

Action No.: 1801-10960
E-File No.: CVQ20PRICEWATERHOUSECOOPERS
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

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

Plaintiff

and

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

Defendants

PROCEEDINGS

Calgary, Alberta
August 26, 2020

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TABLE OF CONTENTS

Description	Page
August 26, 2020 Afternoon Session	1
Reasons for Judgment (Rose Costs Application)	2
Decision (Rose Costs Application)	28
Reasons for Judgment (Perpetual Costs Application)	28
Decision (Perpetual Costs Application)	31
Reasons for Judgment (Security for Costs Application)	31
Decision (Security for Costs Application)	42
Discussion	43
Certificate of Record	45
Certificate of Transcript	46

1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2
3 August 26, 2020

Afternoon Session

4
5 The Honourable

Court of Queen's Bench

6 Mr. Justice Nixon (remote appearance)

of Alberta

7
8 L. Murphy (remote appearance)

For PricewaterhouseCoopers Inc

9 P.J. Darby (remote appearance)

For PricewaterhouseCoopers Inc

10 R.F. Osuna (remote appearance)

For PricewaterhouseCoopers Inc

11 D.J. McDonald, QC (remote appearance)

For Perpetual Energy Inc , Perpetual Operating
Trust, Perpetual Operating Corp

12
13 P.G. Chiswell (remote appearance)

For Perpetual Energy Inc , Perpetual Operating
Trust, Perpetual Operating Corp

14
15 S.H. Leitl, QC (remote appearance)

For S. Rose

16 G. Benediktsson (remote appearance)

For S. Rose

17 L. Rasmussen (remote appearance)

For the Trustee in Bankruptcy

18 R. de Waal (remote appearance)

For the Trustee in Bankruptcy

19 S. Ko (remote appearance)

For the Industry Intervenors

20 A.N. Stempien (remote appearance)

For the Intervenor

21 G.G. Plester (remote appearance)

For Brownlee LLP

22 P. Petrova

Court Clerk

23
24
25 THE COURT CLERK:

Counsel, everyone, good afternoon. Justice

26 Nixon, I see has -- is now in the virtual courtroom.

27
28 This matter is being heard in courtroom 1201 and court is now in session. Thank you.

29
30 THE COURT:

Can I be heard okay?

31
32 THE COURT CLERK:

Sir, this is the clerk --

33
34 UNIDENTIFIED SPEAKER:

You can be heard, yes.

35
36 THE COURT:

Okay, just want to check.

37
38 Just turning to business today, we have three applications and I will be giving rulings
39 separately on each.

40
41 I will start with the Rose Costs Decision.

1
2 **Reasons for Judgment (Rose Costs Application)**

3
4 This concerns Sue Riddell Rose and PricewaterhouseCoopers Inc. These are the oral
5 reasons for judgment of myself, Justice Blair Nixon.

6
7 Insofar as this is an oral judgment, I retain the right to review the transcript and to add case
8 names and citations. It is likely that I will issue a written decision concerning this particular
9 matter.

10
11 In oral judgments, it is not my practice to cite the legislation, jurisprudence, or the *Rules of*
12 *Court* in detail notwithstanding that they have all been considered.

13
14 [Note to Reader: The first 28 pages of this oral decision relate to the Rose Cost Application.
15 The decision under that Application will be issued in September 2020. See 2020 ABQB
16 513.]

17
18 I turn first to the introduction.

19
20 I. Introduction

21
22 THE COURT: PricewaterhouseCoopers (who I will refer to as
23 "PWC Inc") is involved in this litigation in its capacity as the Trustee in Bankruptcy. I will
24 refer to them as the Trustee of Sequoia Resources Corp (who I will refer to sometimes as
25 "Sequoia" or sometimes as "SRC"). SRC formerly operated under the name of Perpetual
26 Energy Operating Corp (which I will refer to sometimes as "PEOC").

27
28 A sales process and negotiation occurred in 2016 between Kailas Capital Corp and
29 Perpetual Energy Inc I will refer to those two entities as "Kailas Capital" and "PEI" from
30 time to time, or in the latter case, "Perpetual" or "Perpetual Energy" from time to time.

31
32 The substance of the negotiation between these two corporations and their respective
33 affiliates involved the transfer of ownership and control of certain oil and gas assets (which
34 I will refer to as "Goodyear Assets") from the Perpetual Group to 1986114 Alberta Inc (I
35 will refer to that as "198Co").

36
37 There were a number of steps underlying the transaction, including the combination of the
38 legal and beneficial ownership of the Goodyear Assets within PEOC; the transfer of the
39 PEOC shares from PEI to 198Co (which I will refer to sometimes as the "PEOC Share
40 Transaction"); the resignation of Ms. Susan Riddell Rose (who I will refer to as "Ms.
41 Rose") as the director of PEOC; and PEOC's change of name from Perpetual Energy

1 Operating Corp to Sequoia Resources Corp (collectively, I refer to those transactions as
2 the "Aggregate Transaction").
3

4 Prior to the PEOC Share Transaction, PEOC was a wholly owned subsidiary of PEI, a
5 widely held public company. The defendant, Ms. Rose, was one of the several directors
6 on the boards of PEI.
7

8 The above mentioned combination of the legal and beneficial ownership of the Goodyear
9 Assets within PEOC occurred immediately before the PEOC Share Transaction. The legal
10 ownership of the Goodyear Assets was already held by PEOC. The beneficial ownership
11 of the Goodyear Assets was shifted from Perpetual Operating Trust (which I will refer to
12 as "POT") to PEOC in order to effect the desired combination (I will refer to that particular
13 transaction as the "Asset Transaction").
14

15 198Co is a wholly owned subsidiary of Kailas Capital. The holding shares of Kailas
16 Capital are owned 50 percent by Mr. Wang and 50 percent by Mr. Yang. Those two
17 individuals are the only directors of Kailas Capital and they are also the principals of 198Co
18 (I will refer to them as the "198Co Principals").
19

20 In *PricewaterhouseCoopers v. Perpetual Energy*, 2020 ABQB 6, I inferred that each of
21 Mr. Wang and Mr. Yang were at arm's length with all members of the Perpetual Group and
22 Ms. Rose: at para 55. There was no evidence that the 198Co Principals were acting in
23 concert with either the Perpetual Group or with Ms. Rose. Further, there was no evidence
24 that the 198Co Principals were related to the Perpetual Group or Ms. Rose, or that they
25 were, as a question of fact, dealing with each other on a non-arm's length basis.
26

27 After the PEOC Share Transaction, the 198Co Principals also became the principals of
28 Sequoia, formerly PEOC (I will refer to them collectively as the "Sequoia Principals").
29

30 During the hearing before this Court, counsel for the Trustee conceded this was PEI doing
31 its transaction through a subsidiary. I find the subsidiary being referred to by the Trustee
32 is PEOC.
33

34 PWC Inc filed a Statement of Claim against Ms. Rose and others on August 2, 2018 (I will
35 refer to that filing as the "August 2018 SOC" or the "August 2018 Statement of Claim").
36

37 The August 2018 Statement of Claim advanced a number of allegations against Ms. Rose,
38 including that she benefitted personally from the asset transaction, that the asset transaction
39 was clearly not in the best interests of PEOC, thus amounting to oppression or prejudice,
40 and that Ms. Rose caused 198Co to agree to a release. I will refer to that collectively as
41 the "Action". Ms. Rose was successful in her defence of the Action. As a result of that

1 success, Ms. Rose is seeking costs (I refer to that as the "Rose Costs Application").

2
3 She is also seeking an order directing that PWC Inc be personally liable for any costs
4 awarded to her.

5
6 PWC Inc concedes that Ms. Rose is entitled to costs but states that she is entitled only to
7 Schedule 'C' costs, taxable in the normal course.

8 9 II. The Issues

10
11 The issues before me relate to the scale of costs and PWC Inc's personal liability.

12
13 In particular, should Ms. Rose's costs be awarded: first, on a solicitor-and-own-client basis,
14 which would allow for the recovery on a full indemnity basis; second, on a solicitor-client
15 basis, which would allow for recovery of reasonable legal fees and disbursements; or, third,
16 on a party-party basis, which would allow for the recovery by reference to Schedule 'C' of
17 the *Alberta Rules of Court* (I will refer to those as the "*Rules*").

18
19 Should PWC Inc be personally liable for the costs rather than have the costs payable by the
20 estate of Sequoia Resources Corp (I will refer to that as "Sequoia Estate").

21
22 I turn to the law of costs, first some general comments.

23 24 III. Law of Costs

25 26 A. General Comments

27
28 Typically, costs are assessed on a pay-as-you-go basis and are payable forthwith. Ms. Rose
29 was successful in responding to the extraordinary claims made against her. As a result, she
30 is entitled to an award of costs.

31
32 The Court has wide discretion to award costs. The discretion extends to awarding any
33 amount that the Court considers to be appropriate in the circumstances, including an
34 indemnity to a party for that party's lawyers' charges.

35 36 B. Rules of Court

37
38 The *Alberta Rules of Court* set out the guidelines regarding the exercise of the Court's
39 discretion in awarding costs. The *Rules* state that a successful party to an application, a
40 proceeding, or an action is entitled to a costs award against the unsuccessful party, and the
41 unsuccessful party must pay the costs forthwith. The rule is premised on the assumption

1 that the unsuccessful party can pay.

