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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	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 DEFENDANT SUSAN RIDDELL ROSE** ***Applications before the Honourable Mr. Justice B. Nixon November 8, 2018***

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1 - INTRODUCTION

1. The Defendant Susan Riddell Rose (**Rose**) respectfully tenders this Brief in support of her applications filed August 27, 2018: Application to Resolve Particular Questions and to Stay the Plaintiff's Application (the **Stay Application**), and Application for Summary Dismissal, as amended (the **Dismissal Application**).

2. The Stay Application seeks orders:

   (a) that the Dismissal Application be determined urgently and prior to the hearing of the Plaintiff's application for judgment on its Statement of Claim (the **Plaintiff's Application**); and

   (b) that the action and Plaintiff's Application be stayed pending such determination.

3. The Dismissal Application seeks orders dismissing or striking the Plaintiff's claims against Rose.

PART 2 - BACKGROUND

4. On March 23, 2018, the Plaintiff, PriceWaterhouseCoopers Inc., was appointed as the trustee in bankruptcy (the **Trustee**) of Sequoia Resources Corp. (**Sequoia**). Sequoia is the successor to Perpetual Energy Operating Corp. (**PEOC**).

5. The Statement of Claim impugns one selected element of a complex transaction (the **Transaction**) completed on October 1, 2016, pursuant to which the parent of PEOC, the Defendant Perpetual Energy Inc. (**Perpetual** or **PEI**), transferred ownership of certain oil and gas assets (the **Goodyear Assets**) to an arm's length third party, 1986114 Alberta Inc. (**198**).

6. PEOC, a single-purpose wholly-owned subsidiary of Perpetual, held the legal interests in the Goodyear Assets in trust. The beneficial interests were held by the defendant Perpetual Operating Trust (**POT**). In order to effect the Transaction, the beneficial interests were conveyed to PEOC (the **Asset Transaction**) and the shares of PEOC were conveyed to 198 (the **Share Transaction**). There were various other agreements that, together with the Share Transaction and the Asset Transaction, comprised the Transaction.

7. Immediately following closing of the Transaction, PEOC, now under new ownership and management, changed its name to Sequoia.

8. Under a new business plan, Sequoia arranged for financing, acquired additional assets from third parties, decommissioned some of the Goodyear Assets, and operated other Goodyear Assets. Sequoia made its own arrangements with its suppliers and creditors.

9. Due to the collapse in natural gas prices and decisions made by Sequoia's management, Sequoia's business plan failed. In March 2018, in the second year following the closing of the Transaction, Sequoia filed for bankruptcy. In a public letter to its stakeholders[1], Sequoia recounted what had happened:

> [Sequoia] was formed in October of 2016 to implement a gas acquisition strategy during what was thought to be the bottom of the gas price cycle. The strategy involved acquiring gas assets, some of which were close to the end of their life-cycle, and work on reducing the operating costs of these assets, in part through the implementation of an aggressive abandonment and reclamation program that would see the restoration of the lands and inactive wells acquired from previous producers back to their original state prior to the commencement of oil and gas activities.
>
> Generally, the completion of abandonment and reclamation activities reduces surface and mineral rental costs and other ongoing expenses, thus reducing overall operating costs. However, up-front capital is required to complete these abandonment and reclamation activities. [Sequoia] believed that by completing abandonments in strategic groups (i.e. on an area by area basis) and completing portions of the abandonment process in-house, [it] would be able to clean up legacy obligations more efficiently and economically than under an otherwise less structured program. To this end, [Sequoia] created an internal abandonment and reclamation team with in-house environmental functions, guided by a seasoned and established operational team, most of whose members have had more than 20 years of experience in Alberta managing these same acquired assets.
>
> Operations commenced on October 1, 2016 and [Sequoia] immediately began its aggressive abandonment and reclamation program. From October 1, 2016 to December 31, 2017, SRC abandoned 150 wells and received reclamation certificates for 91 wells.
>
> Due to its outsized focus on cleaning up environmental liabilities, [Sequoia] ranked fifth in the province of Alberta in terms of reclamation certificates received for the period October 1, 2016 to December 31, 2017.[2] Ahead of [Sequoia] were CNRL, Husky, Cenovus and Paramount, each major Alberta producers that are orders of magnitude larger than [Sequoia], a small start-up. Further, [Sequoia] did not drill any new wells or contribute to the creation of any new environmental obligations during its existence and focused all of its cash on either rehabilitating legacy assets through workover programs or the suspension, abandonment and

[1] Schweitzer Affidavit, paras. 24-5, Ex. A.
[2] Darby cross-exam. 95/3-12.

reclamation of those assets which had completed their productive life and restoring the associated lands to their original condition, in accordance with applicable AER and environmental requirements.

[Sequoia] also implemented other cost reduction programs throughout its operations from field to head office and took advantage of the low cost of office space in Calgary to build a very low G&A, and a lean but experienced and effective team.

These strategies were successful and on target through to the end of the summer of 2017. [Sequoia] steadily increased its production and reduced its overall environmental liabilities.

However, by the end of the summer of 2017, gas prices in Alberta began to slide. In October, where gas had averaged $2.95/GJ over the past four years, prices collapsed to an average of $1.32/GJ for 2017 (source for all historic prices: www.cga.ca). On certain days in October, gas traded at negative prices; producers such as [Sequoia] paid purchasers to take the gas instead of getting paid. During the 2017/2018 winter (Nov. to Mar., inclusive), at a time when gas prices are typically higher seasonally as heating demand peaks, and where historic prices have averaged $3.07/GJ for the past four years, prices for the 2017/2018 winter were $2.04/GJ. During the spring of 2018, gas prices and especially gas futures continued to collapse. The 2018 summer forecast is now $1.13/GJ (source for forward prices: www.gasalberta.com as of today's date). Forecast pricing for 2019, 2020 and 2021 are also very significantly down from forecast pricing when [Sequoia] began operations. Unfortunately, the turn in prices did not appear to be just a short term anomaly. [Sequoia], as a "dry" gas company also does not benefit from high liquids pricing as does some of its non "dry" gas competitors.

As prices continued to drop, [Sequoia's] management investigated various options to diversify its gas exposure, to sell assets, to re-capitalize, to convert vehicle fleets to use compressed natural gas, to purchase generators and convert gas to electricity for sale to the grid. [Sequoia] even investigated using gas to generate electricity for cryptocurrency mining. In this environment, both purchasers of dry gas assets and refinancing providers were difficult to find. None of the special projects had the economics or scale to make a significant enough difference, especially when factoring in the newly implemented and escalating carbon levy.

Ultimately, as a result of the low price environment, [Sequoia] could not complete its abandonment program or continue to operate without sustaining significant losses. [Sequoia] attempted but was unsuccessful in negotiating with municipalities to reduce its tax burden for 2017 and 2018. Municipal taxes do not scale with gas prices and so in a low price environment account for a significant portion of [Sequoia's] costs. [Sequoia] also attempted but was unable to obtain refinancing necessary to outlast this protracted price collapse.

As a result of these developments, on February 22, 2018 [Sequoia] met with the AER to discuss the options available to [Sequoia] for shutting down operations in a safe and orderly manner. On notice to the AER, [Sequoia] began closing down its biggest loss centres, following a plan for the shut-in of the remaining assets. [Sequoia] continued to meet with the AER to work collaboratively and ensure that environmental and safety concerns were addressed throughout the shut-down of operations.

> [Sequoia] entered into this project believing it had a workable strategy to create a sustainable and profitable gas company through a methodical abandonment and reclamation program, with a focus on efficiency. None of the directors were ever paid any fees or remuneration and none of the shareholders (the majority of whom are Canadian) received any dividends or return of capital. This unfortunate outcome is not what anyone had hoped for, and should not have been the end result after the extraordinary dedication, creativity and hard work from the employees and partners of [Sequoia] over the past year and a half.
>
> The Board of Directors and Management Team at [Sequoia] sincerely wish to thank [Sequoia's] employees and partners for all of their contributions. [Emphasis added.][3]

PART 3 - TRUSTEE'S CLAIM THEORIES

10. The Statement of Claim seeks to look back to 2016, impugning only the Asset Transaction, on the basis of four theories:

(a) **BIA Claim** – the Asset Transaction, *when viewed in isolation* from the balance of the arm's length Transaction (rather than, as was the case, as an embedded step in the Transaction), was a non-arm's length transfer at undervalue within the meaning of s. 96(1)(b)(ii) of the *Bankruptcy and Insolvency Act* (the **BIA**)[4];

(b) **Oppression Claim** – the Asset Transaction (in isolation) was oppressive of the interests of *particular alleged creditors* of PEOC within the meaning of ss. 239 and 242 of the Alberta *Business Corporations Act* (the **ABCA**)[5];

(c) **Director Claim** – Rose breached her fiduciary duty and duty of care owed *to PEOC* by approving the Asset Transaction (in isolation)[6]; and

(d) **Public Policy Claim** – the Asset Transaction (in isolation) is void:

(A) on "grounds of public policy" and "statutory illegality" in relation to the public policy underlying the legislation governing the Alberta Energy Regulator (the **AER**); and

---

[3] Schweitzer Affidavit, Ex. A. See also: Trustee's Preliminary Report in the Matter of the Bankruptcy of Sequoia Resources Corp. Estate No.: 25-2351565, page 2.
[4] Statement of Claim, paras. 21-23.
[5] Statement of Claim, paras. 18-20.
[6] Statement of Claim, paras. 15-17.

(B) on "equitable grounds" in relation to the "circumstances" set out in the Statement of Claim.[7]

PART 4 - OTHER APPLICATIONS, PLEADINGS AND AFFIDAVITS

11. On the same date the Statement of Claim was filed, the Trustee filed the Plaintiff's Application. While not portrayed as an application for summary judgment, the Plaintiff's Application seeks final judgment on the entire claim and the following relief:

    (a) an order setting aside and declaring void the Asset Transaction[8]; and

    (b) in the alternative, judgment against each of the Defendants, including Rose, in an amount "not less than $217,570,800.00".[9]

12. On August 27, 2018, Rose filed a Statement of Defence which strongly contests the Trustee's claims. The Perpetual Defendants did the same.

13. In support of the Plaintiff's Application and in response to the Defendants' applications, the Trustee relies on an affidavit sworn by an officer of PriceWaterhouseCoopers Inc., Mr. Paul Darby (the **Darby Affidavit**).

14. In support of their respective Stay Applications, the Defendants filed the Affidavit of Mark Schweitzer sworn October 3, 2018 (the **Schweitzer Affidavit**).

15. In support of their respective Dismissal Applications, the Defendants filed the Affidavit of Susan Riddell Rose sworn October 19, 2018 (the **Rose Affidavit**).

[7] Statement of Claim, para. 24.
[8] The Plaintiff does not seek to set aside any of the other components of the Transaction, including the Share Purchase Agreement and the Release (as defined below).
[9] Plaintiff's Application, paras. 1, 2.

