *is the best for the corporation*. The nominee director's obligation to his "appointing" shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, although likely initially unwelcome, may well be valuable to the appointer in the long run. *The nominee director cannot be a "Yes man"; he must be an analytical person who can say "Yes" or "No" as the occasion requires (or to put it another way, as the corporation requires)*. [Emphasis added.]

172. Although corporate law has evolved significantly since Justice Farley's 1991 decision in *Ballard*, the core proposition recently cited with approval in *Horsehead* remains valid: even a director appointed by the holders of a class or series of shares owe their fiduciary duty to the corporation itself. They cannot simply follow orders from the controlling shareholder who appointed them.

173. Section 122(4) has no application to Rose because PEOC had only one director and shareholder. Even if it were applicable, s. 122(4) is of no assistance to Rose.

174. There is no merit to this ground for dismissing the Trustee's claims against Rose.

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[153] *Horsehead Holding Corp., Re,* 2016 ONSC 958, at paras. 1-3 (*Horsehead*) **[Trustee's Authorities, Tab 27]**
[154] *Ibid*, at para. 9 **[Trustee's Authorities, Tab 25]**
[155] *Ibid* **[Trustee's Authorities, Tab 25]**

Issue 7: Whether the Trustee's Claim for Relief on the Grounds of Public Policy, Statutory Illegality and Equitable Rescission should be Struck

1. The Defendants' arguments

175. The Trustee pleads that the Asset Transaction, the Share Transaction and the Retained Interests Transactions (collectively, the "**Transactions**") are void:

175.1. on public grounds, for being contrary to the public policy reflected in Alberta's oil and gas regulatory regime (the "**Regulatory Regime**");

175.2. on the basis of statutory illegality, as they were expressly or implied prohibited by the Regulatory Regime; and

175.3. on equitable grounds, for the reasons in the circumstances set out in the Trustee's Statement of Claim.

176. The Trustee seeks an Order setting aside the Asset Transaction and declaring it void as against the Trustee.

177. The Defendants advance various arguments in favour of striking these claims on the basis that they do not disclose a reasonable claim, constitute an abuse of process and are frivolous irrelevant or improper:

177.1. The Trustee has no authority under the BIA to plead such claims;[156]

177.2. This Court has "no jurisdiction to adjudicate such claims";[157]

177.3. The "doctrine of illegality, including conduct contrary to public policy, can only be used as a defence to oppose the enforcement of rights by a plaintiff";[158] and

[156] Rose's Statement of Defence, at para. 38.
[157] Rose's Statement of Defence, at para. 39.
[158] Perpetual Defendants' Statement of Defence, at para. 59.

177.4. Equitable rescission or other relief on equitable grounds "can only be granted in cases of fraud, innocent misrepresentation and where a contract is obtained by unconscionable acts, none of which is alleged nor exists".[159]

2. The Trustee is authorized to pursue these claims

178. The Defendants' argument on this issue is a variation of their argument that the Trustee lacks standing to pursue non-*BIA* claims for oppression relief and breaches of Rose's duties as a director. As discussed above, these arguments are without merit.

179. In *Dylex*, the Court declined to strike the Trustee's claims for oppression relief and breach of fiduciary against the bankrupt company's former directors.[160] In reaching this conclusion, the Court noted that "it has been well recognized that a trustee in bankruptcy is not limited to the remedies specifically available under the *[BIA]*."[161] The Court cited a fraudulent preference action as a non-*BIA* claim that could be advanced by a trustee.[162]

180. In *Dorais*, also discussed above, our Court of Appeal allowed a trustee's appeal from a case management judge's order that it was not permitted to seek a declaration that certain transfers were void or to advance a constructive trust claim against an individual related to its former director.[163] As in *Dylex*, the Court confirmed that the trustee was entitled to pursue non-*BIA* claims that would benefit the general body of creditors:

> Actions under the [*Fraudulent Preferences Act*] are brought on behalf of all creditors, not just one prosecuting the action [citation omitted]. A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which would be the general body of creditors.[164]

181. Advancing claims of this nature was "consistent with the Trustee's overall duties" because it would benefit the general body of creditors and not result in any preferential payment or treatment of any particular creditor.[165]

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[159] Perpetual Defendants' Statement of Defence, at para. 60.
[160] *Dylex*, *supra*, at para. 22 **[Trustee's Authorities, Tab 10]**
[161] *Ibid*, at para. 19 **[Trustee's Authorities, Tab 10]**
[162] *Ibid* **[Trustee's Authorities, Tab 10]**
[163] *Dorais*, *supra*, at paras. 11 and 23 **[Trustee's Authorities, Tab 15]**
[164] *Ibid*, at para. 12 **[Trustee's Authorities, Tab 15]**
[165] *Ibid*, at para. 13 **[Trustee's Authorities, Tab 15]**