2
3 Deciding whether to impose, deny, or vary an amount in a costs award, the Court may
4 consider, among other factors: (i) the conduct of a party that was unnecessary, or that
5 unnecessarily lengthened or delayed the Action or any stage or step of the Action; and (ii)
6 whether any application, proceeding, or step in the Action was unnecessary, improper, or
7 a mistake.

8 9 C. Categories of Costs

10
11 Where costs are warranted, the Court tends to look at three types of categories of costs
12 awards. I have touched on them above but I will summarize them here again in a bit more
13 detail.

14
15 First, solicitor-and-own-client costs. Where this category of costs is applied, the successful
16 party receives full indemnity for their legal fees and proper disbursements.

17
18 Second, solicitor-client costs. Where this category of costs is applied, the successful party
19 receives reasonable legal fees and disbursements which amounts to less than full
20 indemnity.

21
22 Third, party costs. Where this category of costs is applied, the successful party typically
23 references Schedule 'C' of the *Rules*.

24
25 Ultimately, the individual circumstances of each case best inform the exercise of judicial
26 discretion.

27 28 D. Scale of Costs

29
30 First, solicitor-and-own-client costs, which are full indemnity. This Court confirmed the
31 obligation to compensate a wrongfully accused party. Costs may stem from the
32 reputational and personal impact of serious and unfounded allegations.

33
34 While this costs category is not closed, an award of costs and own-client costs is virtually
35 unheard of, except where they were provided for by contract. In particular, costs awarded
36 on this basis will be available only if one of the successful litigants identifies a contractual
37 foundation for full indemnification.

38
39 In this case, there is no evidence of a relevant contract so that factor is not available to
40 justify an award of costs on a solicitor-and-own-client basis.

41

1 However, as stated above, this category of costs is not closed. In one case, this Court held
2 that full indemnity for legal costs was justified in order to discourage allegations of bias
3 and dishonesty where no reasonable basis existed to support such allegations.
4

5 I turn to solicitor-client costs. An award of solicitor-client costs is more common than an
6 award of solicitor-and-own-client costs. Solicitor-client costs are awarded in
7 circumstances where the successful party should receive reasonable legal fees and
8 disbursements because the situation warrants an award that is less than full indemnification.
9 This award equates to an amount of reasonable fees and disbursements but no frills or
10 extras which should not be fairly passed on to the unsuccessful litigants. Solicitor and
11 client costs only apply to litigation expenses that arise from the litigation in question.
12

13 Solicitor and client costs awards are also rare. They must be based on a finding of
14 intentional misconduct during the litigation. The kinds of misconduct that attract this level
15 of award has been described as reprehensible, egregious, scandalous, or outrageous. The
16 Alberta Court of Appeal has identified a number of factors which favour an award of
17 solicitor and client costs.
18

19 I turn to party-party costs. I include comments on party-party costs for completeness. The
20 party-party costs are awarded by reference to Schedule 'C' of the *Rules*. Schedule 'C' was
21 recently amended effective May 1st, 2020, and apply, subject to agreement or court order
22 to the contrary, to all assessable items whether the activity described in the item happened
23 before or after that date.
24

25 Prior to the amendment of Schedule 'C', the Court addressed its longstanding deficiencies
26 through enhancements including by way of one or more of the following: first, a multiplier
27 against the applicable column; second, an inflationary adjustment; third, an extra lump-
28 sum amount; or fourth, a modifier based on a percentage of actual legal costs.
29

30 The Trustee conceded that an award of costs calculated by reference to Schedule 'C' was
31 available to Ms. Rose. This concession sets the floor amount. Given the circumstances of
32 this case, I do not address this option further on this occasion.
33

34 E. Jurisdiction to Award Costs Against Non-parties 35

36 Common law courts have the jurisdiction to award costs against nonparties on the basis
37 they were the promoter of the unsuccessful litigation. The Court has stated that when the
38 real litigant who puts up a man of straw in whose name the litigation is carried on in order
39 to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be
40 cited by notice to appear and show cause, and may thereupon be ordered in a proper case
41 to pay costs of the opposite party even when the nominal litigant has had legal status similar

1 to that of the real litigant to instate the proceedings.

2
3 In one particular case, the Court of Appeal awarded costs against a receiver-manager. In
4 that case, the Court stated the following, and I quote: (as read)

5
6 Exposure to possible liability for costs on the part of a private receiver
7 has been the subject of surprisingly little comment in both case law
8 and text authority. Nonetheless the general power of the court to
9 award costs against the real promoter of the litigation, although
10 unnamed as a party to it, seems clear. The power was inherent in the
11 Court of Chancery and has survived today. It is also contemplated by
12 the *Rules of Court*.

13 ...

14 The traditional test is who is the real promoter of the litigation? Once
15 that is determined exposure to liability for costs may arise should that
16 litigation fail ... In misconduct cases solicitors may have to pay. The
17 extended liability has reached insurers ...

18
19 That Coopers & Lybrand carried the litigation here is confirmed by
20 the fact that the application for the ex parte injunction was backed by
21 the affidavit of John MacNutt, an officer of Coopers & Lybrand. The
22 intended beneficiaries in the action were 20th Century, the insolvent
23 debtor, and the Bank of British Columbia which sought to avoid the
24 honouring of its letter of credit and put Coopers & Lybrand in as their
25 private receiver-manager under its debenture from 20th Century.

26 27 F. Personal Liability of Trustees in Bankruptcy for Costs

28 29 First, Bankruptcy Proceedings

30
31 Bankruptcy court is a separate court in Canada that deals exclusively with bankruptcies. A
32 judge who presides over bankruptcy court is specifically educated and trained in these types
33 hearings and is heavily experienced and knowledgeable about Canadian bankruptcy and
34 insolvency.

35
36 While this action is not a bankruptcy proceeding, I will provide a few preliminary
37 comments. In particular, section 197 of the BIA provides authority of the courts to award
38 costs in bankruptcy proceedings and it reads as follows: (as read)

39
40 197 (1) Subject to this Act and to the General Rules, the costs of and
41 incidental to any proceedings in court under this Act are in the

1 discretion of the court.

2
3 (2) The court in awarding costs may direct that the costs shall be taxed
4 and paid as between party-party or as between solicitor and client, or
5 the court may fix a sum to be paid in lieu of taxation or of taxed costs,
6 but in the absence of any express direction costs shall follow the event
7 and shall be taxed as between party-party.

8
9 (3) Where an action or proceeding is brought by or against a trustee,
10 or where a trustee is made a party to any action or proceeding on his
11 application or the application of any other party thereto, he is not
12 personally liable for costs unless the court otherwise directs.

13
14 Subsection 197(3) of the BIA is noteworthy for the purposes of this case. Even in
15 bankruptcy proceedings, the Court has the discretion to award costs against trustees
16 personally. In summary, the policy in bankruptcy proceedings is loser pays. That policy
17 is a common thread in most litigation forums.

18 19 Second, Civil Law Proceedings

20
21 Section 197 of the BIA applies to bankruptcy proceedings. In this case, the Trustee is the
22 plaintiff in a civil lawsuit. The Trustee elected to sue outside of Bankruptcy Court to seek
23 civil remedies. In doing so, the Trustee lost any protection from personal liability for costs.
24 The Trustee and the lawsuit are governed by the *Alberta Rules of Court*.

25
26 The *Alberta Rules of Court* offer no immunity to trustees in bankruptcy from orders for
27 costs. A summary of the law in this area is as follows, and I quote: (as read)

28
29 Section 197(3) only applies to proceedings in the bankruptcy court. If
30 a trustee in bankruptcy takes proceedings or has proceedings taken
31 against it in the ordinary civil courts, section 197(3) has no application
32 and if the trustee is unsuccessful in such proceedings, it will be
33 personally liable for costs. A trustee is, however, entitled to
34 indemnity out of the bankrupt estate unless it has been guilty of some
35 misconduct in bringing the proceedings or has taken them out without
36 permission. Costs of civil litigation may, in an appropriate case, be
37 awarded against the trustee on a solicitor and client basis.

38
39 I note for the record that I have not included the various cases in that quote.

40
41 Ordinary civil litigation is not a proceeding under the BIA. In civil litigation cases, well

1 established law makes a trustee a person liable for the costs of litigation. Though a trustee
2 must take steps to recover or protect the bankrupt's property, its duties do not extend to
3 elaborate and expensive investigative and litigation in civil courts. Justice Newbould
4 commented on this area as follows, and I quote: (as read)

5
6 The general rule is that a receiver or trustee litigates at its peril if there
7 is no source of indemnity available to it, with the two standard sources
8 of indemnity residing in the assets of the estate or a contract of
9 indemnity from one or more creditors. The discipline imposed by a
10 "loser pays" costs rule applies equally to decisions to commence
11 proceedings by a receiver or a trustee.
12

13 A bankruptcy trustee has no duty to sue. However, section 39(1)(d) of the BIA provides
14 that a trustee in bankruptcy may, with the permission of the inspectors, bring, institute, or
15 defend any action or other legal proceeding relating to the property of the bankrupt. This
16 legislative framework in section 30 of the BIA raises a few points.
17

18 First, the purpose of section 30 of the BIA is to protect the estate. Inspectors are part of
19 that protective process. That legislative framework is deliberate and is structured that way
20 to allow a trustee to benefit from the business experience of the inspectors.
21