PART 5 - PRIOR PROCEDURAL ORDERS AND DIRECTIONS

16. The Trustee originally returned the Plaintiff's Application on August 30, 2018, conceding from the outset that it could not be heard on that date.

17. On August 30, 2018, the parties appeared before Justice Jeffrey. Counsel for the Trustee submitted that the entire lawsuit should be finally determined through a single day's hearing to be scheduled in only three months' time.[10] Counsel for the Perpetual Defendants and Rose made it clear that the Defendants wish to see the proceeding move quickly so long as it is procedurally fair and efficient. To that end, the Defendants' counsel submitted that the Stay Applications and Dismissal Applications should be heard before the Plaintiff's Application given the dispositive threshold issues to be determined.

18. Justice Jeffrey ordered that:

    (a) the parties were to consult with Justice Horner regarding the appointment of a Calgary Commercial List justice to hear all the applications; and

    (b) the Stay Applications shall be heard as soon as possible and before the hearing of the Plaintiff's Application.[11]

19. On September 18, 2018, Justice Horner directed that the Stay Applications be heard by Justice Nixon on November 8, 2018.[12] Justice Horner stated that should those applications not be successful, the scheduling of the other applications could be made directly with the office of Justice Nixon.

20. Subsequently, the Trustee took the position that the Stay Applications and the Dismissal Applications should be heard together on November 8, 2018, effectively conceding the first component of the Stay Application. The Defendants obliged.

[10] August 30, 2018 hearing transcripts [Tab 59], 4/1-4.
[11] Order granted August 30, 2018 [Tab 60].
[12] Email from office of Horner J. dated September 18, 2018 [Tab 61].

PART 6 - ADOPTION OF PERPETUAL DEFENDANTS' SUBMISSIONS

21. Rose adopts the submissions of the Perpetual Defendants regarding the:

(a) Stay Applications;

(b) applications to dismiss the BIA claim; and

(c) applications to strike the Public Policy Claim.

PART 7 - ROSE APPLICATIONS

22. Rose's Dismissal Application is founded on the following additional grounds:

(a) Rose was fully released from the claims made by the Trustee;

(b) the Trustee does not have, and should not have, standing as a 'complainant' under the ABCA to pursue the Oppression Claim; and

(c) the Director Claim does not disclose a reasonable cause of action.

PART 8 - OVERVIEW OF ROSE SUBMISSIONS

23. This balance of this Brief will address the following:

- Part 9 – The inadmissible and incomplete evidence contained in the Darby Affidavit.
- Part 10 – The conduct of the Trustee that calls into question its neutrality and qualification to proceed.
- Part 11 – The full and final release in favour of Rose which provides a complete bar to the Trustee's claims against her.
- Part 12 – The Trustee's false conception of 'ARO' (asset retirement obligations) that underlies all of its claims.
- Part 13 – Rose's adoption of the submissions of the Perpetual Defendants regarding the law applicable to summary dismissal.
- Part 14 – Why the Trustee does not have authority to sue under the BIA.
- Part 15 – Why the Trustee should not be granted standing as a complainant to pursue the Oppression Claim.
- Part 16 – Why the Director Claim should be struck as disclosing no reasonable cause of action.

PART 9 - DARBY AFFIDAVIT

A. Trustee has no direct knowledge

24. Darby has no direct knowledge of any relevant facts. As conceded to this Court by Trustee's counsel, "… the Trustee … is not a witness to these events. The Trustee is relying on the records obtained from [Perpetual]."[13]

25. Notably, the Trustee has control of all of Sequoia's records regarding its operations since October 2016, yet the Darby Affidavit says nothing about them. This is remarkable given the Trustee's curious allegation that the Defendants were somehow the cause of Sequoia's bankruptcy, which occurred 18 months after the closing of the Transaction.

26. Further, while the Trustee interviewed the principals of Sequoia, Harold Wang and Wentao Yang, it saw no reason to ask them about their participation in the negotiation of the Transaction.[14] While the Trustee's claims against Rose are premised on alleged interests of the AER and unidentified municipalities as creditors of PEOC, the Trustee saw no reason to consult with them about their positions.[15] The Trustee has not even told the AER about its claims based on the AER's alleged interests.[16]

27. As such, the Trustee's evidence is nothing more than partially informed, hearsay-based, interpretations of past, selected events.

B. Darby Affidavit contains inadmissible opinion evidence

28. As a lay witness, Darby conceded that he did not intend to give opinion evidence.[17] Under Alberta law, his opinions are inadmissible.[18]

29. Nonetheless, the Darby Affidavit contains opinion evidence on crucial points. For instance, he gives his opinion that there was oppression.[19] He gives his opinion that

---

[13] August 30, 2018 hearing transcripts [Tab 59], 21/30-32.
[14] Darby cross-exam. 59/19-60/20; 65/2-66/6; 65/26-66/6; 66/16-67/1; 76/24-77/16.
[15] Darby cross-exam. 59/19-60/16; 77/17-79/7.
[16] Darby cross-exam. 79/8-18.
[17] Darby cross-exam. 11/26-12/5; 76/12-23. There may be an exception under s. 96 of the BIA regarding value. Counsel for the Perpetual Defendants will address that as appropriate.
[18] As noted by Justice Major in *R v D(D)*, 2000 SCC 43 [Tab 1] at para 49, "[a] basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved."
[19] Darby Affidavit, para. 51. Darby cross-exam. 69/26-70/6; 81/1-26. This is all the more remarkable given that Darby has never been a corporate officer or director: Darby cross-exam. 6/18-19.

Rose was the "directing mind" of PEOC.[20] This evidence has no probative value, especially when considering that Darby has no direct knowledge of anything.

PART 10 - CONDUCT OF THE TRUSTEE

30. A trustee in bankruptcy is held to high standards. The Trustee is an officer of the Court. This requires, among other things, that the Trustee report all relevant information to the Court and act neutrally.[21] The Trustee is governed by the BIA, as well as a Code of Ethics which requires, among other things, that the Trustee act with high integrity, honesty and impartiality.[22]

31. The conduct of the Trustee is relevant to the Court's assessment of the Trustee's position and the Darby Affidavit. It is relevant to the exercise of the Court's discretion in determining whether the Trustee should be granted standing to pursue the Oppression Claim.

32. The Trustee has not acted in accordance with its duties.

33. Counsel for the Trustee represented to this Court that the Trustee's claim was filed only as a result of Perpetual having failed to provide the Trustee with certain requested information.[23] Incongruously, the Trustee never exercised its broad enforcement powers under s. 164 of the BIA to obtain the information. This claim has nothing to do with a request for additional information.

34. While the Darby Affidavit represents that Perpetual failed to provide relevant information[24], the fact is that Perpetual was cooperative and caught off-guard when this extraordinary law suit was filed.[25] As we have now discovered, the Trustee's "preliminary review" sent to Perpetual on June 26, 2018[26] was in fact the Trustee's final and unbending view.[27] While the Trustee concedes that the law suit against Rose is extraordinary[28], it saw no reason to inform Rose that a law suit was coming, or to ask her a single question about the allegations it planned to make against her. Without any

[20] Darby cross-exam. 80/14-27.
[21] Darby cross-exam. 6/13-15; 8/2-16.
[22] Darby cross-exam. 8/17-11/8, Ex. 2.
[23] August 30, 2018 hearing transcripts [Tab 59], 2/9-17.
[24] Darby Affidavit, paras. 11-13.
[25] Darby cross-exam. 15/2-19/17; 24/20-26/20; 30/5-34/21; 62/25-63/16. Rose Affidavit, paras. 59-63, Exs. X, Y.
[26] Darby Affidavit, Ex. B.
[27] Darby cross-exam. 26/21-27/7; 34/22-35/4.
[28] Darby cross-exam. 67/24-68/2.

direct knowledge of anything, Darby was happy to opine that Rose personally benefitted from the Asset Transaction without having allowed her an opportunity to explain why that view is dead wrong.[29]

35. That is not the conduct expected of an Officer of the Court.

PART 11 - RELEASE IS A COMPLETE BAR TO CLAIMS AGAINST ROSE

A. Introduction

36. Another subject that the Trustee did not ask Rose about was the full and final release in her favour (the **Release**) which bars the Trustee's claims.

37. Nor did the Trustee's counsel ask Rose a single question about the Release during her cross-examination.

B. Facts

38. It is common ground that the Share Purchase Agreement[30] was an extensively negotiated, arm's length agreement made between sophisticated parties who were represented by sophisticated legal counsel.

39. The Trustee does not challenge or seek to set aside the Share Purchase Agreement.

40. Article 8 of the Share Purchase Agreement[31] provided for "Closing and Deliveries". Clause 8.1 set out Perpetual's (Vendor's) closing deliverables, including:

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

41. Clause 8.2 of the Share Purchase Agreement set out 198's (Purchaser's) closing deliverables, including a reciprocal release in favour of Rose:

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

[29] Darby cross-exam. 68/13-75/5.
[30] Rose Affidavit, Ex. H.
[31] Rose Affidavit, Ex. H, pp. 38-39.

42. "Claim" was defined broadly in clause 1.1(m) of the Share Purchase Agreement as "any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing".[32]

43. 198, Perpetual and PEOC negotiated at arm's length and agreed to a written form of "Resignation & Mutual Release" (the Release).[33] As provided for in the Share Purchase Agreement, the new directors of PEOC (under the new ownership of 198) signed on behalf of PEOC.[34] Rose released PEOC and PEI from any Claims relating to her having acted as a director and officer of PEOC. Correspondingly, the Release provides:

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

44. Notably, the Trustee's claims against Rose do not allege fraud, criminal conduct or deceitful conduct. Contrary to the express terms of the Release, the Trustee's claims against Rose are solely in relation to Rose having acted as a director of PEOC.

45. The Release further provides:

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

46. The Trustee was aware of the above provisions of the Share Purchase Agreement and the Release when it sent its preliminary views to Perpetual. The Trustee expressed no

[32] Rose Affidavit, Ex. H, p. 3.
[33] Darby Affidavit, Ex. H. Rose Affidavit, paras. 56-58.
[34] Darby cross-exam. 83/23-84/1.

concerns about the Release at the time.[35] The Trustee's artificial segregation of the Asset Transaction from the Transaction puts it in the unusual, if not untenable, position of conceding that the Release was part of the negotiated Transaction[36], but somehow disconnected from the Asset Transaction (the only transaction it challenges).