182. The Trustee applies to set aside the Asset Transaction, *inter alia*, on grounds of public policy, statutory illegality and equitable grounds. As in *Dorais*, the Trustee is entitled to pursue this claim because:

182.1. The Trustee is not limited to pursuing *BIA* relief, as the Defendants contend.

182.2. Pursuant to ss. 30(1)(d) and 72 of the *BIA*, the Trustee can pursue non-*BIA* relief that accrues to the advantage of the general body of creditors; and

182.3. Setting aside the Asset Transaction would accrue to the benefit of Sequoia's creditors generally.

3. The Court has jurisdiction to adjudicate these claims

183. In her Statement of Defence, Rose pleads that:

> This Honourable Court has no jurisdiction to adjudicate such claims. That the AER is dissatisfied with the scope of its mandate and power is a matter for the Legislature.[166]

184. Without the benefit of Rose's submissions, it is difficult to "fill in the blanks" and anticipate what Rose's argument will be on this point.

185. However, Rose's allegation that the Court "has no jurisdiction to adjudicate such claims" appears inconsistent with the Perpetual Defendants implied admission that the Court *can adjudicate these issues*, but only when they are raised "as a defence to oppose enforcement of rights by a plaintiff".[167]

186. There can also be no suggestion that the Court "has no jurisdiction to adjudicate" the Trustee's equitable rescission claim.[168] Even the Perpetual Defendants do not make that contention.[169]

[166] Rose's Statement of Defence, at para. 1.
[167] Perpetual Defendants' Statement of Defence, at para. 60.
[168] Perpetual Defendants' Statement of Defence, at para. 60.
[169] Perpetual Defendants' Statement of Defence, at para. 60.

187. Accordingly, it appears that the real issue raised by the Defendants with respect to the public policy and statutory illegality issues is whether they can support a claim or can only be relied on as defences.

4. The Trustee is entitled to seek a declaration that the Asset Transaction is void, on the basis of public policy or statutory illegality

188. In their Statement of Defence, the Perpetual Defendants allege that:

> The doctrine of illegality, including conduct contrary to public policy, *can only be used as a defence* to oppose the enforcement of rights by plaintiff.[170]

189. This is not a correct statement of the law. A plaintiff may seek a declaration that the impugned agreement is void, as the Trustee has done in the present Action.[171]

190. In *Sidmay Ltd. v. Wehttam Investments Ltd.*, the Ontario Court of Appeal considered a mortgagee's appeal from a judgement in favour of the plaintiff mortgagor declaring that the mortgage was void and unenforceable on the basis of statutory illegality.[172]

191. The Court allowed the appeal on the basis that the transaction at issue was not illegal.[173] However, it proceeded to consider the law governing statutory illegality, concluding that:

> There is a general rule that the Court will not render assistance to the enforcing of any rights of parties to an illegal contract unless the party claiming relief before the Court can bring himself within the class of persons for whose protection the illegality of the contract was created.[174]

192. The Court also noted the decision in *Chapman v. Michaelson*, which stands for the proposition that a trustee appointed in respect of a party to an illegal transaction may apply to the Court for a declaration as to the illegality of the transaction.[175]

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[170] Perpetual Defendants' Statement of Defence, at para. 59.
[171] Statement of Claim, at para. 1.
[172] *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] 1 O.R. 508 (*Sidmay*), at paras. 1 and 6 **[Trustee's Authorities, Tab 28]**
[173] *Ibid*, at paras. 42-44 **[Trustee's Authorities, Tab 28]**
[174] *Ibid*, at para. 58 **[Trustee's Authorities, Tab 28]**
[175] *Ibid*, at para. 54, citing *Chapman v. Michaelson*, [1908] 2 Ch. 612; aff'd [1909] 1 Ch. 238 **[Trustee's Authorities, Tab 28]**

193. Per *Chapman*, the Trustee is entitled to seek a declaration as to the illegality of the Asset Transaction.[176]

194. Accordingly, the Perpetual Defendants' allegation that "no action can be brought to declare contracts void" is without merit.[177]

195. In any event, the Court in *Sidmay* confirmed in *obiter* that a party can seek relief from the Court in relation to an illegal transaction as long as "it can bring himself within the class of persons for whose protection the illegality of the contract was created."[178]

196. As in *Dorais*, the Trustee is entitled to seek relief on behalf of the general body of creditors.[179] The Trustee pleads that, in addition to being contrary to public policy and explicitly or implicitly prohibited, the Asset Transaction "unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors" including by:

    196.1. Rendering PEOC insolvent, if it was not already insolvent;

    196.2. Rendering PEOC unable to pay the municipal property taxes with respect to the Goodyear Assets; and

    196.3. Rendering PEOC unable to pay the ARO associated with the Goodyear Assets.

197. The Defendants cannot establish that the creditors of PEOC, including its contingent creditors, are not "persons for whose protection" the Regulatory Regime was created.