22 When inspectors are appointed, their permission must be sought before certain actions are
23 taken by the trustee.
24

25 One of the powers on which the trustee needs to seek inspector approval before proceeding
26 concerns legal proceedings. In particular, a trustee may only bring, institute, or defend any
27 action or other legal proceeding relating to the property of the bankrupt if it has the
28 permission of the inspectors. Failure of the trustee to seek permission from the inspectors
29 as a prerequisite to exercising certain powers has been held by other superior courts to be
30 fatal. That is, absent evidence that a trustee obtained the permission from the inspectors to
31 assign a contract, the Court cannot assume that it was properly authorized.
32

33 Second, section 30 of the BIA refers to the need for the trustee to seek permission from the
34 inspectors as a prerequisite to certain actions. The inspectors are appointed as
35 representatives of all creditors and they occupy positions of trust. They are expected to
36 assist the trustee by virtue of their experience and are required to supervise certain aspects
37 of the administration that is carried out by the trustee.
38

39 The authorization will ordinarily be given through a properly called meeting of inspectors.
40 The inspectors must authorize the legal proceedings. Mere acquiescence is not sufficient.
41

1 In particular, inspectors give direction and advice to the trustee regarding specific actions
2 to be taken in the administration of the estate. They also supervised the trustee's
3 administration and ensure the trustee acts in accordance with their direction.
4

5 In this case, the Trustee was asked for evidence that the inspectors approved the Action.
6 The Trustee never produced any evidence of inspector approval of the lawsuit against Ms.
7 Rose, notwithstanding that it was asked for this information.
8

9 Third, the phrase "property of the bankrupt" is defined in section 67 of the BIA. The
10 lawsuit must be in the best interests of the estate noting the costs and risks associated with
11 the litigation.
12

13 If the lawsuit is to pursue claims for the benefit of the estate's creditors, it must concern
14 claims of the creditors generally and not individual creditor claims. In this case, however,
15 the Trustee made claims against Ms. Rose which, on their face, related to two alleged
16 individual creditors. The conduct of the trustee is also relevant, and I quote: (as read)
17

18 If a trustee brings legal proceedings without first proper investigation
19 and inquiries to see if there is a sound basis for the proceeding, the
20 court may order the trustee to pay costs personally. Where the trustee
21 acted in a highhanded manner in proceedings with the sale of assets
22 when a motion had been brought by a secured creditor for possession
23 of certain assets, the Court ordered the trustee to pay costs of the
24 creditor personally.
25

26 Where a trustee caused litigation by carelessness and lack of common
27 sense, the Court ordered the trustee to pay the costs of litigation
28 personally.
29

30 Where the trustee gave an unfair and improper advantage to a
31 prospective purchaser of assets, it was ordered to pay costs personally
32 of all of the proceedings.
33

34 Where a trustee acted improperly in connect with an appeal launched
35 by the bankrupt prior to the bankruptcy with respect to a debt alleged
36 to be owing to the bankrupt, the trustee was ordered to pay costs
37 personally.
38

39 Again, I did not cite all of the relevant jurisprudence that was in that quote.
40

41 In the context of proceedings under the BIA, courts have ordered costs to be personally

1 payable by a trustee of a proposal trustee in various circumstances, including the following:
2 first, where the trustee has taken an improper and perverse view as to its duties; second,
3 where the assets of the estate are insufficient to pay the award of costs; third, where the
4 trustee failed to take a neutral view of the case; fourth, where the trustee failed to
5 impartially represent the interests of all creditors; and fifth, where the trustee advanced an
6 adversarial strategy, including as to the issues of debateable merit.

7
8 While section 197 of the BIA contemplates party-party costs in bankruptcy proceedings,
9 in civil proceedings the Court may award costs on any scale against the trustee, including
10 on a solicitor-client basis. The courts have awarded escalated costs against a trustee in the
11 following circumstances: first, the trustee's conduct in the litigation deserving of rebuke,
12 including because it abandoned its neutral role in the proceedings; second, where a trustee
13 adopts an adversarial stance in litigation with no justifiable reason; third, where the trustee's
14 conduct has put the party opposite to unnecessary considerable expense; and fourth, where
15 the trustee took a position opposite clear precedent.

16 17 IV. Trustees in Bankruptcy are held to Higher Standards than other Civil Litigants

18 19 A. General Principles

20
21 A trustee in bankruptcy is held to high standards. The trustee is an officer of the court.
22 This requires the trustee to report all relevant information to the Court and act neutrally.

23
24 The trustee is governed by the BIA and a Code of Ethics. The trustee has duties at common
25 law. This requires the trustee to conduct itself with a high degree of integrity, honesty, and
26 impartiality.

27
28 Even when involved in litigation, a trustee should not adopt an adversarial and hostile role.
29 Rather, the trustee should present all relevant facts in a dispassionate non-adversarial
30 manner.

31
32 The Alberta Court of Appeal has noted the applicability of this duty to the trustee in this
33 very manner. A trustee in bankruptcy has an obligation to act fairly and justly, and to do
34 so and to do what is morally right and honest. Where the trustee chooses to commence
35 litigation in respect of an alleged improper transaction, it is not to "take up the cudgel" in
36 favour of any particular creditor and should not assume an adversarial or hostile role from
37 the witness stand in its conduct or in its affidavit format.

38
39 Adopting an adversarial and hostile role in litigation, including in respect of reviewable
40 transactions, while presenting a bare bones skeletal case just sufficient to invoke the
41 presumption in section 95(2) without disclosing to the Court those facts which might weigh

1 against the presumption, is conduct by a trustee as an officer of the court which must not
2 be tolerated or condoned. As an officer of the court, the trustees should just present the
3 facts. In doing so, it is critically important that a trustee conduct a proper investigation.
4

5 Further, in the course of providing evidence in an affidavit format, the trustee must
6 remember that it should restrict its evidence to the facts. In this case, the Trustee opined
7 in its affidavit that the Asset Transaction was not in the best interests of PEOC. This was
8 not a matter on which the trustee should express an opinion. Generally, affidavits which
9 include opinions, arguments, conclusions, and law will be struck out or ignored. Any
10 conclusion based on the evidence is a function of the Court, not of the affiant.
11

12 B. Investigating a Director

13 1. Procedural Fairness - Neutral Approach

14 The consequences of suing a director of a public company are significant. This is especially
15 the case where the allegations against the director include assertions that his or her conduct
16 was oppressive, unfairly prejudicial, or unfairly disregarded the interests of the creditors of
17 the corporation.
18
19

20
21 The decision of a trustee in bankruptcy to sue a director of a public company is a
22 discretionary decision. The foundation underlying that decision are in the nature of
23 investigative proceedings.
24

25 An investigative proceeding that may result in a lawsuit by a trustee in bankruptcy against
26 a director of a public company must include the full participation by the individual affected.
27 The procedural guarantees that are therefor necessary and would include the following:
28 first, the director must be informed of the nature of the allegation against her or him;
29 second, the director must be able to respond to the allegations.
30

31 In my view, the greater the potential impact of a lawsuit on a director, the greater the need
32 for procedural protections to meet the common law duty of fairness in the requirement of
33 fundamental justice. When conducting an investigation, the trustee in bankruptcy has an
34 obligation to follow a procedure that is in compliance with the principles of procedural
35 fairness. This means fairness to and in respect of the director who is being investigated.
36

37 Fairness in this context includes disclosure of the facts against him or her. It requires that
38 the director be given an opportunity to respond fully to the facts and allegations. It also
39 requires that the director be informed of the investigator's objectives. As well, the decision
40 maker must have all of the facts in order to make an informed decision.
41

1 The question that should always be asked by the trustee is whether it adhered to those
2 principles in conducting the investigation.

3
4 The rules of procedural fairness include the conduct of a neutral and thorough
5 investigation. The investigation file prepared by the trustee must be objective. That is, the
6 investigative report must present the position of the director in a factual and balanced way.
7

8 In my view, it is important that a trustee in bankruptcy comply with the rules of procedural
9 fairness when it is conducting an investigation into a director, and certainly any director of
10 a public company.

11
12 In this regard, I adopt the comments of Lord Denning in a particular case that he
13 commented on in 1976. While he made those comments in the context of a Race Relations
14 Board that was charged with duties similar to those of the Canadian Human Rights
15 Commission, I view the statements as being instructive of the duty any investigative body
16 has to act fairly. The comments of Lord Denning in this regard are as follows, and I quote:
17 (as read)

18
19 In recent years, we have come to consider the procedure of many
20 bodies who form an opinion. In all these cases it has been held that
21 the investigating body is under a duty to act fairly, but that which
22 fairness requires depends on the investigation and the consequences
23 which it may have on the persons affected by it. The fundamental rule
24 is that if a person may be subjected to pains or penalties, or be exposed
25 to prosecution or proceedings, or deprived of remedies or redress, or
26 in some such way adversely affected by the investigation and report,
27 then he should be told the case made against him and be afforded a
28 fair opportunity of answering it. The investigating body is, however,
29 the master of its own procedure. It need not hold hearings. It can do
30 everything in writing. It need not allow lawyers. It need not put every
31 detail of the case against a man. Suffice it if the broad grounds are
32 given. It need not name its informants. It can give the substance only.
33 Moreover it need not do everything itself. It can employ secretaries
34 and assistants to do all the preliminary work and leave much to them.
35 But, in the end, the investigating body must come to its own decision
36 and make its own report: *Selvarajan v Race Relations Board*, [1976]
37 1 All ER 12 (CA).