47. The Trustee resolved to sue Rose in the face of the Release, and never told her.[37] Despite its mandate as a neutral officer of the Court, the Trustee saw no reason to ask Rose about the Release:

> Q. And nowhere in this letter, Exhibit B, do you mention the release signed in favour of my client, do you?
>
> A. No, it does not mention the release.
>
> Q. Right. So it wasn't a big enough concern then to mention, was it?
>
> A. We were asking for their opinion on these issues.
>
> Q. You didn't ask for their opinion on the release, did you?
>
> A. No.
>
> Q. So you were thinking of a lawsuit against Ms. Rose personally in respect of alleged breaches of her fiduciary duty. You didn't ask for her side of the story; right? We've covered that?
>
> A. We have. The evidence speaks for itself.
>
> Q. Okay. And you were also thinking of suing her in the face of a release in her favour, and you didn't think it was proper to ask about that? Right?
>
> A. Right.[38]

48. The Darby Affidavit is silent on the Release save to acknowledge its existence:

> 28. Rose resigned as a director of PEOC on October 1, 2016. I attach a copy of a "Resignation & Mutual Release", as Exhibit H. <u>It confirms, in the preamble, that Rose acted as a director and officer of PEOC "at the request of" PEI, that the [Share Transaction] required her to resign and that PEI requested her to resign</u>. <u>It also provides that PEI and PEOC agree to release Rose with respect to "having acted, at the request of PEI, as director and officer of PEOC"</u>. Rose was replaced as director of PEOC by Wentao Yang and Hao Wang. [Emphasis added.][39]

49. In contrast, the Rose Affidavit states the following:

> ***Release***
>
> 56. The release of me as a director of PEOC attached to the Darby Affidavit as Exhibit H was negotiated at arm's length between

[35] Darby cross-exam. 82/26-83/15.
[36] Darby cross-exam. 83/14-22.
[37] Darby Affidavit, Ex. B.
[38] Darby cross-exam. 82/7-25.
[39] Darby cross-exam. 68/10-12.

> Perpetual and 198. It was signed on behalf of PEOC by the new directors appointed by 198.
>
> 57. In my experience, it is standard industry practice to release outgoing directors in a change of control. To do otherwise would be highly unusual. Indeed, the retiring directors often receive additional protection, such as extended director and officer liability insurance coverage, which was not extended to me upon my resignation and release by PEOC.
>
> 58. At no time has the Trustee asked me any questions about the release or suggested that it is not binding on Sequoia.

50. During the cross-examination of Rose, Trustee counsel did not ask a single question about the Release. Rose's evidence is unchallenged in all respects.

51. The Release provides a bulletproof defence to Rose in respect of all of the Trustee's claims against her. The entire claim against Rose should be dismissed.

C. Plaintiff's claim regarding the Release

52. The Statement of Claim does not seek to set aside the Release.

53. The Statement of Claim pleads that Rose, as the sole director of PEOC, breached her duties to PEOC by:

> … causing PEI to require 198 to agree that, as a condition of closing the Share Transaction, 198 would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to section 122(3) of the ABCA. [Emphasis added.][40]

54. As such, instead of seeking to set aside the Release, the Trustee seeks monetary damages from Rose on the theory that Rose caused PEI to require 198 to agree to the Release. The theory is absurd. If the Release is not set aside, there can be no damages against Rose. Rose is released from any claim for damages.

55. Moreover, the allegation is entirely belied by the evidence. There is no evidence that Rose could possibly have *caused PEI* to do anything. Rose did not control PEI – a public company with its own board of directors. As conceded by Darby, the Release confirmed that Rose acted as a director and officer of PEOC at the request of Perpetual.

[40] Statement of Claim, paras. 15 and 16.

As judicially admitted by the Trustee's counsel: "This was Perpetual doing this transaction through a subsidiary."[41]

56. Rose makes this clear:

> ***I was not the "directing mind" of PEOC***
>
> 80. PEOC was a special purpose wholly owned subsidiary of Perpetual. I took my responsibilities as a director and officer of PEOC seriously, considered its best interests and the interests of its stakeholders, and exercised my business judgment to the best of my ability, but the ultimate decision to enter into the Transaction was that of Perpetual and its board of directors. [Emphasis added.][42]

57. Further, it is clear that PEI did not *require 198 to agree* to anything. Again, the Release expressly provides that:

> The parties acknowledge and declare that they have been provided with sufficient time and opportunity to consider all factors related to the execution of this Mutual Release and acknowledge a full awareness of its consequences and its voluntary execution. The parties acknowledge having received independent legal advice regarding the execution of this Mutual Release, or have voluntarily chosen not to receive such advice. [Emphasis added.]

58. The evidence is that 198 was a sophisticated arm's length party which vigorously negotiated all aspects of the Transaction with the assistance of sophisticated legal counsel.[43] There is not one iota of evidence that 198 was forced or "required" to do anything.

59. On cross-examination, Darby conceded that he has no evidence to the contrary:

> Q. Based on your discussions with [the principals of 198], was it your understanding that they were willing purchasers of the Goodyear Assets?
>
> A. Held in PEOC, yes.
>
> Q. And that they were not pressured in any way to do the Deal?
>
> A. I can't comment on if they were pressured or not. [Emphasis added.][44]

60. Demonstrating the Trustee's reluctance to acknowledge basic facts which contradict its claims, Darby resisted admitting the obvious fact the parties signed the Release of their own free will. Ultimately, but reluctantly, Darby was forced to concede.[45]

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[41] August 30, 2018 hearing transcripts [Tab 59], 21/33.
[42] Darby cross-exam. 88/3-89/27.
[43] Darby cross-exam. 65/2-25.
[44] Darby cross-exam. 65/19-25.

61. The Trustee's allegation that 198 was "caused" to agree to the Release is baseless. As an Officer of the Court, the Trustee never should have made the allegation.

D. Section 122(3) of the ABCA

62. Again, the Statement of Claim pleads that Rose breached her duties to PEOC by:

> … causing PEI to require 198 to agree that, as a condition of closing the Share Transaction, 198 would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct as a director of PEOC, contrary to section 122(3) of the ABCA. [Emphasis added.][46]

63. The Statement of Claim provides no particulars regarding its position in relation to section 122(3). The Darby Affidavit says nothing about it. Rose' Statement of Defence pleads the Release[47], and the Trustee did not reply.

64. Section 122(3) of the ABCA provides:

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

65. On its face, it is clear that section 122(3) provides for the principle – well-known to the courts and commercial lawyers – that officers and directors may not contract out of existing duties owed to the corporation. Hence, one frequently sees merger and acquisition deals with lock-up provisions qualified by a "fiduciary out". Directors may not agree to disregard superior bids.

66. The object of section 122(3) is clearly to ensure that existing directors of the corporation comply with their duties to the corporation while in office.

67. While we have seen nothing from the Trustee on this point, if the Trustee's position is that section 122(3) precludes a corporation from entering into a mutual release with a former director then that will be startling. If that position was accepted by the Court, the implication will be that directors can never be released in change of control transactions. Law suits against directors could never be settled.

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[45] Darby cross-exam. 83/23-85/5.
[46] Statement of Claim, para. 16.
[47] Rose Statement of Defence, paras. 24-29.

68. That position would also be highly ironic, in that it was PEOC (now Sequoia) – in whose shoes the Trustee now stands – that negotiated and signed the Release. The implication of the Trustee's apparent position would be that Sequoia could walk away from that bargain. This is especially galling given that the Trustee does not seek to set aside the Share Purchase Agreement or the Release.

(a) Principles applicable to interpreting releases

69. The following principles are applicable to the interpretation of contractual releases[48]:

(a) No particular form of words is necessary to constitute a valid release. Any words showing an intention to renounce a claim or discharge an obligation are sufficient.

(b) The normal rules relating to the construction of a written contract, emanating from the Supreme Court of Canada's pronouncements in *Sattva*, apply to a release. A release is to be construed according to the particular purpose for which it was made.[49]

(c) A release that is general in its terms will be construed in light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the parties by whom it was executed.[50]

(d) Generally, a release will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside their contemplation.[51] However, a party may agree to release claims of which that party is unaware, including even claims which on the known facts

[48] *Bank of British Columbia Pension Plan, Re*, 2000 BCCA 291 [Tab 2] at para. 17, citing *Chitty on Contracts*, 27th ed (London: Sweet & Maxwell, 1994) at pp. 1074-5. See also *Toscana Ventures Inc. v Sundance Plumbing, Gas & Heating Ltd.*, 2013 ABQB 289 [Tab 3] at para. 18 (Master) and *Terwillegar Towne Residents Assn. v Brookfield Residential (Alberta) LP*, 2015 ABQB 14 [Tab 4] at para. 22 (Master).
[49] *White v Central Trust Co.* (1984), 54 NBR (2d) 293, 1984 CarswellNB 38 [Tab 5] at para. 32 (CA); *Bank of British Columbia Pension Plan*, *Re* [Tab 2] at para. 17.
[50] *White* [Tab 5] at paras. 32 and 33.
[51] *Athabasca Realty Co. v Foster* (1982), 18 Alta LR (2d) 385, 1982 CarswellAlta 42 [Tab 6] at para. 34 (CA).

could not have been imagined, if language is used to express that intention.[52]

70. The interpretive principles do not change where allegations of breach of fiduciary duty are made.[53]

71. The Alberta Court of Appeal held in 1982 that a release covers specifically what the parties had in contemplation at the time of execution.[54] The Court relied upon case law from the English House of Lords in the 1800s that has since been supplanted by modern English and Canadian law.

72. In this case, there can be no argument that the new directors of PEOC were not aware of the scope of the release they negotiated. The Release was the product of the Transaction. The new directors of PEOC obviously knew that the Release would cover Rose's role in relation to the Transaction.

73. The English Court of Appeal has more recently confirmed that a party may agree to release claims of which that party is unaware, including even claims which on the known facts could not have been imagined, if appropriate language is used to express that intention. This proposition was described as being not open to doubt.[55]

74. The current English position is consistent with the treatment of releases across Canada. Courts have given general releases the wide application one would expect from the plain wording of such releases. For example, in *Tabener v. World Wide Treasure Adventures Inc.*, the Court stated, "More importantly, the release is stated to be a full and final release and I think that the clause must be given a very general interpretation because of the kind of release it was intended to be."[56]

(b) Jurisprudence concerning section 122(3)

75. Considering the parallel provision in Ontario's *Business Corporations Act*, the Superior Court of Justice in *McKay-Cocker Construction Ltd. v. McMurdo* held that the "policy of

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[52] *Mostcash plc v Fluor Ltd.*, [2002] EWCA Civ 975 [Tab 7] at paras 48 – 52 (Eng CA), as summarized in Fred D. Cass, *The Law of Releases in Canada* (Aurora: Canada Law Book, 2006) [Tab 54] at p. 98.
[53] *Simkeslak Investments Ltd. v Kolter Yonge LP Ltd.*, 2011 ONSC 7134 [Tab 8] at para. 73.
[54] *Athabasca Realty Co.* [Tab 6] at para. 34.
[55] *Mostcash plc* [Tab 7] at para. 52.
[56] 1994 CarswellBC 403, [1994] BCJ No 1154 [Tab 9] at para. 7 (CA).

the legislation is to regulate the conduct of directors and officers of the corporation …"[57] The Ontario equivalent of section 122(3) may have retrospective effect, but only insofar as it precludes officers and directors from contracting out of their duties while they held their positions with the corporation.[58] That is to say, they cannot subsequently deny that they had the duty on the basis of a contract. That is not the case here.