5. The claim for equitable rescission should not be struck

198. In their Statement of Defence, the Perpetual Defendants plead that:

> There is no basis for equitable rescission or other relief on equitable grounds. Such relief can only be granted in cases of fraud, innocent misrepresentation and where a contract was obtained by unconscionable acts, none of which is alleged or exists. In any event, a remedy of declaring the contract void for this reason is unavailable

[176] *Ibid*, at para. 54 **[Trustee's Authorities, Tab 28]**
[177] Perpetual Defendants' Statement of Defence, at para. 59.
[178] *Sidmay*, *supra*, at para. 58 **[Trustee's Authorities, Tab 28]**
[179] *Dorais*, *supra*, at paras. 12-13 **[Trustee's Authorities, Tab 15]**

> because of the impossibility of restoring the parties to their pre-contractual position over two years after the Transaction.[180]

199. With respect to the second issue raised in the above paragraph, the Perpetual Defendants allegation is inconsistent with the law on equitable rescission, cited by this Court in *Houle v. Knelsen Sand and Gravel Ltd.*:

> [51] However, where the parties can be placed in a position equivalent to where they first started, equitable rescission is flexible and generous: [citation omitted.]. In *Canadian Deposit Insurance Crop. v. Canadian Commercial Bank* [citation omitted.], Wacowich J. (as he then was wrote):
>
> > In rescinding a contract a Court strives to place the parties back in the position they were in before they entered into the contract. It is not always possible to restore the parties to precisely the same position. The position is succinctly stated in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas 1218 at 1278:
> >
> > …the practice has always been for a Court of Equity to give this relief whenever by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. [Emphasis added.]
>
> [52] 'Practical justice' is also noted by the Supreme Court of Canada in *Redican v. Nesbitt*, [1923] SCR 135 at para. 90.
>
> [53] Courts can tailor relief by using mechanisms such as adjustments, compensation, indemnification and account of profits to ensure both sides find themselves in a position equivalent to the position they started in: *McInnis* at 1435.[181]

200. There is no evidence that the Defendants could not be placed in a position "equivalent to where they first started" before the Goodyear Assets were transferred to PEOC in the Asset Transaction.

201. In any event, this is not a basis to strike the Trustee's equitable rescission claim.

202. The other basis advanced by the Defendants for striking the Trustee's equitable rescission claim is that the agreement must have been "obtained by unconscionable acts, none of which is alleged or exists."

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[180] Perpetual Defendants' Statement of Defence, at para. 60.

[181] *Houle v. Knelsen Sand and Gravel Ltd.*, 2015 ABQB 659, at paras. 51-53, appeal allowed on other grounds, 2016 ABCA 247 **[Trustee's Authorities, Tab 29]**

203. In its Statement of Claim, the Trustee pleads that the Asset Transaction is void "on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim."[182]

204. As our Court of Appeal pointed out in *HOOPP*, excerpted allegations in a Statement of Claim cannot be viewed in isolation; they must be placed "in the entire context of the pleading."[183]

205. The Trustee's pleads that all the circumstances set out in the Statement of Claim constitute the grounds for equitable rescissions. The "unconscionable acts" the Defendants allege are required would include:

    205.1. The Defendants causing PEOC, POT and POC to enter into the Retained Interests Agreement to support PEOC's LLR so as "to allow the Asset Transaction and Share Transaction to be completed without regulatory intervention by the AER;[184] and

    205.2. Rose breaching her duties as the sole director of PEOC, including by causing PEOC to enter into the Asset Transaction for her own benefit and at the expense of PEOC and its creditors.[185]

206. Even if the evidence did not support these allegations, as it does, they must be assumed to be true for the purposes of an application to strike.[186]

207. Accordingly, there is no basis to strike the Trustee's equitable rescission claim.

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[182] Statement of Claim, at para. 24.3.
[183] *HOOPP*, *supra*, at paras. 14 and 15 **[Trustee's Authorities, Tab 4]**
[184] Statement of Claim, at paras. 10-11.
[185] Statement of Claim, at paras. 15-20.
[186] *Colony Management*, *supra*, at para. 28 **[Trustee's Authorities, Tab 5]**

PART IV - RELIEF SOUGHT

208. The Trustee respectfully requests that the Applications be dismissed, with costs.

Calgary, Alberta
November 1, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DE WAAL LAW

Per: _____
Rinus de Waal/Luke Rasmussen
Counsel for the Respondent,
PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp.

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