38
39 I note that particular case has been cited with approval by the Supreme Court of Canada in
40 a 1989 case in that court: see *Syndicat des Employes de Production d Quebec et l'Acadie*
41 *v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at para 27.

1
2 While the trustee in bankruptcy is not obligated to investigate every nuance or interview
3 every possible witness, the failure to interview a key witness could demonstrate a serious
4 deficiency in the investigative process. The broad discretion vested in the trustee in
5 bankruptcy in respect of the investigative process it wishes to implement, including which
6 witnesses to interview, does not allow it to short-circuit the investigative process and ignore
7 a key witness. To the contrary, the failure to interview a person who is significantly
8 connected to the subject transaction may lead to an inference of prejudgment by the trustee.
9

10 2. Suggested Conduct

11
12 In my view, if a trustee is considering the prospect of suing a director such as Ms. Rose,
13 the trustee must do two things.
14

15 First, it must conduct an appropriate investigation. In the course of conducting the
16 investigation, the trustee must ensure that she or he seeks, reviews, considers all of the
17 relevant and material evidence to determine whether it has a viable lawsuit.
18

19 Using the present case as an example, the standard requires a trustee to: first, ask questions
20 of the relevant parties; second, review the relevant documentary evidence it thinks
21 necessary for the litigation of a claim; and, third, ensure that the issues that are to be
22 litigated have at least been raised with the possible defendant such that they have an
23 opportunity to provide feedback before the litigation is formally commenced. Once the
24 trustee has the benefit of all of the relevant and material facts, they must consider the
25 totality of the potential evidence in the context of the case they wish to consider pursuing.
26

27 Second, the trustee must comply with section 30 of the BIA and seek permission of the
28 inspectors. In my view, if a trustee fails to conduct a reasonable investigation of the
29 allegations that it wishes to pursue, the trustee has not fulfilled its duties to the court.
30

31 V. PWC Inc's Actions

32
33 It is clear from all of the above that the Trustee's actions are at the heart of its costs in this
34 costs analysis with respect to the scale of costs and PWC's personal liability.
35

36 A. Trustee's Preliminary Review - The June 26, 2018, Letter

37
38 On June 26th, 2018, the Trustee wrote PEI and advised that it had completed a preliminary
39 review of the material provided by the Perpetual Group (I refer to that as the "June 26th,
40 2018, Trustee Letter"). The June 26th, 2018, Trustee Letter focused on the Asset
41 Transaction and asked the Perpetual Group if there was anything specific it wanted the

1 Trustee to consider with respect to the following: first, the apparent non arm's length nature
2 of the transaction between POT and SRC, then PEOC; second, the fact that the
3 consideration received by SRC from the transaction appeared to have been conspicuously
4 less than the consideration given by SRC, particularly taking into account the ARO; third,
5 the timing of the transaction; and, fourth, the financial position of SRC immediately before
6 and immediately after the transaction and the benefit of the transaction to SRC.

7
8 The June 26th, 2018, Trustee Letter then asked the Perpetual Group if there was anything
9 else it considered relevant to the review by the Trustee. The letter closed by asking the
10 Perpetual Group to let the Trustee know so that it could consider any such additional
11 information.

12 13 B. Summary of Key Events

14
15 The following is an overview of the events leading up to: first, the June 26, 2018, Trustee
16 Letter; and, second, the August 2018 Statement of Claim which was filed on August 2nd,
17 2018. These particulars stem from my review of the questioning of the Trustee.

18
19 First, the Trustee received an email from Ms. Rose dated June 13th, 2018. In that email,
20 Ms. Rose indicated to the Trustee that she was just reaching out concerning the data that
21 had been provided to the Trustee on the prior Wednesday. In that email communication,
22 Ms. Rose stated explicitly that she was available to walk through any of the information or
23 spreadsheets with evaluation work, if required.

24
25 Second, on June 14th, 2018, the Trustee replied that, "We are reviewing the data provided
26 and will get back to you." Ms. Rose responded to the Trustee on the same day and asked,
27 "Any idea when you might be ready for a discussion?"

28
29 Third, on June 15th, 2018, the Trustee replied to Ms. Rose and stated, "We're still reviewing
30 the information, not sure on timing." Ms. Rose responded to the Trustee on the same day
31 and stated, "When you can give us a better indication on timing, that would be great."

32
33 Fourth, on questioning the Trustee confirmed that by June 26, 2018, he had reached a
34 preliminary view that the Asset Transaction was a non-arm's length transfer. The Trustee
35 also confirmed in questioning that in respect of the non-arm's length transfer, there was no
36 further work required.

37
38 Fifth, on June 26th, 2018, the Trustee communicated its preliminary views to Ms. Rose
39 concerning the Aggregate Transaction in the June 26th, 2018, trustee letter. That letter
40 made no reference to a claim against Ms. Rose.

1 Sixth, Ms. Rose responded to the June 26, 2018, trustee letter on that same day. She
2 communicated to the Trustee that, "We would like to meet tomorrow, if possible, as we do
3 not agree with your preliminary conclusions."
4

5 Seventh, on June 27th, 2018, the Trustee responded to Ms. Rose that, "Once we have
6 reviewed any additional information or comments you choose to provide, the Trustee may
7 request a meeting." Ms. Rose responded to the Trustee the same day and said:
8

9 Thank you for the opportunity to provide this additional information.
10 We will prepare a document in that regard and work diligently toward
11 providing it in as timely a fashion as possible. It will likely be next
12 week given the scope.
13

14 Eighth, on July 6th, 2018, Ms. Rose communicated to the Trustee and stated:
15

16 I am just touching base to let you know we are working diligently to
17 pull together the additional information. I believe we are on pace for
18 later next week. Thanks so much.
19

20 (I refer to that as the "Rose July 6th, 2018, Reporting Email".)
21

22 Ninth, in questioning the Trustee confirmed that he received the Rose July 6th, 2018,
23 Reporting Email. There is no evidence that the Trustee responded to that email from Ms.
24 Rose. Further, there is no evidence that the Trustee communicated with the Perpetual
25 Group between July 6th, 2018, and August 2nd, 2018, when it filed the August 2018
26 Statement of Claim.
27

28 Tenth, during questioning, the Trustee justified its actions by stating that, "Time was
29 passing. There's 2,500 wells in this package that need attention. We're a bankruptcy
30 trustee. We need to move fast."
31

32 Eleventh, in questioning the Trustee asserted a number of times that there was an urgent
33 need to deal with the wells. Notwithstanding that assertion, there is no evidence as to on
34 what the Trustee needed to move fast. In considering this comment, I find that we are now
35 in August of 2020 and there is still no evidence the Trustee has reclaimed a single well
36 during the last two years. Further, I find there is no evidence to connect the alleged urgency
37 concerning the wells with the urgency to file the August 2018 Statement of Claim against
38 Ms. Rose and others, particularly without warning to her.
39

40 Twelfth, during questioning the Trustee was asked whether it occurred to him to provide
41 Ms. Rose with a response date. Specifically, the Trustee was asked whether it was a

1 reasonable thing to do. The Trustee responded that there was no response to his request
2 for further information. The Trustee further stated, "We completed our review. We gave
3 them ample time to respond." At a hearing on August 30th, 2018, the Trustee represented
4 to this Court that the Trustee requested information or an explanation in the June 26, 2018,
5 Trustee Letter. At the August 30th, 2018, hearing the Trustee stated that none was provided
6 and, as a result, the Statement of Claim was filed on August 2nd.
7

8 Based on my review of the June 26th, 2018, Trustee Letter, I find the Trustee: first, did
9 request further material but did not specify or request anything in particular; second, did
10 not set any deadline by which the Perpetual Group was to respond; and, third, made no
11 reference to a claim against Ms. Rose.
12

13 C. Alleged Benefit Factors 14

15 In the August 2018 Statement of Claim, the Trustee alleged that Ms. Rose would benefit
16 personally from the Asset Transaction. I reiterate that the Trustee did not disclose to Ms.
17 Rose prior to filing the commencement document on August 2nd, 2018, that she would be
18 named as a defendant in the Action. In cross-examination concerning this allegation, the
19 Trustee made the following three admissions:
20

21 First, in cross-examination the Trustee confirmed that Ms. Rose was not asked whether she
22 received a personal benefit for the deal. Based on this evidence, I find that the Trustee did
23 not provide Ms. Rose with the opportunity to address the benefit allegation before the
24 August 2018 Statement of Claim was filed.
25

26 Second, in cross-examination the Trustee asserted that Ms. Rose benefited because
27 liabilities were removed from the Perpetual Group. I infer that the liabilities the Trustee is
28 referring to in this answer are primarily the asset retirement obligations (which I define as
29 "ARO"). I find that in making this assertion, the Trustee drew a legal conclusion without
30 asking Ms. Rose for her position on the matter.
31

32 Third, in cross-examination the Trustee stated that he did not remember having the
33 conversation with anyone whether or not we should ask Ms. Rose about the alleged benefit.
34 Based on the evidence before me, I find the Trustee did not ask Ms. Rose a single question
35 concerning the alleged benefit applicable to her before it filed the August 2018 Statement
36 of Claim.
37

38 D. Oppression and Prejudice Factors 39

40 In an affidavit filed on August 2nd, 2018 (I refer to that as the "August 2018 Trustee
41 Affidavit"), the Trustee opined that the Asset Transaction was clearly not in the best

1 interests of PEOC.