76. In *Tongue v. Vencap Equities Alberta Ltd.*, the trial judge stated that "Directors cannot obtain a valid release from liability for future breaches of the CBCA."[59]

77. The Alberta Court of Appeal has confirmed that section 122(3) "renders unenforceable any attempt by contract to have a releasor waive or release his right to be dealt with fairly under s. 131 [regarding insider trading] in a case where he does not know that he was not dealt with fairly."[60] The point is that where the releasor grants a release with "eyes wide open", as was the case with the Release, it must be given its intended effect.

78. This view of section 122(3) is consistent with the modern principle applicable to statutory interpretation which says that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[61] The principles of statutory interpretation also require that terms are used consistently and with the same meaning throughout a statute[62]; where different terms are used, a different meaning was intended[63]; and that legislative schemes are "[…] coherent and effective, and provisions are presumed to be straightforward, exact, grammatically correct, concise and consistent"[64].

79. In this regard it is noteworthy that section 122(3) only speaks of "a director", whereas section 124(1), concerning a corporation's ability to indemnify directors and officers, expressly contemplates the indemnification of a "former director" of a corporation in addition to "a director". Thus, in order for the legislation to have a consistent meaning, it

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[57] *McKay-Cocker Construction Ltd. v McMurdo*, [2001] OTC 791, 2001 CarswellOnt 3833 [Tab 10] at para. 16.
[58] *Ibid.* Note that the issue before the Court was whether it should grant leave to amend a pleading. The issue was not finally determined.
[59] *Tongue v Vencap Equities Alberta Ltd.*, [1994] 5 WWR 674,1994 CarswellAlta 35 [Tab 11] at para. 139 (QB), aff'd 1996 ABCA 208 at para. 139.
[60] *Tongue v Vencap Equities Alberta Ltd.*, 1996 ABCA 208 [Tab 12] at para 29.
[61] Ruth Sullivan, Sullivan on the Construction of Statutes, 6 ed (LexisNexis: Markham, 2014) [Tab 55] at pp. 7-8, 412-413.
[62] *Ibid* at p. 217.
[63] *Ibid* at p. 218.
[64] *Ibid* at p. 206.

must be that section 122(3) does not bar former directors from having the benefit of a release granted in their favour in appropriate circumstances.[65]

E. Conclusion: the Release is a complete bar to the Trustee's claims

80. Rose is the beneficiary of a negotiated arm's length release which expressly released her from the claims made by the Trustee. The Statement of Claim does not seek to set aside the Release. The allegation that Rose *caused PEI* to *require 198* to agree to the Release is entirely unfounded. Section 122(3) of the ABCA has no application.

81. Accordingly, on the basis of the Release alone, this Court should dismiss all claims against Rose.

PART 12 - ASSET RETIREMENT OBLIGATIONS ("ARO") AND THE AER

82. The Statement of Claim and the Darby Affidavit make repeated reference to what they define as 'ARO'. The concept is central to each of the causes of action pleaded in the Statement of Claim:

(a) the theory of the BIA claim is that the ARO was a significant *liability* of PEOC which is relevant to the determination of value under s. 96(1)(b)(ii) of the BIA[66];

(b) the theory of the Oppression Claim is that the Transaction was oppressive to the interests of the AER as an alleged *creditor* in respect of the ARO;

(c) the theory of the Director Claim is that Rose breached her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction in light of the ARO; and

(d) the theory of the Public Policy claim is that the Transaction violated the public policy reflected in Alberta's oil and gas regulatory regime, seemingly as a result of Sequoia's subsequent inability to pay the ARO.

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[65] The term "former director" is mentioned under the definition of a complainant for the purposes of the oppression remedy, in the context of information that auditors request, and in the context of current and former directors' disclosure obligations regarding material contracts.

[66] The issue of value is not before the Court. The applications to dismiss the BIA Claim are based on the position that the Transaction was made at arm's length. Please see the Brief of the Perpetual Defendants in this regard.

83. Underlying each theory is the contention that the ARO was a *current liability* of PEOC *owed to the AER* at the *time of the Asset Transaction*.[67] The contention is unfounded.[68]

84. ARO refers to the asset retirement obligations associated with oil and gas wells and associated facilities. It is not a liability.[69] For accounting purposes, it is characterized as a 'provision'.[70] The provision is an estimate of future anticipated reclamation costs. The estimate is highly judgmental and uncertain.[71] All that is certain is that the entity that ultimately owns the assets when they are reclaimed will be liable to pay for the reclamation work at that time.[72] Liability does not attach to prior owners.

85. Potential purchasers of oil and gas assets make their own judgments as to the ARO associated with the assets. That judgment informs their assessment of the market value of the assets. That is what happened in this case: 198 negotiated the purchase of the Goodyear Assets based on its assessment of the current value of the Goodyear Assets with full disclosure of Perpetual's ARO estimate and based on its own ARO estimate.[73]

86. This kind of value assessment was recognized by the Supreme Court of Canada in relation to the forestry industry, which involves analogous reclamation obligations.[74] The Court stated: "The obligation to reforest areas harvested in accordance with a forest tenure in Alberta is a <u>future expense</u> that is embedded in the tenure. As such, <u>the obligation serves to depress the value of the forest tenure. It is not a separate existing debt of the vendor that is assumed by the purchaser as part of the sale price of the forest tenure</u>."[75]

87. The reclamation costs are anticipated to be borne by the corporation, not the AER[76]. The AER only becomes involved if it issues an order requiring reclamation work. If the work is not done, then the matter is referred to the Orphan Well Fund. As such, there is no assumption that the AER will be a creditor.

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[67] Statement of Claim, paras. 5, 6, 14, 16, 19, 20, 22, 24. Darby Affidavit, paras. 31, 34, 39, 40, 41-44, 46, 51, 52-6, Ex. B.
[68] Rose Affidavit, paras. 74-6, Ex. DD. This evidence was not challenged on cross-examination.
[69] Darby cross-exam. 90/24-92/1.
[70] Darby cross-exam. 92/2-8.
[71] Darby Affidavit, para. 39. Darby cross-exam. 92/9-27. Darby's ARO estimate is in fact pure hearsay based on a third party's ostensible opinion which he did not disclose: Darby cross-exam. 13/19-14/2.
[72] Darby cross-exam. 94/14-95/2.
[73] Darby cross-exam. 40/2-18.
[74] *Daishowa-Marubeni International Ltd. v R*, 2013 SCC 29 [Tab 13].
[75] *Ibid* at para. 3.
[76] The nature and role of the AER and Orphan Well Association was explained by the Alberta Court of Appeal in *Redwater (Orphan Well Assn. v Grant Thornton Ltd.*, 2017 ABCA 124 [Tab 14] at paras. 11-15, 22.

88. In this case, the AER issued an order just before Sequoia's bankruptcy (18 months after the Transaction), but no reclamation work has been done.[77] Indeed, the AER's proof of claim filed with the Trustee concedes that its claim may be as low as $1. The Trustee may determine it to be zero.

89. As such, as at the date of the Transaction, the AER was not close to becoming a creditor of PEOC. The Trustee has not tendered any evidence to the contrary.

90. Hence, a fundamental premise of each of the Trustee's four claim theories is unfounded.

PART 13 - SUMMARY DISMISSAL

91. Rose adopts the submissions of the Perpetual Defendants regarding the law applicable to applications for summary dismissal.

92. The Trustee is in no position to contest that summary dismissal is not appropriate on the basis of a need for additional evidence. The Trustee has submitted to the Court that the Trustee's much broader claim can be summarily determined in a one-day hearing based on the Darby Affidavit alone.[78] The Trustee elected not to file any additional evidence in response to the Schweitzer Affidavit and Rose Affidavit.

PART 14 - TRUSTEE HAS NO AUTHORITY UNDER THE BIA TO SUE

93. Generally, a trustee in bankruptcy may only sue with the permission of the inspectors, and the law suit must pursue the common interests of all of the creditors at the time of bankruptcy.

94. In *BDO Canada Limited v Dorais*[79], the Alberta Court of Appeal stated:

> Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. Of particular importance are sections 30 and 72:
>
> 30(1) The trustee may, <u>with the permission of the inspectors</u>, do all or any of the following things:
>
> (d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

[77] Orders issued by regulatory bodies are not necessarily monetary in nature and provable in bankruptcy: *AbitibiBowater Inc., Re*, 2012 SCC 67 [Tab 15] at para. 3. Indeed, in *Redwater* [Tab 14] (Supreme Court of Canada decision under reserve), the AER took the position that it does <u>not</u> become a creditor.
[78] August 30, 2018 hearing transcripts [Tab 59], 4/1-4, 22/11-19.
[79] 2015 ABCA 137 [Tab 16] at para. 8.

> . . .
>
> The case law establishes that a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors: *Toyota Canada Inc. v Imperial Richmond Holdings Ltd.* (1997), 1997 CanLII 14850 (AB QB), 202 AR 274 at para. 20, 54 Alta LR (3d) 183; *Principal Group Ltd. (Bankrupt) v Principal Savings and Trust Co.* (1990), 1990 CanLII 5952 (AB QB), 111 AR 81 at para. 14, 80 CBR (NS) 313 affm'd (1992), 1992 ABCA 97 (CanLII), 3 Alta LR (3d) 123, 12 CBR (3d) 257 (CA); *Principal Group Ltd. (Bankrupt) and Valan v Alberta* (1993), 139 AR 26 at para. 10, 8 Alta LR (3d) 73. Personal claims do not "relate to the property of the bankrupt" under s. 30(1)(d). [Emphasis added.][80]

95. The Trustee has offered no evidence of inspector approval of this law suit – not even in response to the applications to challenge the Trustee's standing and to stay the claim. There should be no presumption of authority in these circumstances.[81]

96. Further, the Oppression Claim seeks to advance the interests of two particular alleged creditors based on their alleged relationship with PEOC at the time of the Transaction. It does not advance a claim based on any common interests of the current creditors of Sequoia. The Darby Affidavit does not even disclose the identities and claims of the current creditors of Sequoia.

97. This begs the question as to why neither the AER nor the unidentified municipalities have sued or provided any evidence. The Trustee has not even tendered hearsay evidence from them.

98. Indeed, when asked whether he had considered it part of the Trustee's duty to consider the negotiation of the Transaction, Darby said: "We did not look into third-party interests such as municipalities, the ARO …".[82] While the Trustee interviewed the AER about various matters, it did not ask the AER about the alleged ARO liability that underpins the Oppression Claim.[83] The Trustee has apparently not even told the AER about the claim.[84]

99. Accordingly, on the evidence, the Trustee has no authority under the BIA to advance a law suit premised on the alleged interests of the AER and the unidentified municipalities at the time of the Transaction.

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[80] See also: *Sangha (Re)*, 2018 BCSC 1049 [Tab 17] ; *Principal Group Ltd. (Trustee of) v Principal Savings & Trust Co.* (1990), 111 AR 81 1990 CarswellAlta 260 [Tab 18] at para. 25 (QB).
[81] *Hoole v Advani,* [1996] BCJ No 731, 1996 CarswellBC 725 [Tab 19] (SC).
[82] Darby cross-exam. 59/19-60/16.
[83] Darby cross-exam. 77/17-79/7.
[84] Darby cross-exam. 79/8-18.

PART 15 - THE TRUSTEE DOES NOT HAVE, AND SHOULD NOT BE GRANTED, STANDING AS COMPLAINANT TO MAKE THE OPPRESSION CLAIM

A. Overview

100. The Oppression Claim is premised on the interests of alleged creditors of PEOC. The ABCA provides that creditor-based oppression claims may only be pursued if the Court determines that the plaintiff is a 'proper person' to make the claim. The Trustee is not a proper person to make the Oppression Claim for several reasons:

(a) Given that the Trustee's standing to proceed is squarely disputed by the Defendants, the Trustee was obligated to apply for leave to proceed with the Oppression Claim. It failed to do so. The Oppression Claim is a non-starter as a result.

(b) A trustee in bankruptcy may only pursue a creditor-based oppression claim where the claim relates to the interests of the bankrupt's current creditors. The Oppression Claim does not do so, in that it concerns the alleged interests of two particular alleged creditors at the time of the Transaction.

(c) Creditor-based oppression claims may only proceed if the putative complainant establishes a *prima facie* case that the claim relates to the actionable reasonable expectations of creditors who were creditors at the time of the impugned conduct. The Trustee has not established any such case.

(d) Creditor-based oppression claims against individual directors have a higher burden. The putative complainant must establish a *prima facie* case in fraud or actionable reasonable expectations in relation to the director personally resulting in unjust personal benefit. The Trustee has not established any such case.

B. Oppression

101. In *BCE*,[85] the Supreme Court of Canada summarized the test for oppression as involving two related inquiries:

(a) whether the evidence establishes that the complainant had reasonable expectations of the defendant[86]; and

(b) whether the evidence establishes that the reasonable expectations were violated by conduct constituting "oppression", "unfair prejudice" or "unfair disregard" of the relevant interest.[87]

102. Where a creditor makes an oppression claim, additional considerations are involved.

C. Creditor as complainant

103. A creditor of a corporation may sue the corporation or its officers/directors for oppression only if the Court exercises its discretion in determining that the creditor qualifies as a complainant.

104. "Complainant" is defined in section 239(b) of the ABCA as follows:

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

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[85] 2008 SCC 69 [Tab 20].
[86] "At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. …": *Ibid* at para. 70.
[87] *Ibid* at para. 68. The Court emphasized at para. 89 that: "Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression."

D. General principles regarding creditor oppression claims

105. Debt claims should not be converted into oppression claims.[88] Creditors can sue on their contractual rights.

106. The oppression remedy is not an opportunity for contractual parties to seek new rights under their agreement. As the Court of Appeal for Ontario stated:

> The oppression remedy is not, however, a means by which commercial agreements negotiated at arm's length by sophisticated parties can be rewritten to accord with a court's after-the-fact assessment of what is "just and equitable" in the circumstances. It is not the function of the court to rewrite contracts or to relieve a party to a contract of the consequences of an improvident agreement.[89]

107. Nor is the oppression remedy an opportunity for a creditor to seek the rights of a shareholder. The Supreme Court of Canada has emphasized that: "The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders."[90]

E. Trustee's status as complainant is a threshold issue

108. The Statement of Claim alleges that the Trustee is a proper person to make the Oppression Claim.[91] The Defendants have expressly denied that.[92] Nonetheless, the Trustee has no intention of seeking a determination by the Court as to whether it is a proper person within the meaning of s. 239 of the ABCA.[93]

109. There is strong authority for the proposition that, as a matter of due process, the issue of a putative complainant's standing should be determined as a threshold issue prior to the determination of the merits of a putative oppression claim.[94]

110. As stated by the Supreme Court of Canada in *Peoples*: "Creditors … may … apply for the oppression remedy … by asking a court to exercise its discretion and grant them status as a 'complainant'."[95]

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[88] *Royal Trust Corp. of Canada v Hordo* (1993), 10 BLR (2d) 86, 1993 CarswellOnt 147 [Tab 21] at para. 14.
[89] *J.S.M. Corp. (Ontario) Ltd. v Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 [Tab 22] at para. 60.
[90] *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 [Tab 23] at para. 43.
[91] Statement of Claim, para. 18.
[92] Rose Statement of Defence, paras. 18-23; Perpetual Defendants' Statement of Defence, paras. 53-55.
[93] Submissions of Trustee counsel to Jeffrey J.: August 30, 2018 hearing transcripts [Tab 59], 25/26-34.
[94] *Sammi Atlas Inc., Re* (1997), 36 BLR (2d) 318, 1997 CarswellOnt 4710 (Ct J (Gen Div, Commercial List) [Tab 24]; *Levy-Russell Ltd. v Shieldings Inc.* (1998), 41 BLR (2d) 134, 1998 CarswellOnt 3455 (Ct J (Gen Div)) [Tab 25]; *Zimmer v. DenHollander*, 2004 ABQB 493 [Tab 26] at paras. 3-5, 18-26; *Newcastle Projects Inc. v Percon Projects Inc.* 2010 BCCA 563 [Tab 27] at para. 31; *Ratner v L.H. Ratner Construction Ltd.* 2010 BCCA 593 [Tab 28] at para. 21; *HSBC Capital Canada Inc. v First Mortgage Alberta Fund (V) Inc.* 1999 ABQB 406 [Tab 29].

111. In *First Mortgage Fund (V) Inc. (Receiver of) v. Boychuk*[96], (then) Justice Ritter found that while the failure of a putative complainant to seek leave prior to taking steps to advance an oppression claim is not fatal:

> 25 It does make sense that the Plaintiff bring a chambers application for its designation as a complainant at an early date, so that if the court determines that it does not qualify, costs will not be wasted by other steps. … [The] discretion will be exercised on the basis of broad equitable principles that will only be capable of being properly addressed once evidence is before the court touching on questions like why or why not the Plaintiff is a proper party to be designated as a complainant. … [Emphasis added.]

112. On appeal, the Court of Appeal stated:

> 18 … As a fundamental principle, a claim must be advanced by someone with standing to pursue it. If a plaintiff lacks the authority, even the most generous construction of the statement of claim will not vest the claim in the plaintiff, and it must be struck.
>
> …
>
> 26 … If Deloitte, in the next step to be taken in these proceedings, establishes its status as a complainant it may advocate the investors' interests in a representative capacity and maintain the oppression action. …[97] [Emphasis added.]

113. It bears emphasis that while the Trustee is on notice of the Defendants' intention to challenge the Trustee's status as a complainant as a threshold issue, the Trustee elected not to tender any additional evidence. The Darby Affidavit says nothing about this issue. The Trustee has not applied to have its disputed standing determined.

F. Trustee's oppression theory

114. To properly exercise its judicial discretion under section 239, the Court should consider the nature of the oppression claim that the Trustee proposes to pursue.

115. The Statement of Claim pleads the Oppression Claim as follows:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Transaction]:
>
> 19.1 Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

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[95] *Peoples* [Tab 23] at para. 50.
[96] 2001 ABQB 712 [Tab 30].
[97] 2002 ABCA 194 [Tab 31].

> 19.2 PEI and POC carried on or conducted their business or affairs in an manner that was:
>
> oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors. [Emphasis added.]

116. Regarding the "interests of the creditors of PEOC", the Statement of Claim makes allegations only regarding the "ARO" and unidentified municipalities:

> 20. As a result of the [Transaction] generally, and the Asset Transaction in particular:
>
> 20.1 if PEOC was not insolvent, it was rendered insolvent;
>
> 20.2 PEOC was liable for, but unable to pay the municipal property taxes with respect to the Goodyear Assets pursuant to the *Municipal Government Act*; and
>
> 20.3 PEOC became liable for, but unable to pay, the ARO[98] associated with the Goodyear Assets;
>
> all for the benefit of PEI, POC and Rose personally. [Emphasis added.]

117. There are no allegations regarding the amounts or nature of the alleged debt. There are no allegations that any creditors had any actionable reasonable expectations of any kind.

118. The theory of the Oppression Claim was stated by Darby as follows:

> **Oppression and Prejudice to Creditors**
>
> 51. In the opinion of the Trustee, the Asset Transaction was clearly not in the best interests of PEOC. The Transaction also disregarded and prejudiced the creditors of PEOC. In particular, the inability of PEOC to pay the ARO and municipal property taxes directly affected its creditors.

119. Darby acknowledged that the Oppression Claim relates only to the Asset Transaction:

> Q. And I just want to be doubly clear in relation to paragraph 51 of your affidavit. Your personal opinion about the merits of an oppression lawsuit relates just to the Asset Transaction. You're clear about that; right?
>
> A. Yes.
>
> Q. You don't offer any opinion in relation to Ms. Rose's discharge of her duties as a director in relation to the [Transaction], do you? As a whole.
>
> A. No, I believe our analysis was primarily on the Asset Transaction.[99]

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[98] The Statement of Claim incorrectly defines 'ARO' as abandonment and reclamation liabilities associated with the Goodyear Assets (para. 5). On the basis of a third party's undisclosed "cost model", Mr. Darby estimated that the ARO at the time of the Transaction was $218,958.274 (para. 40). If Plaintiff's Application is heard, this contention will be hotly contested, including by expert evidence.

120. The Trustee's counsel represented to this Court that the theory of the Oppression Claim is not fact intensive; it is simply that Sequoia was "set up to fail"; that this in and of itself constitutes oppression. "It's not more complicated than that."[100]

121. Neither the Statement of Claim nor the Darby Affidavit provide any particulars as to the nature or amount of the alleged debt, the identities of the municipalities, or the nature of their relationships, if any, with PEOC.[101]

122. In fact, and as addressed below, there was no debt owed to the AER in relation to ARO. The evidence establishes that neither the AER nor any municipalities were creditors at the time of the Transaction. As such, a fundamental premise of the Oppression Claim is untenable.