2
3 Based on the evidence before me, I find the Trustee did not ask Ms. Rose any questions
4 concerning oppression or prejudice prior to filing the August 2018 Statement of Claim. In
5 particular, I find that the Trustee did not ask Ms. Rose any questions concerning the
6 exercise of her business judgment as a director of PEOC.

7
8 While the evidence is that the Trustee interviewed the Sequoia principals, I find the Trustee
9 did not ask those individuals any questions concerning their participation in the negotiation
10 of the Aggregate Transaction before the filing of the August 2018 Statement of Claim. I
11 make this finding concerning the Sequoia Principals because the Trustee conceded in cross-
12 examination that he did not know what occurred between the vendors and the purchasers.

13
14 Based on the evidence before me, I find that the Trustee did not ask the Sequoia Principals
15 any questions concerning the allegations it was going to make in the August 2018
16 Statement of Claim regarding: first, the release; second, the Asset Transaction; third, the
17 Aggregate Transaction; and, fourth, Ms. Rose.

18
19 The Trustee went on to state in cross-examination that the Asset Transaction was its focus.
20 The Trustee further stated that, "We looked at the transaction in isolation."

21
22 In cross-examination, the Trustee stated that the Sequoia Principals were involved in other
23 transactions around town. The Trustee also conceded that the Sequoia Principals
24 understood the oil and gas industry.

25
26 In cross-examination, the Trustee was asked whether he would be better able to discharge
27 his duty if he had, among other steps, followed up with Ms. Rose on her advice that they
28 were providing additional materials. The answer of the Trustee to that question was
29 twofold.

30
31 First, the Trustee stated that the review was complete. Based on my review of the evidence,
32 I infer the Trustee meant that he had completed his review of the evidence by June 26th,
33 2018. The nature of this comment suggests that the Trustee had closed his mind to further
34 consideration at that point. As a result, I find the Trustee had developed tunnel vision by
35 that June 26, 2018, date.

36
37 Second, the Trustee stated that they had provided Ms. Rose and the Perpetual Group ample
38 time to respond. Based on my review of the evidence, including the last communication
39 from Ms. Rose to the Trustee and the argument advanced by the Trustee, I find the alleged
40 "ample time" given by the Trustee to Ms. Rose to respond was between the Rose July 6th,
41 2018, Reporting Email and August 2nd, 2018. That equates to 18 clear business days

1 which includes five days of Stampede week.
2

3 The Trustee represented to this Court that its claim was filed because PEI failed to provide
4 the Trustee with certain requested information. Based on my review of the events generally
5 and the contents of the June 26, 2018, Trustee Letter specifically, I find no merit in this
6 representation. To the contrary, I find the Trustee presented its alleged preliminary position
7 in the June 26th, 2018, Trustee Letter. Then it declined to meet with Ms. Rose.
8

9 Contrary to the argument advanced by the Trustee, I also find that it did not request any
10 additional information from PEI or Ms. Rose. Instead, I find the Trustee stated it would
11 review any additional information or comments that Ms. Rose chose to provide and it might
12 then request a meeting. I make this finding because, as noted above, the June 26th, 2018,
13 Trustee Letter did not request any particular information. That letter simply listed five
14 areas in respect of which Ms. Rose or PEI might want to provide further particulars.
15

16 Ms. Rose reached out twice to the Trustee and both times indicated that materials were
17 being prepared for its review. Concerning the Rose July 6th, 2018, reporting email, I find
18 the Trustee never provided Ms. Rose with the courtesy of a reply.
19

20 As noted above, the Trustee indicated on June 27th, 2018, in a communication to Ms. Rose
21 that it would review any additional information provided. When I first reviewed that
22 evidence, I took comfort from that reply because it suggested the Trustee had an open mind
23 at that juncture. An open mind at that juncture is consistent with its responsibility to
24 investigate matters appropriately. However, I find the Trustee contradicted itself on that
25 point during questioning.
26

27 When asked during questioning whether it would have been reasonable for it to provide a
28 deadline concerning the additional data that Ms. Rose was assembling for the Trustee, the
29 Trustee answered that Ms. Rose had not responded to its request for further information. I
30 find the Trustee's response is inconsistent with the late June and early July communications
31 in evidence. I find no request from the Trustee for additional information. What the
32 Trustee stated was that it would review additional information if provided by Ms. Rose.
33 Again, I find that the Trustee had developed tunnel vision by June 27th, 2018.
34

35 Based on my review of the evidence, I find PEI and Ms. Rose were offering to provide
36 additional data to the Trustee, and the Trustee was on notice of that fact.
37

38 E. Release Allegations 39

40 The Trustee alleged that Ms. Rose caused 198Co to agree to the Release. Some background
41 is warranted here for context.

1
2 The purchase of PEOC by 198Co was outlined above. That acquisition by 198Co occurred
3 on October 1st, 2016.
4

5 In the Pricewaterhouse reasons that I gave earlier this year, I inferred that each of 198Co
6 Principals were at arm's length with: first, all members of the Perpetual Energy Group of
7 entities; and, second, Ms. Rose. As noted above, the 198Co Principals were Mr. Wang and
8 Mr. Yang.
9

10 The voting shares of Kailas Capital were owned 50 percent by Mr. Wang and 50 percent
11 by Mr. Yang, and 198Co is a wholly owned subsidiary of Kailas Capital. The evidence is
12 that Kailas Capital and 198Co were represented by the law firm of McCarthy Tetrault LLP.
13

14 The Release is dated October 1st, 2016, and was signed by Ms. Rose on one hand and by
15 one of the 198Co Principals on the other hand. But for the allegation made by the Trustee,
16 there is nothing unusual about that Release. The evidence is that the Release is a common
17 document in transactions that involve the purchase and sale of shares.
18

19 The Trustee's Preliminary Report dated April 11th, 2018, which I referred to as the
20 Trustee's April 2018 Preliminary Report, indicated that the strategy implemented by the
21 Sequoia Principals appears to be successful until around August 2017 when gas prices in
22 Alberta began to decline significantly.
23

24 The Trustee was aware of the Release when it sent its preliminary views to PEI. The
25 Trustee expressed no concerns about the Release at the time it issued the June 26th, 2018,
26 Trustee Letter.
27

28 In the August 2018, Statement of Claim, the Trustee alleged that Ms. Rose personally
29 caused PEI to require 198Co to deliver the releases which had been executed by the new
30 directors of PEOC.
31

32 The assertion in the August 2018 Statement of Claim is that Ms. Rose caused PEI to require
33 198Co to agree to the Release (I refer to that as the "Trustee's Release Assertion"). Based
34 on my review of the evidence, I find the Trustee did not ask Ms. Rose any questions
35 concerning the Trustee's Release Assertion before the August 2018 Statement of Claim
36 was filed. Similarly, I find the Trustee did not ask the 198Co Principals any questions
37 concerning the Trustee's Release Assertion before the August 2018 Statement of Claim
38 was filed.
39

40 VI. Application of the Law to the Facts 41

1 A. Did the Trustee conduct an appropriate investigation?
2

3 Given the evidence and analysis, I find the Trustee did not conduct an appropriate
4 investigation in respect of the lawsuit that it launched against Ms. Rose. This finding is
5 supported by a number of evidentiary factors.
6

7 First, the Trustee asserted that certain documents spoke for themselves and that he did not
8 need to ask Ms. Rose any questions. I disagree. The context that Ms. Rose could have
9 provided to the Trustee undoubtedly would have been useful in the exercise of his
10 judgment, especially considering the nature of the Action.
11

12 Second, I found above that the Trustee did not ask the Sequoia Principals any questions
13 concerning the allegations it was going to make in the August 2018 Statement of Claim
14 regarding the Release, the Asset Transaction, the Aggregate Transaction, or Ms. Rose.
15 Again, the context that the Sequoia Principals could have provided to the Trustee likely
16 would have been useful in the exercise of its judgment considering this action. I state that
17 because the Trustee's August 2018 Preliminary Report indicated that the strategy
18 implemented by the Sequoia Principals appeared to be successful until around August
19 2017, when gas prices in Alberta began to decline significantly. That comment, by itself,
20 warranted follow-up questions by the Trustee.
21

22 Third, I also note with significance the additional wells which SRC acquired as reported
23 on page 1 of the Trustee's 2018 report. In particular, by its own hand, the Trustee reports
24 that SRC grew between the date that 198Co acquired SRC and August 2017. Based on the
25 evidence before me, as summarized by the Trustee, that growth in SRC was from the
26 original well count of 2,500 wells to 3,200 wells.
27

28 The Trustee's April 2018 preliminary report indicates that those additional wells were
29 acquired in separate asset purchases from: first, Husky Oil Operations Ltd.; second,
30 Waldron Energy; and, third, various other operators. In outlining this data which is
31 presented on the face of the Trustee's 2018 report, I make no findings. However, it suggests
32 that certain questions should have been raised for the benefit of all stakeholders, including
33 the Court.
34

35 As an example, in the August 2018 Statement of Claim, the Trustee asserts that, "As a
36 result of the transaction generally and the Asset Transaction, in particular, if PEOC was
37 not insolvent, it was rendered insolvent all for the benefit of Rose personally". Given that
38 assertion in the pleadings, the Trustee should have asked the Sequoia Principals why they
39 were adding assets to a corporation that was allegedly insolvent.
40

41 While I make no determination concerning these additional asset purchases, I think the

1 Court would want to know the answer to that question. Further, I am of the view that as
2 an officer of the court, the Trustee should have asked at least the Sequoia Principals a
3 question of that nature. The answers to questions of that nature may add important context
4 to the elements that the Trustee needs to prove as the plaintiffs in this action. Indeed, the
5 answers to such questions may be critical to the proper administration of justice in matters
6 of bankruptcy.