G. Trustee has no standing under the ABCA to pursue the Oppression Claim

123. Consistent with the jurisprudence regarding the authority of a trustee in bankruptcy to sue generally, a trustee in bankruptcy *may* be granted standing as a complainant to sue for oppression *if* the trustee is advancing oppression claims that could be made by the bankrupt's *current* creditors *generally*. As stated by one court:

> It seems to me that while a 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 … 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 …'. 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. [Emphasis added.][102]

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[99] Darby cross-exam. 90/1-11.
[100] August 30, 2018 hearing transcripts [Tab 59], 31/8-30.
[101] Darby cross-exam. 60/11-16.
[102] *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.* (2001), 16 BLR (3d) 74, 2001 CarswellOnt 2954 [Tab 32] at para. 30 (Sup Ct J [Commercial List]); *Dylex Ltd. (Trustee of) v Anderson* (2003), 63 OR (3d) 659, 2003 CarswellOnt 819 at para 15 [Tab 33] (Sup Ct J); *Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.* (2003), 180 OAC 158, 2003 CarswellOnt 5210 [Tab 34] at para. 46 (CA); *Ernst & Young Inv. v. Essar Global Fund Limited*, 2017 ONCA 1014 [Tab 35] at para. 63.

124. Again, the Trustee does not seek to sue for oppression in relation to interests of Sequoia's current creditors. The Trustee seeks to sue for oppression in relation to unspecified but peculiar interests of the AER and certain unidentified municipalities at the time of the Transaction.

125. Given the Trustee's overarching duty to protect the interests of Sequoia's creditors generally, it is remarkable that the Trustee seeks to proceed with a law suit premised only on the interests of particular alleged creditors at the time of the Transaction.[103] This is even more remarkable given that the Trustee has no idea how much the law suit will cost the estate, except that it will be "expensive."[104]

126. Assuming that an oppression claim of a trustee in bankruptcy is a collective, representative claim on behalf of all creditors (and the within claim is not), the inquiry turns to whether the Court should exercise its discretion to grant standing to the plaintiff as a "complainant" for the purposes of the specific oppression claim in question.

127. Canadian jurisprudence has established that a putative complainant *may* be granted standing to bring an oppression claim *if* a court determines that:

(a) the plaintiff was in fact a creditor of the corporation at the time of the impugned conduct; and

(b) on the evidence, the court should exercise its discretion to designate the plaintiff as a "proper person" to bring the claim.[105]

(a) The Oppression Claim does not relate to the interests of creditors of PEOC at the time of the Transaction

128. The law is well settled that if a trustee in bankruptcy has standing to sue for oppression, the claim must concern the alleged reasonable expectations of the creditors of the corporation *at the time of the impugned conduct*.[106] As stated by the Court of Appeal for Ontario:

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[103] Darby Affidavit, para. 51.
[104] Darby cross-exam. 86/15-87/24.
[105] *Zimmer* [Tab 26] at para. 35.
[106] Janis Sarra, *"Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings"* in Janis P. Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 99 [Tab 56] at p. 111 ("The court will decline to grant status where the interest is too remote, where the creditor is not proceeding in good faith, where the complainant was not a creditor at the time of the impugned action, or where the acts complained of have nothing to do with the debt."); *Jacobs Farms Ltd. v Jacobs*, [1992] OJ No 813, 1992 CarswellOnt 3215 [Tab 36] at paras. 12-14 (Ct J (Gen Div); *Hordo* [Tab 21] at paras.

> I stress Mr. McGuiness' observation that the oppression remedy is not intended to give a creditor after-the-fact protection against risks that the creditor assumed when he entered into an agreement with a corporation. The position of a creditor who can, but does not, protect itself against an eventuality from which he later seeks relief under the oppression remedy, is much different than the position of a creditor who finds his interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself. In the latter case there is much more room for relief under the oppression provisions than in the former case. See *SCI Systems Inc. v. Gornictzki Thompson & Little Co.* (1997), 147 DLR (4th) 300 (Ont. Gen. Div.) var'd on other grounds (1998), 110 OAC 160 (Ont. Div. Ct.); see also M. Koehnen, Oppression Remedies and Related Remedies … [Emphasis added.][107]

129. On the evidence, there were no creditors of PEOC at the time of the Transaction.

130. With respect to the AER, the evidence is overwhelming that it was not a creditor of PEOC at the time of the Transaction.[108] This completely nullifies any oppression claim based on the interests of the AER.

131. Regarding municipal taxes, Darby *assumed* that a specific sum was outstanding as at the time of the Transaction.[109] Remarkably, Darby made no inquiries of the municipalities to determine whether they were owed anything at the time of the Transaction, or whether they consider that they had any reasonable expectations that were violated. He made no inquiries of Perpetual about this.

132. Mr. Schweitzer explained that the figure assumed by Darby represents 2014 taxes paid in 2015. In 2016, PEOC was invoiced a total of $6,376,323 in property taxes regarding the Goodyear Assets.[110]

133. Rose explained that the adjustment provisions of the Share Purchase Agreement ensured that 198 would acquire the shares of PEOC without PEOC having any debt at the time of closing save for certain amounts to paid in the fourth quarter of 2016

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12 13, citing *Trillium Computer Resources Inc. v Taiwan Connection Inc.* (1992), 10 OR (3d) 249 (Ct J (Gen Div) at p. 253; *First Edmonton Place Ltd. v 315888 Alberta Ltd.* (1988), 40 BLR 28, 1988 CarswellAlta 103 [Tab 37] at para. 78 (QB), rev'd on other grounds (1989), 45 BLR 110 (Alta CA); *The Investment Administration Solutions Inc. v Pro-Financial Asset Management Inc.*, 2018 ONSC 1220 [Tab 38]; *Apotex Inc. v. Laboratoires Fournier S.A.*, 2006 CarswellOnt 7164, [2006] OJ No 4555 [Tab 39] at paras. 39-43 (Sup Ct J).

[107] *J.S.M.* [Tab 22] at para. 66; *Ma v Ma*, 2010 ONSC 1273 [Tab 40] (Sup Ct J); *Hayat v Raja*, 2016 ONSC 6805 [Tab 41]; *Shefsky v California Gold Mining Inc*., 2016 ABCA 103 [Tab 42].

[108] Darby cross-exam. 78/16-27, 79/1-7; Rose Affidavit, paras. 64-76.

[109] Darby Affidavit, para. 40.3.

[110] Schweitzer Affidavit, para. 20, fn 1.

regarding municipal property taxes, and those were more than offset by prepaid expenses, royalty account credits, and deferred payment obligations.[111]

134. Moreover, all 2016 municipal taxes associated with the Goodyear Assets were paid in full by either PEI or Sequoia with the exception of only three municipalities which had subsequent to the closing agreed, upon request by Sequoia, to a voluntary deferred payment plan to allow for higher investment in their respective jurisdictions.[112] Clearly, if a creditor voluntarily agrees to defer payment, it has no claim for non-payment unless payment is not received on the deferred date.

135. Rose's evidence was not challenged on cross-examination.

(b) The Court should not exercise its discretion in favour of the Trustee

136. Regarding the second element of the test (the Court's discretion), the Alberta Court of Appeal has held that a creditor of a corporation may qualify as a complainant in two situations:

(a) where the plaintiff alleges and establishes a *prima facie* case that the corporation was used as a vehicle for committing fraud; or

(b) where the impugned conduct constituted a breach of the reasonable expectations of the plaintiff based upon its relationship with the corporation.[113]

137. The Trustee has not alleged fraud.

138. Regarding (b), to qualify as complainant for an oppression action, a creditor must have been in a position *analogous to that of a minority shareholder who had a legitimate interest in the manner in which the affairs of the corporation are conducted*.[114] There is no evidence that the AER or the municipalities were in such a position. Rather, the evidence is that PEOC was a single-purpose wholly-owned subsidiary of Perpetual.

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[111] Rose Affidavit, paras. 64-68.
[112] Rose Affidavit, paras. 70-71.
[113] *Zimmer* [Tab 26] at para. 47; *First Edmonton* (QB) [Tab 37] at paras. 56-57; *Mackenzie v Craig*, 1999 ABCA 84 [Tab 43] at para. 17.
[114] See, for instance, *Hordo* [Tab 21] at paras 14-17; *Gestion Trans-Tek Inc. v Shipment Systems Strategies Ltd.,* [2001] OTC 860, [2001] OJ No 4710 [Tab 44] at paras. 21-22 (Sup Ct J).

139. Factors to be considered by the Court include:

(a) commercial practice;

(b) the nature of the corporation;

(c) relationships;

(d) past practice;

(e) preventative steps;

(f) representations and agreements; and

(g) fair resolution of conflicting interests.[115]

140. The Trustee offers no evidence on any of this.

141. It is also noteworthy that the Trustee's theory of oppression is based on an isolation of the Asset Transaction from the Transaction[116]. The Supreme Court of Canada has made it clear that: "Courts considering claims for oppression are … instructed to engage in fact-specific contextual inquiries looking at business realities, not merely narrow legalities."[117] (The Brief of the Perpetual Defendants expands upon this point.)

142. Accordingly, Rose submits that the Trustee has failed to establish grounds on which this Court should exercise its discretion to grant the Trustee standing to pursue the Oppression Claim against any of the Defendants.

H. Test for personal liability for oppression

143. Additional considerations regarding a creditor's permission to sue a director personally fortify the above conclusion.

144. The exercise of judicial discretion is doubly important regarding personal claims, as it is all too often that officers and directors are sued personally as a litigation tactic. The Supreme Court of Canada and the Court of Appeal for Ontario have emphasized that the

[115] *BCE* [Tab 20] at paras. 72-84.
[116] Darby cross-exam. 53/21-54/2; 56/15-23; 57/2-12; 60/6-16/ 67/2-14.
[117] *Wilson v Alharayeri*, 2017 SCC 39 [Tab 45] at para. 23.

"scent of tactics" is a relevant factor.[118] In this case, the conduct of the Trustee regarding the claim against Rose has the fragrance of hardball tactics.

145. Cases finding directors personally liable are rare, and cases finding liability in the extreme amount claimed by the Trustee are non-existent.[119] To establish standing to sue Rose personally, the Trustee must establish a *prima facie* case that the AER and the municipalities had actionable reasonable expectations of Rose personally in her capacity as a director of PEOC at the time of the Transaction.

146. The Trustee has pleaded nothing in this regard. The Darby Affidavit says nothing about this. Rose's evidence disproves it.

147. In *Wilson v. Alharayeri*, the Supreme Court of Canada affirmed the two-prong test developed in *Budd v. Gentra* in determining whether a director personally acted oppressively:

(a) the oppressive conduct must be properly attributable to the director because she is implicated in the oppression (i.e. she must have exercised, or failed to have exercised, her powers as to effect the oppressive conduct); and

(b) the director must have personally benefitted (in the form of an immediate financial advantage or increased control of the corporation) or have breached a personal duty owed as a director or misused a corporate power.[120]

148. The Court concluded that under these two elements, four potential scenarios can arise:

(a) the director acted in bad faith and obtained a personal benefit;

(b) the director acted in bad faith but did not obtain a personal benefit;

(c) the director acted in good faith and obtained a personal benefit; and

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[118] *Ibid* at para. 54; *Budd v Gentra Inc.* (1998), 111 OAC 288, 1998 CarswellOnt 3069 [Tab 46] at para. 50 (CA).
[119] Director liability for oppression was recently addressed by the Supreme Court of Canada in *Wilson* [Tab 45].
[120] *Wilson* [Tab 45] at paras. 47-50. See also Dennis H. Peterson & Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed (Toronto: LexisNexis, 2009) (loose-leaf updated 2018) [Tab 57] ch 17 at 17.290.

(d) the director acted in good faith and did not obtain a personal benefit.[121]

149. The Trustee has not alleged bad faith by Rose.

150. The Supreme Court found that scenarios (a) and (d) tend to be more clear-cut. Under (a), the director is more likely to be held personally liable. The opposite is true for (d). For (b) and (c), the court must determine whether it would be fair to hold the director personally liable in all the circumstances.[122]

151. Even where the court concludes that there was oppression by the director, the enquiry continues as follows:

> 52. … even where it is appropriate to impose personal liability, this does not necessarily lead to a binary choice between the directors and the corporation. Fairness requires that, where "relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe" … Where there is a personal benefit but no finding of bad faith, fairness may require an order to be fashioned by considering the amount of the personal benefit. …
>
> 53. Second, … any order made … should go no further than necessary to rectify the oppression. … This follows from s. 241's remedial purpose insofar as it aims to correct the injustice between the parties.
>
> 54. Third, any order under s. 241(3) [CBCA] may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders … it protects only those expectations derived form an individual's status as security holder, creditor, director or officer. Accordingly, remedial orders … may respond only to those expectations. They may not vindicate expectations arising merely by virtue of familial or other personal relationship. And they may not serve a purely tactical purpose … The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director … Overall, the third principle requires that an order under s. 241(3) remain rooted in, informed by, and responsive to the reasonable expectations of the corporate stakeholder.
>
> 55. Fourth – and finally – a court should consider the general corporate law context in exercising its remedial discretion … As Farley J. put it, statutory oppression "can be a help; it can't be the total law with everything else ignored or completely secondary" … This means that director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances …

[121] *Wilson* [Tab 45] at para. 50.
[122] *Ibid* at para. 51.

152. The Statement of Claim and the Darby Affidavit make bare assertions of personal benefit[123], but they are devoid of any particulars.

153. This is alarming when one considers that: (a) prior to the delivery of the Trustee's preliminary views to Perpetual[124], the Trustee had already decided to sue Rose on the basis of an alleged personal benefit, but did not disclose that to her[125]; and (b) the Trustee saw no reason to ask Rose about any personal benefit because he had firmly pre-judged the matter by that time.[126]

154. In short, the Trustee chose to allege that Rose personally benefited when it knew that it had no supporting evidence; and it did not want to hear from Rose that she did not personally benefit. That is not the conduct of a neutral Officer of the Court.

155. Similarly, while the Trustee makes extraordinary allegations about the exercise of Rose's business judgment as a director of PEOC, Darby saw no reason to ask her about that:

> Q. At no time did you ask Ms. Rose during your communications with her about the exercise of her business judgment as a director of PEOC, did you?
>
> A. No.
>
> Q. Didn't think that was necessary?
>
> A. Her exercise of her judgment's quite clear in signing the transaction on both sides.
>
> Q. So you didn't think that was necessary?
>
> A. The evidence speaks for itself.
>
> Q. So you did not think that was necessary; correct?
>
> A. Yes.[127]

156. If the Trustee had bothered to ask Rose whether she personally benefited from the Transaction, he would have learned that she unequivocally denies it, and that she can explain why:

> ***I received no "personal benefit" from the Transaction***
>
> 77. Mr. Darby speculates that I received a "personal benefit" from the Transaction. He does not say what kind of benefit or how much it might be worth. He never asked me about any such benefit in the course of our discussions and correspondence.

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[123] Statement of Claim, paras. 16.3.4, 16.4.3, 17.2, 22.2.5; Darby Affidavit, para. 49.
[124] Darby Affidavit, Ex. B.
[125] Darby cross-exam. 70/9-16.
[126] Darby cross-exam. 70/9-72/27.
[127] Darby cross-exam. 73/1-11.

> 78. I did not receive a personal benefit from the Transaction. As an officer and director of PEOC, I received no salary and no other form of compensation. I received no compensation from Perpetual or any other party other than my normal salary for my work on the Transaction. All of the shares of PEOC were owned by Perpetual. My work on behalf of PEOC was in my capacity as the director and officer nominated by Perpetual.
>
> 79. I am a shareholder of Perpetual, a publicly traded company. There was no material impact on the Perpetual share price following the Transaction as described in Exhibit EE.[128] I have not sold any shares of Perpetual that I owned at the time of closing.[129]

157. Rose's evidence went untouched during her cross-examination.

158. As noted above, Rose also swore that she took her responsibilities as a director and officer of PEOC seriously, considered its best interests and the interests of its stakeholders, and exercised her business judgment to the best of her ability, but the ultimate decision to enter into the Transaction was that of Perpetual and its board of directors.[130]

159. In conclusion, the Trustee has no grounds on which this Court should exercise its discretion to grant it standing as a complainant to sue Rose for oppression. The Oppression Claim against Rose should be dismissed.

PART 16 - DIRECTOR CLAIM

A. Law regarding applications to strike

160. Rose adopts the submissions of the Perpetual Defendants regarding the law applicable to applications to strike claims as pleading no reasonable cause of action.

B. Claims by trustees in bankruptcy regarding duties owed to the bankrupt corporation

161. A trustee in bankruptcy may sue a bankrupt corporation's directors for breaches of duties owed to the corporation.[131]

162. The Trustee stands in the shoes of the corporation. It has no greater claim or position.[132]

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[128] Darby cross-exam. 95/16-98/2.
[129] Rose Affidavit, paras. 77-79.
[130] Rose Affidavit, para. 80.
[131] *Peoples* [Tab 23].

C. Director Claim duplicates Oppression Claim

163. Superficially, the Director Claim appears to concern the interests of PEOC. However, in substance, the Director Claim is a duplication of the Oppression Claim. Indeed, Darby explains them as having the same foundation:

> **Oppression and Prejudice to Creditors**
>
> 51. In the opinion of the Trustee, the Asset Transaction was clearly not in the best interests of PEOC. The Transaction also disregarded and prejudiced the creditors of PEOC. In particular, the inability of PEOC to pay the ARO and municipal property taxes directly affected its creditors. [Emphasis added.

D. Fiduciary duty

164. A director's fiduciary duties do not change because the corporation was insolvent or approaching insolvency. The duties are owed to the corporation and only the corporation.[133]

165. The fiduciary duty is a duty of loyalty to the corporation. The Statement of Claim does not plead any coherent theory under which it could be said that Rose was disloyal to PEOC. PEOC was a single-purpose wholly-owned subsidiary of Perpetual. PEOC's interests were Perpetual's interests.

166. In *BCE*, the Supreme Court of Canada summarized the nature of a director's fiduciary duty to the corporation:

> 37. The fiduciary duty of the directors of the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of the shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear – it is to the corporation: *Peoples Department Stores*.
>
> 38. In *Peoples Department Stores*, this Court found that although directors *must consider* the best interests of the corporation it may be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ. at para. 42:
>
> > We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees suppliers, creditors, consumers governments and the environment.

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[132] R Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law Inc., 2015) [Tab 58] at p. 43; *Re Giffen*, [1998] 1 SCR 91 [Tab 47] at para. 52; *Saulnier v Royal Bank of Canada*, 2008 SCC 58 [Tab 48] at para. 50.
[133] *Peoples* [Tab 23] at paras. 45-6, 53.

…

> 40. In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives … It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions. [Emphasis added.][134]

167. The Statement of Claim pleads no facts that would justify this Court second-guessing Rose's business judgment as a director of PEOC, a wholly-owned subsidiary of Perpetual.

E. Duty of care

168. The duty of care owed by directors under s. 122(1) of the ABCA imposes a legal obligation to be diligent in supervising and managing the corporation's affairs.[135] In *Peoples* the Supreme Court of Canada stated this about the duty of care:

> 66. In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff …
>
> 67. Directors and officers will not be held in breach of the duty of care … if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.[136]

169. In *BCE*, the Supreme Court of Canada clarified that the duty of care does not provide an independent cause of action. Rather, applying the principles of *Saskatchewan Wheat*

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[134] *BCE* [Tab 20] at paras. 37, 38 and 40.
[135] *Peoples* [Tab 23] at para. 32.
[136] See also *Greenlight Capital Inc. v Stronach* (2006), 22 BLR (4th) 11, 2006 CarswellOnt 6719 [Tab 49] at para. 79, rev'd in part on other grounds (2008), 240 OAC 86, 2008 CarswellOnt 4093 (Div Ct).

Pool v. Canada[137], "courts may take this statutory provision into account as the standard of behaviour that should reasonably be expected."

170. The Statement of Claim does not plead any particulars regarding the nature of the alleged duty of care or how it was breached.

171. Given the duplication between the Director Claim and the Oppression Claim – which purports to advance the interests of third party creditors – it is noteworthy that s. 122(1)(b) does not provide third parties with a direct cause of action against directors.[138] Third parties must establish an independent duty of care based on a particular relationship. Under the applicable law of tort, a third party suing a director has a claim only where the director's impugned actions "*are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own*".[139]

172. There are no such allegations in the Statement of Claim.

F. Interests of PEOC

173. The Director Claim is ostensibly a claim that belonged to PEOC (now Sequoia) for alleged breaches of Rose's duties to PEOC at the time of the Transaction.

174. As PEOC was a wholly-owned single-purpose subsidiary of Perpetual at the time, the theory is entirely untenable. PEOC had no stakeholder other than Perpetual. The best interests of PEOC were the best interests of Perpetual. As judicially admitted by the Trustee's counsel: "This was Perpetual doing this transaction through a subsidiary."[140] The proposition that PEOC had an independent and different set of interests is artificial and commercially absurd.

175. Section 122(4) of the ABCA is informative in this regard:

> 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 or appointed by the holders of a class or series of shares or by employees or creditors or a class

[137] [1983] 1 SCR 205 [Tab 50].
[138] *Transportaction Lease Systems Inc. v Weaver*, 2007 ABQB 246 [Tab 51] at para. 51.
[139] *Hogarth v Rocky Mountain Slate Inc.*, 2013 ABCA 57 [Tab 52] at para. 13, citing *Blacklaws v 470433 Alberta Ltd.*, 2000 ABCA 175 at para. 41.
[140] August 30, 2018 hearing transcripts [Tab 59], 21/33.