7
8 In relation to the investigation as a whole, I find that the Trustee drew a legal conclusion
9 concerning the alleged benefit involving the ARO without allowing Ms. Rose to put her
10 position forward. Indeed, the Trustee did not ask Ms. Rose a single question concerning
11 the alleged benefit that he was going to include in the August 2018 Statement of Claim
12 against her.

13
14 While additional data from Ms. Rose may not have changed the alleged preliminary views
15 of the Trustee, it had an obligation to consider any additional evidence that was provided.
16

17 In that regard, I am troubled by the assertion of the Trustee that it had provided Ms. Rose
18 with ample time to respond.

19
20 In these circumstances, I find that Ms. Rose was not provided with ample time to respond.
21 I make this finding for four reasons:

22
23 First, the Trustee was positioning himself to launch a claim in the range of \$220,000,000
24 against Ms. Rose in circumstances where it did not provide her with any notice of the
25 forthcoming lawsuit against her. Not only should the Trustee have given notice of that
26 possibility to Ms. Rose, it had a duty to properly investigate the circumstances and to
27 provide her with the opportunity to address the issues before it filed the lawsuit.

28
29 Second, Ms. Rose had indicated that further data was going to be provided for the Trustee
30 to consider. While Ms. Rose did not meet her own self-imposed deadline, I do not view
31 that as justification for the Trustee to "move fast" in terms of filing the lawsuit. Based on
32 my review of the evidence, I find no indication that the Trustee ever set a deadline by which
33 Ms. Rose was to provide the additional particulars.

34
35 Third, in any dispute between parties, it is important to provide sufficient time for the
36 potential defendant to answer questions and provide its position on matters. In this case,
37 there was a total of 18 clear business days between the last communication of Ms. Rose to
38 the Trustee, which occurred on July 6th, 2018, and the filing of the August 2018 Statement
39 of Claim on August 2nd, 2018. Given the magnitude of the case that it was going to launch
40 against Ms. Rose, I find that time span was not ample. Indeed, the fact that the Trustee had
41 not alerted Ms. Rose to her personal exposure in the lawsuit further supports the finding

1 that the time span was neither ample, nor sufficient, particularly when her potential
2 exposure was in the range of \$220,000,000.

3
4 Fourth, I disagree with the alleged justification given by the Trustee that it had to move
5 fast. While I do not minimize the ultimate need for the attention that needs to be given to
6 2,500 wells, in the circumstances of this case I do not accept that as being the justification
7 for the Trustee to "move fast". I find no evidence before me of any emergencies that had
8 to be dealt with forthwith. Further, I find no evidence as to why the filing of the August
9 2018 Statement of Claim, a mere 18 clear business days after Ms. Rose indicated on July
10 6th, 2018, that additional data would be forthcoming, would address any emergency. This
11 finding is supported by the fact that there is no evidence that the Trustee has reclaimed any
12 wells since it was appointed in March 2018.

13
14 Given the overall context, I find that the investigation carried out by the Trustee was not
15 complete insofar as he did not ask the key witness, being Ms. Rose, any questions
16 concerning the alleged benefit issue as it pertained to her. Again, I find no evidence the
17 Trustee informed Ms. Rose that it was going to make a claim against her concerning his
18 perception that she benefitted from the Asset Transaction. Given the facts and analysis, I
19 also find the Trustee failed in its obligation to conduct a thorough investigation when it
20 failed to question Ms. Rose and the 198Co Principals.

21
22 As a result, the Trustee breached his duty of procedural fairness by not providing a
23 thorough and neutral investigation. Given the nature of the allegations made by the
24 Trustee, which include: first, the alleged failure to exercise business judgment; second, the
25 alleged oppression; third, an allegation of being unfairly prejudicial; and, fourth, an
26 allegation of unfairly disregarding the interests of the creditors of the corporation, and the
27 magnitude of the claim against Ms. Rose which was in the range of \$220,000,000, I find
28 that the conduct of the Trustee was egregious. The fact that this tactic was pursued by an
29 officer of the court is even more concerning.

30
31 As noted above, the Trustee's Release Assertion in the August 2018 Statement of Claim is
32 that Ms. Rose caused PEI to require 198Co to agree to the Release. On the face of that
33 pleading, I am not bothered by that factual allegation. This allegation suggests that PEI
34 forced 198Co to do something. That may have been the case but this allegation is an
35 important factor in this case because of the manner in which the August 2018 Statement of
36 Claim is framed.

37
38 While the Trustee is the master of its own investigative procedure, it is under a duty to act
39 fairly. I am troubled by what came before me in evidence during the underlying hearing.

40
41 In this circumstance, the Trustee saw no reason to ask Ms. Rose about the Release. He saw

1 no reason to ask her whether she had caused PEI to require 198Co to agree to the Release
2 notwithstanding it planned to allege that very point in the August 2018 Statement of Claim.
3 Based on the evidence before me, I find the Trustee's Release Assertion was made without
4 proper investigation. It was merely an assumption.

5
6 Concerning that evidence, I have two comments.

7
8 First, I acknowledge that the commencement document need only plead important facts
9 that, in law, create a certain cause of action. In the August 2018 Statement of Claim, the
10 Trustee pleaded that Ms. Rose breached her duties to PEOC by causing PEI to require
11 198Co to agree that, as a condition of closing the share transaction, 198Co would deliver
12 to PEI Releases executed by PEOC's new directors purporting to release Rose from any
13 claims by PEOC relating to her conduct as a director of PEOC. While it is trite law, I state
14 for the record that a fact alleged in a pleading is not evidence.

15
16 The Trustee stated in questioning that he did not question the 198Co Principals because he
17 was not aware of any evidence where they had been involved in the asset purchase
18 agreement. During the same questioning, the Trustee also confirmed that it did not occur
19 to him that he would be better able to discharge his duty to be honest and impartial, and
20 provide interested parties with full and accurate information, if, first, he examined more
21 carefully the records received from SRC or from PEI concerning the negotiation of the
22 asset purchase agreement, or, second, followed up with Ms. Rose on her advice that they
23 were providing additional information to the Trustee.

24
25 Similarly, I also find the Trustee did not ask Ms. Rose any questions concerning the
26 Trustee's release assertion. Indeed, based on my review of the June 26, 2018, Trustee
27 Letter, I find no mention of the Release.

28
29 When asked during questioning why he did not ask Ms. Rose for her side of the story, the
30 Trustee stated, "The evidence speaks for itself". In the context of that same cross-
31 examination, the Trustee also confirmed that he did not think it was proper to ask Ms. Rose
32 about the Trustee's release assertion. During the initial hearing, counsel for the Trustee
33 tried to justify the lack of questioning of Ms. Rose by asserting that he was "... not sure
34 what she should have been asked, the Release is clear. The circumstances are clear and,
35 really, there's nothing sinister about the fact there's nothing more to ask her about that
36 except her opinion about whether it's legal, I suppose."

37
38 I do not accept that assertion on behalf of the Trustee. My reasons are fourfold.

39
40 First, Ms. Rose provided evidence in affidavit format that the Release was negotiated at
41 arm's length. That evidence from Ms. Rose contradicts an important element in the

1 Trustee's Release Assertion. The Trustee did not cross-examine on that evidence or tender
2 reply evidence.

3
4 Second, given the nature of the Trustee's Release Assertion in the August 2018 Statement
5 of Claim, I would have expected the Trustee to at least ask the 198Co Principals the
6 following question - Did Ms. Rose cause PEI to require you, the 198Co Principals, to
7 execute the release against your will? There is no evidence to suggest that a simple
8 question of that type was asked of these key stakeholders.

9
10 Third, given that the Trustee was going to claim \$220,000,000 against Ms. Rose, I would
11 have expected a thorough investigation. While the domain of the investigation in these
12 circumstances is under the control of the Trustee, I find that a thorough investigation would
13 have required the Trustee to ask the key stakeholders some questions. In this case, the
14 evidence of Ms. Rose was that at no time did the Trustee ask her any questions about the
15 Release or suggest that it is not binding on SRC. The Trustee did not cross-examine on
16 that evidence or tender reply evidence.

17
18 Fourth, implicit in the Trustee's Release Assertion in the August 2018 Statement of Claim
19 is the allegation that the 198Co principals were not acting on a non-arm's length basis in
20 respect of one or both of Ms. Rose or PEI. Notwithstanding that allegation, I find that the
21 Trustee provided no evidence that 198Co was operating on a non-arm's length basis in
22 respect of either Ms. Rose or PEI.

23
24 To the contrary, the evidence is that 198Co was a sophisticated party that was at arm's
25 length of both Ms. Rose and PEI. Further, the evidence is that 198Co was represented by
26 the law firm of McCarthy Tetrault LLP and it vigorously negotiated all aspects of the
27 Aggregate Transaction. In the absence of evidence, the suggestion that McCarthy Tetrault
28 was forced to do anything in the context of a deal is inconceivable to me.

29
30 Based on the evidence before me during the hearing, I found no basis whatsoever to suggest
31 that Ms. Rose caused PEI to cause 198Co to agree to the Release. To the contrary, I find
32 there is a lack of evidence to support the allegation that was included in the August 2018
33 Statement of Claim. I make this preliminary finding because the Trustee did not carry out
34 a proper investigation. He just made certain assumptions and did not take steps to
35 investigate the necessary underlying facts. I find this to be inexcusable conduct for any
36 investigative officer, particularly an officer of the Court.