> of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.[141]

176. Perpetual owned 100% of the shares of PEOC. PEOC was a single-purpose subsidiary at the instance of Perpetual. Perpetual appointed Rose as the director of PEOC. Under the law, and as a matter of common sense, it was perfectly appropriate for Rose to approve the Asset Transaction as part of the Transaction, to which Perpetual was an arm's length party.

G. Specific allegations

177. The Statement of Claim pleads the Director Claim as follows:

> 15. At all material times until her resignation as director of PEOC following the closing of the Transactions, Rose:
>
> 15.1. was the sole director and directing mind of PEOC;
>
> 15.2 owed fiduciary duties to PEOC, including a duty to act honestly and in good faith with a view to the best interests of PEOC, in accordance with s. 122(1)(a) of the [ABCA];
>
> 15.3 owed PEOC a duty of care, including a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, in accordance with s. 122(1)(b) of the ABCA; and
>
> 15.4 was required to comply with the provisions of the ABCA, including s. 120.

178. With respect to paragraph 15.1, the Statement of Claim concedes that Rose was a nominee of Perpetual. Perpetual, not Rose, was the "directing mind" of PEOC. Perpetual could replace Rose as a director of PEOC in an instant.

179. The alleged breaches are outlined in the Statement of Claim as follows:

> 16. Rose breached her duties to PEOC, *inter alia*, by:
>
> 16.1 failing to act honestly and in good faith with a view to the best interests of PEOC;
>
> 16.2 failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
>
> 16.3 causing PEOC to enter into the Asset Transaction with POT in circumstances where:
>
> 16.3.1 Rose and the other Defendants had determined that the assets to be purchased by PEOC were high liability

[141] See *Gainers Inc. v Pocklington Holdings Inc.* (1995), 179 AR 91, 1995 CarswellAlta 777 [Tab 53] at para. 18 (QB), rev'd on other grounds, 2000 ABCA 151.

assets that should be disposed of by, and for the benefit of, the Defendants;

16.3.2 Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear Assets;

16.3.3 Rose was aware that PEOC was insolvent, or would be rendered insolvent by the Asset Transaction; and

16.3.4 Rose would benefit personally from the Asset Transaction, including as a beneficial shareholder in PEI;

16.4 failing to disclose to PEOC, contrary to sections 120 and 122 of the ABCA, *inter alia*:

16.4.1 that the [Transaction was] not reasonable or fair to PEOC and were not in PEOC's best interest;

16.4.2 that the [Transaction was] highly prejudicial to PEOC's interest; and

16.4.3 that Rose, as a beneficial shareholder and director of PEI, had a material interest in PEI, POT and POC, which benefited from the [Transaction], at the expense of PEOC; and

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

180. The allegations of breach in the Statement of Claim are addressed individually below. None disclose a cause of action against Rose.

16.1. failing to act honestly and in good faith with a view to the best interests of PEOC

16.2 failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

181. These allegations refer to the fiduciary duty and duty of care owed to the corporation by directors.

182. No specific breaches are alleged. These allegations are conclusory. The only way to interpret the allegations is to read paragraphs 16.3, 16.4 and 16.5 as the particulars of the alleged breaches, although the Statement of Claim does not specify the duty to which they relate.

183. Paragraph 16.3 of the Statement of Claim alleges that Rose breached a duty by causing PEOC to enter into the Asset Transaction in circumstances where, as alleged at 16.3.1: "Rose and the other Defendants had determined that the assets to be purchased by

PEOC were high liability assets that should be disposed of by, and for the benefit of, the Defendants."

184. This allegation does not disclose a breach of Rose's fiduciary duty or duty of care.

185. The Statement of Claim alleges that PEOC was a single-purpose wholly-owned subsidiary of Perpetual. PEOC had no interests independent of the interests of Perpetual. It had no stakeholder other than Perpetual.

186. To put this another way, and for the sake of argument only, there is nothing unlawful, wrong or improper with a corporation using a wholly-owned subsidiary to hold title to risky, unique, high maintenance or "high liability" assets. That is done all the time. Moreover, if an arm's length buyer comes along and wants to buy the assets, there is nothing unlawful, wrong or improper with the parent company selling the shares of the subsidiary.

187. In this regard, recall the Trustee's concession that the Share Purchase Agreement was negotiated at arm's length. It was under the Share Purchase Agreement that the shares of PEOC were sold to 198 so that 198 could acquire control of the Goodyear Assets. Isolating the Asset Transaction for the purposes of the analysis is entirely artificial.

16.3.2 Rose was aware that PEOC was unable to meet the obligations associated with the Goodyear Assets

188. This allegation has no relevance to Rose's duties to PEOC. There is no allegation that Rose had a personal duty in relation to PEOC's balance sheet. This complaint is really about the ability of creditors to collect from PEOC.

189. Further, the Statement of Claim pleads that PEOC was unable to meet the obligations associated with the Goodyear Assets before and after the Asset Transaction.[142] On the theory of the claim, the Asset Transaction had no impact on PEOC's ability to meet its obligations.

16.3.3 Rose was aware that PEOC was insolvent, or would be rendered insolvent by the Asset Transaction

[142] Statement of Claim, paras. 13, 14.3, 20.1 and 22.4.

190. This allegation is substantively the same as that in paragraph 16.3.2. It concerns the interests of third parties, not PEOC. No claim against Rose is pleaded.

16.3.4 Rose would benefit personally from the Asset Transaction, including as a beneficial shareholder in PEI

191. The Statement of Claim provides no particulars of any personal benefit.

192. Nor is the receipt of a personal benefit from a transaction necessarily a breach of the fiduciary duty or duty of care.

193. Nor does the Statement of Claim plead any viable theory under which Rose would have personally benefited from the Asset Transaction. Under the Asset Transaction, the legal and beneficial interests of the Goodyear Assets were combined in PEOC. If one accepts the Trustee's contention that it is appropriate to look at the Asset Transaction in isolation of all other aspects of the Transaction, and that the combination of the interests harmed PEOC, then it would be logical to conclude that, as an officer and director of PEOC, Rose could not have benefitted.

16.4 failing to disclose to PEOC, contrary to sections 120 and 122 of the ABCA, inter alia:

16.4.1 that the [Transaction] was not reasonable or fair to PEOC and [was] not in PEOC's best interest;

16.4.2 that the [Transaction was] highly prejudicial to PEOC's interest; and

16.4.3 that Rose, as a beneficial shareholder and director of PEI, had a material interest in PEI, POT and POC, which benefited from the [Transaction], at the expense of PEOC

194. Rose was the sole officer and director of PEOC. The sole shareholder of PEOC knew what was happening. She knew what was happening. There was no one else at PEOC to whom she could have "disclosed" anything. Allegations that Rose failed to disclose things to herself are preposterous.

195. Section 120 provides for a duty of disclosure that is separate and distinct from the fiduciary duty and duty of care provided for in section 122.

196. Section 120 provides:

> **Disclosure by directors and officers in relation to contracts**
>
> 120(1) A director or officer of a corporation who
>
> (a) is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation, or
>
> (b) is a director or an officer of or has a material interest in any person who is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation,
>
> shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of the director's or officer's interest.
>
> …
>
> (9) If a director or an officer of a corporation fails to comply with this section, a Court may, on application of the corporation or any of its shareholders, set aside the material contract or material transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or both. [Emphasis added.]

197. Section 120 is entirely inapplicable because Rose was not a party to the Asset Transaction. This aspect of the claim is a non-starter.

198. Similarly, if the Trustee is alleging that Rose failed to disclose to PEOC that PEOC was entering the Asset Transaction, that is absurd.

> ***16.5 causing PEI to require 198 to agree that, as a condition of closing the Share Transaction, 198 would deliver to PEI releases executed by PEOC's new directors, purporting to release Rose from any claims by PEOC relating to her conduct a director of PEOC, contrary to section 122(3) of the ABCA***

199. The Release is addressed above.

200. Again, the allegation that Rose caused PEI (Perpetual) to do anything is specious.

201. The Statement of Claim makes no other allegations regarding the Release. No cause of action regarding a breach of any duty is pleaded.

H. Relief claimed for alleged breaches of duties

202. The Statement of Claim seeks the following relief in relation to the alleged breaches of duties by Rose:

> 17. As a result of the breaches by Rose of her duties as the director of PEOC:
>
> 17.1 the Asset Transaction should be set aside and declared void, *inter alia*, pursuant to s. 120(9) of the ABCA[143];
>
> 17.2 Rose should be required to account to PEOC for any profit she realized as a result of the Asset Transaction; and
>
> 17.3 PEOC suffered damages, including:
>
> 17.3.1 the difference between the consideration given and received by PEOC as a result of the Asset Transaction;
>
> 17.3.2 cost incurred until the Goodyear Assets are returned to POT, including the costs related to address safety, environmental and other issues relating to the Goodyear Assets; and
>
> 17.3.3 costs incurred to investigate the [Transaction] and to act in the best interests of the creditors of PEOC. [Emphasis added.]

203. Regarding paragraph 17.1, as addressed above, section 120(9) has no application because Rose was not a party to the Asset Transaction, and because the Asset Transaction was obviously disclosed to PEOC.

204. Regarding paragraph 17.2, as addressed above, there is no allegation specifying how it would have been possible for Rose to have profited from the Asset Transaction.

205. Regarding paragraph 17.3.1, there is no viable claim pleaded under which PEOC could have suffered damages in relation to the Asset Transaction.

206. Regarding paragraphs 17.3.2 and 17.3.3, those are costs for which the Trustee is responsible pursuant to the BIA. Those are not damages suffered by PEOC. There is no authority for the proposition that a Trustee can seek indemnity for the costs of satisfying its statutory obligations under the BIA through a claim under section 122 of the ABCA.

207. Accordingly, the Director Claim should be struck as disclosing no reasonable cause of action.

[143] Section 120 provides for disclosure by directors and officers in relation to contracts. Section 120(9) provides that the Court may set aside any "material contract". It does not provide for personal liability of directors.

PART 17 - CONCLUSION

208. The Trustee's claim should never have been initiated. The Statement of Claim is ill-conceived and inconsistent with the neutrality and fair-mindedness expected of a trustee in bankruptcy, an officer of the court.

209. In the context of an arm's length change of control transaction negotiated between sophisticated parties advised by counsel, Rose was fully and finally released from allegations precisely like those advanced by the Trustee.

210. In any case, the Trustee's case theory is premised on a tortured, technical interpretation of an embedded step in a broader Transaction, and, ironically, betrays a fundamental misunderstanding of how ARO is accounted for.

211. At all times during her tenure as director Rose acted in accordance with her statutory duties and with a view toward the best interests of PEOC's stakeholders.

212. Thus, and for the reasons set out above, the Trustee's claims against Rose should be dismissed now.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF NOVEMBER 2018.

Norton Rose Fulbright Canada LLP

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Aditya Badami
Counsel for the Defendant

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