37
38 Given the facts and analysis, I find the Trustee did not investigate the Trustee's Release
39 Assertion appropriately. As a result, I find no evidence that the Trustee established an
40 evidentiary foundation to support its allegation that Ms. Rose caused PEI to cause 198Co
41 to agree to the Release.

1
2 In summary, I find the Trustee effectively took no steps to investigate the merits of the
3 allegations against Ms. Rose that it included in the August 2018 Statement of Claim in
4 respect of the Release. He just made assumptions.
5

6 B. Scale of Costs 7

8 The Trustee has expressed concern that the submissions advanced by Ms. Rose in the
9 context of the Rose Costs Application suggest that the Trustee engaged in various forms
10 of misconduct. In particular, the Trustee asserts that Ms. Rose alleges that various claims
11 made against her in the Action were without any benefit, were without any belief that they
12 were all well founded, legally and factually. The Trustee asserts that there is no reasonable
13 basis, in law or fact, for these submissions by Ms. Rose.
14

15 While I acknowledge the assertions advanced by the Trustee, I disagree. For the reasons
16 already discussed, I find the allegations advanced by Ms. Rose are well founded both in
17 law and fact.
18

19 I find that an award of solicitor-client costs in favour of Ms. Rose is warranted. I make
20 this finding because this is a circumstance where justice can only be done by a substantial
21 indemnification for costs.
22

23 Ms. Rose swore an affidavit on May 1st, 2010, that attached a bill of costs indicating her
24 solicitor-client costs were in the amount of approximately \$683,431 (I refer to that as the
25 "Rose Bill of Costs").
26

27 Counsel for each of the Perpetual Group of entities and Ms. Rose allocated work between
28 themselves. The purpose of this work allocation was to reduce or avoid the duplication of
29 effort on common issues (I refer to that as the "Defendants' Work Allocation").
30

31 The Trustee did not cross-examine Ms. Rose on the Rose May 2020 affidavit. Further, the
32 Trustee did not file any evidence in response to this application.
33

34 The Defendants' Work Allocation is relevant to the Rose Costs Application because much
35 of the work carried out by counsel for the Perpetual Group otherwise would have been
36 duplicated by counsel for Ms. Rose. There is no evidence that the Trustee challenged the
37 Defendants' Work Allocation. Based on the facts and analysis, I find the Defendants' Work
38 Allocation to be a prudent course of conduct in the circumstances.
39

40 Given that the Trustee did not cross-examine Ms. Rose on her May 2020 affidavit, I accept
41 the Rose Bill of Costs at \$683,431.

1
2 I set the award of costs at 85 percent of the Rose Bill of Costs. I make this determination
3 because I find the Trustee exercised very poor judgment that equates to positive
4 misconduct. The positive misconduct to which I refer is fourfold.

5
6 First, the Trustee did not conduct as thorough of an investigation of the matters as he should
7 have done in the circumstances of this case. While the Trustee might have decided to
8 proceed with the lawsuit, the need for a thorough investigation as a prerequisite to that
9 litigation move is of fundamental importance.

10
11 Second, the Trustee did not provide Ms. Rose with notice of the possible claim in the range
12 of \$220,000,000 against her. For the record, I find this lack of notice inexcusable. The
13 provision of notice is of fundamental importance in many areas of the law and one of those
14 areas includes the need for a trustee to give notice in the context of a potential lawsuit. I
15 expect no less from an officer of the court.

16
17 Third, the Trustee should have provided Ms. Rose the opportunity to provide additional
18 data for it to consider. I find it outrageous that Ms. Rose notified the Trustee that further
19 particulars were forthcoming and that it neither waited for the additional particulars, nor
20 gave Ms. Rose a deadline by which she should have submitted those particulars to the
21 Trustee.

22
23 Fourth, I find that Ms. Rose was not given sufficient time to address matters. In the
24 circumstances of this case, I find that the conduct of the Trustee in this regard is egregious.
25 If a Trustee is going to sue a director of a public company and make the type of allegations
26 it did in this case, it needs to provide that individual with time to address matters. This
27 point overlaps with notice, but is a separate issue.

28
29 As a final comment, I make this particular award of costs so that other officers of the court
30 are deterred from similar conduct. When this type of conduct occurs, the responsible party
31 should be penalized beyond the ordinary order of costs.

32 33 C. PricewaterhouseCoopers Liability for Ms. Rose's Costs

34
35 The Trustee sued Ms. Rose personally in civil court in relation to a corporate transaction.
36 Nearly four years have lapsed since the Aggregate Transaction was effected. Much has
37 happened in the world since then, including in respect of the financial prospects of SRC.

38
39 The Alberta Court of Appeal has recognized that the Sequoia Estate will not be able to pay
40 costs. Indeed, the Trustee also conceded that the Sequoia Estate would not likely be able
41 to pay costs.

1
2 Based on my review of the law, I find I have the jurisdiction to award costs against non-
3 parties on the basis that they were the promotor of the unsuccessful litigation. I find that
4 PWC Inc shall personally bear the responsibility for the costs awarded in the Rose Costs
5 Application. As a result and given the circumstances of this case, I order PWC Inc to be
6 directly liable for the costs, rather than the Sequoia Estate.
7

8 VII. I turn to my conclusions.
9

10 **Decision (Rose Costs Application)**

11 Given the evidence, findings, and analysis above, my conclusions are as follows.
12

13
14 First, costs shall be granted in favour of Ms. Rose.
15

16 Second, the costs in this action concerning Ms. Rose shall be granted on a solicitor-client
17 basis. I make this finding because this is a circumstance where justice can only be done by
18 a substantial indemnification of costs. I set the award of costs at 85 percent of the Rose
19 Bill of Costs.
20

21 Third, PWC Inc shall be directly liable for the costs to Ms. Rose.
22

23 That concludes my decision in respect of the Rose Costs Application.
24

25 I will turn next to the Perpetual Costs Application. Just as an aside, I will ask at the end of
26 the third decision if there is any particulars or any other business that we should address.
27

28 **Reasons for Judgment (Perpetual Costs Application)**

29
30 Turning to the second application, this being the Perpetual Costs Application, this involves
31 Perpetual Energy Inc and Pricewaterhouse Inc These are the oral reasons for judgment of
32 myself, Justice Blair Nixon.
33

34 Insofar as this is an oral judgment, I retain the right to review the transcript and to add case
35 names and citations. I may issue a written decision in respect of this matter, but I have not
36 yet made a final determination. As an aside, unlikely I will issue a written decision on this
37 second matter.
38

39 In oral judgments, it is not my practice to cite legislation, jurisprudence, or the *Rules of*
40 *Court* in detail notwithstanding that they have been considered.
41

1 I. Introduction

2
3 The Perpetual Energy defendants, who I will refer to as the "Perpetual Defendants" are
4 seeking costs concerning the litigation that was launched against them by
5 PricewaterhouseCoopers Inc, LIT. I will refer to them as PWC Inc. In their quest for costs,
6 the Perpetual Defendants filed an Application for Costs (I will refer to that as the "Perpetual
7 Costs Application"). The Perpetual Defendants are seeking an order directing that PWC
8 Inc be directly liable for any costs awarded to it. The Perpetual Defendants seek costs
9 because they allege that they were substantially successful at this stage of the litigation.

10
11 II. The Issues

12
13 There are a number of issues in the Perpetual Costs Application. I frame those issues as
14 follows.

15
16 First, should costs be granted in favour of the Perpetual Defendants?

17
18 Second, if the Perpetual Defendants are entitled to costs in respect of this action, should
19 such costs be granted: (a) on a solicitor-and-own-client basis, which would allow for full
20 indemnity recovery; (b) on a solicitor-client costs basis, which would allow for reasonable
21 legal costs and disbursement recovery; or (c) on a party-party basis, which would allow for
22 recovery by reference to Schedule 'C' of the *Alberta Rules of Court*.

23
24 If costs are granted, should PWC Inc be directly liable for the costs rather than the estate
25 of Sequoia Resources Corporation (I will refer to that as the "Sequoia Estate").

26
27 III. Facts and Findings

28
29 The Perpetual Defendants were successful in striking, first, the oppression claim and,
30 second, the aggregate of the public policy, statutory illegality, and equitable rescission
31 claims against them. The Perpetual Defendants were not successful in striking the BIA
32 claim against them.

33
34 The Trustee sought full indemnity costs against the Perpetual Defendants. The bill of costs
35 which the Perpetual Defendants put in evidence shows solicitor-client costs for all matters
36 relating to the Action up to February 14th, 2020, are in the amount of \$772,003.40 (I will
37 refer to that as the "Perpetual Bill of Costs").

38
39 The Perpetual Bill of Costs amount does not include the costs of this application which the
40 Perpetual Defendants also seek.

41

1 The Trustee did not cross-examine on the Perpetual Bill of Costs or tender responding
2 evidence.

3
4 Perpetual Energy Inc is a publicly traded corporation with directors, officers, employees,
5 and shareholders.

6 7 IV. Analysis

8
9 The Trustee elected to sue the Perpetual Defendants in the civil court. As a result, the
10 Trustee is subject to the jurisdiction of this court.

11 12 A. The Law

13
14 I reviewed the framework of costs in my earlier decision today concerning the Rose Costs
15 Application. Much of that same law applies to the Perpetual Costs Application. I
16 incorporate by reference the review of the law which I outlined in the oral decision I gave
17 in respect of Ms. Rose.

18
19 Just as individuals have reputations that can be damaged by inappropriate attacks on their
20 character, so too do corporations. This has been recognized by the Alberta Court of Appeal
21 which has commented that at risk in the proceedings were not only damages but the
22 industry reputation of the respondent corporations and their officers.

23 24 B. Application of the law to the facts

25
26 The Perpetual Defendants assert they should be awarded two-thirds of their full indemnity
27 costs for their successful application which struck two of the three claims against them.
28 They have further asserted that the costs related to the BIA claim should be in the cause,
29 to be assessed when that claim is finally determined.

30
31 While the Perpetual Defendants advance many good arguments, I find it is not appropriate
32 to order any costs at this stage in respect of those applications. I make this finding for two
33 reasons.

34
35 First, the Perpetual Defendants have only won on, first, the oppression claim and, second,
36 the aggregate of the public policy, statutory illegality and equitable rescission claims. While
37 the Perpetual Defendants have not lost on the BIA claim, the Court has pressed the pause
38 button on that matter.

39
40 Second, the Perpetual Defendants will be advancing arguments concerning the BIA claim
41 in approximately six weeks. Once I have decided the BIA claim in respect of the

1 Application to Strike and for Summary Dismissal, it will be appropriate for me to consider
2 a costs application, provided such an application is filed by the successful party.

3
4 C. Conclusion

5
6 **Decision (Perpetual Costs Application)**

7
8 Given the facts and analysis concerning this application, my conclusion on the three above
9 mentioned issues are as follows.

10
11 First, I exercise my discretion and direct that costs not be granted in favour of the Perpetual
12 Defendants at this time. Based on my analysis above, I will only consider costs in respect
13 of the Perpetual Defendants after I have decided the Application to Strike and for Summary
14 Dismissal. As noted above, the application by the Perpetual Defendants will be heard in
15 approximately six weeks.

16
17 Second, since I have not awarded any costs to the Perpetual Defendants at this time, I need
18 not consider the basis upon which the costs should be granted. That determination can be
19 made after I decide the Application to Strike and for Summary Dismissal, provided the
20 winning party brings a costs application.

21
22 Third, since I have not awarded any costs to the Perpetual Defendants at this time, I need
23 not consider if PWC Inc should be directly liable for the costs.

24
25 That concludes my decision in respect of the second application.

26
27 **Reasons for Judgment (Security for Costs Application)**

28
29 I turn to the Security for Costs application by Perpetual Energy. Again, this is an
30 application by Perpetual Energy as applicant and PricewaterhouseCoopers Inc as
31 respondent.

32
33 These are the oral reasons for judgment of myself, Justice Blair Nixon. Insofar as this is
34 an oral judgment, I retain the right to review the transcript and to add in case names and
35 citations. I may issue written reasons but I have not yet made a final decision in that regard
36 in respect of this third matter.

37
38 In oral judgments, it is not my practice to cite the legislation, jurisprudence, or the *Rules of*
39 *Court* in any detail notwithstanding that they have all been considered.

40
41 I. Introduction

1
2 The Applicants, who I will refer to collectively as the Perpetual Defendants, are seeking
3 Security for Costs (which I will refer to as "Security for Costs"), concerning the litigation
4 that was launched against them by PricewaterhouseCoopers Inc, LIT (which I will refer to
5 as "PWC Inc"). In the underlying action, which I will refer to as the "Action", PWC Inc is
6 acting in its capacity as trustee in bankruptcy of Sequoia Resources Corp, and not in its
7 personal capacity (I will refer to it as the "Trustee" from time to time).
8

9 The Perpetual Defendants seek Security for Costs because they are concerned that the
10 estate of Sequoia Resources Corporation (which I will refer to as the "Sequoia Estate"),
11 may not have the financial resources to fund any costs that may be awarded to the
12 Applicants in the event they are ultimately successful. The Perpetual Defendants also seek
13 an order directing that PWC Inc be directly liable for any costs awarded in favour of the
14 applicants.
15

16 II. Issues

17

18 The issues below are as the Perpetual Defendants frame them in their brief that they filed
19 in respect of this application, albeit as restated by me.
20

21 First, does the Court have jurisdiction to grant an order for Security for Costs?
22

23 Second, is the application for Security for Costs an abuse of process by the Perpetual
24 Defendants?
25

26 Third, will the Sequoia Estate be able to pay costs in the event the Perpetual Defendants
27 are successful in this action?
28

29 Fourth, if the Sequoia Estate will not be able to pay costs in the event the Perpetual
30 Defendants are successful in this action, should the Security for Costs be ordered under
31 either section 4.22 of the *Alberta Rules of Court* or section 254 of the *Alberta Business
32 Corporations Act*.
33

34 Fifth, if an order for Security of Costs is to be granted, should this Court direct PWC Inc
35 to advance to the clerk of the Court of the Queen's Bench of Alberta Security for Costs of
36 this action (I will refer that as a "Security")?
37

38 Sixth, if the order for Security for Costs is granted, what should be the quantum?
39

40 Seventh, if the Court grants an order for Security for Costs, should it direct that the Security
41 be held by the clerk until further order of the Court as security for any costs award in favour

1 of the Perpetual Defendants in this action?

2
3 III. Facts and Findings

4
5 Some general comments. The Alberta Court of Appeal has ordered the Trustee to post
6 Security for Costs concerning its appeal of an order of this Court which struck, first, the
7 oppression remedy and, second, the director liability claim, and third, the public policy
8 claim: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36 (Veldhuis
9 JA in Chambers) [*Veldhuis Reasons*]. All of those reasons were appealed by the Trustee
10 to a panel of the Alberta Court of Appeal. The appellate panel dismissed the Trustee's
11 application: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 254.

12
13 The Trustee filed no evidence opposing this application for Security for Costs.

14
15 The Trustee confirmed on cross-examination that there was a high probability that the
16 unsecured creditors would get nothing from the Sequoia Estate unless the plaintiff, PWC
17 Inc, was successful in all of its lawsuits. The Trustee also confirmed in cross-examination
18 that the prospect of returning anything to unsecured shareholders was very remote.

19
20 Based on the facts that were before the Alberta Court of Appeal concerning the Sequoia
21 Estate, that appellate court determined that the Sequoia Estate would be unlikely and
22 unable to pay costs: *Veldhuis Reasons* at para 32.

23
24 Based on the evidence and findings and analysis, I find on a balance of probabilities that
25 the Sequoia Estate will be unable to pay a costs award concerning this litigation in the event
26 the Perpetual Defendants are successful in their defence of this action.

27
28 IV. Analysis

29
30 A. Jurisdiction

31
32 The Trustee asserts that I do not have jurisdiction to deal with a Security for Costs
33 application. This is a threshold issue.

34
35 1. The Civil Court v. Bankruptcy Court

36
37 A trustee in bankruptcy may proceed by an action in the ordinary civil courts
38 notwithstanding that the relief sought might also have been claimed by a court sitting in
39 bankruptcy: Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2020*
40 *Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2020) at 588 (para I§8)
41 [*Houlden and Morawetz 2020 Annotated BIA*]. The determination of which court a trustee

1 in bankruptcy is advancing a claim is made by the trustee.

2
3 If the trustee elects to come before this court sitting in bankruptcy, it needs to title the
4 documents in accordance with the appropriate *Bankruptcy and Insolvency General Rules*.
5 The fact that the trustee can select either court, sitting in a civil context or sitting in
6 bankruptcy, is touched on in the *Houlden & Morawetz 2020 Annotated BIA* commentary.
7 That commentary states that if the proceeding were taken in the ordinary court and the
8 court trying the matter is of the opinion that the summary procedure of the court sitting in
9 bankruptcy would have been more appropriate, it can show its disapproval when it deals
10 with the matter of costs: *Houlden and Morawetz 2020 Annotated BIA* at 588.

11
12 I make the determination as to whether I am sitting in a bankruptcy or ordinary civil court
13 by my initial review of the commencement documents: *Houlden and Morawetz 2020*
14 *Annotated BIA* at 1288 (para M§12). When a matter is brought before this Court sitting in
15 bankruptcy, the commencement documents used in the proceedings must be dated and
16 entitled in the name of the court in which they are used together with the words "In
17 Bankruptcy and Insolvency": see section 9(1) of the *Consolidated Regulations of Canada*,
18 c 368. Further, when a trustee is advancing a matter in the court sitting in bankruptcy,
19 every document used in the filing of a bankruptcy application or used after the filing of an
20 assignment must be entitled "In the matter of the bankruptcy of ...": see section 9(2) of
21 the *Consolidated Regulations of Canada*, c 368.

22
23 I reviewed the commencement documents in this action. Based on my review of the
24 relevant documents, there is no indication that the Trustee was advancing this action in the
25 context of this Court sitting in bankruptcy. While this Court has the jurisdiction to sit either
26 in a civil context or a bankruptcy context, I find that the August 2018 Statement of Claim
27 is not framed as being in the name of the bankruptcy court.

28
29 Similarly, neither the applications for costs nor the application for Security for Costs are
30 framed as being in the bankruptcy court. Given the facts and analysis, I find the Trustee
31 elected to sue the Perpetual Defendants in the civil court, being the Alberta Court of
32 Queen's Bench and not in the context of this court sitting in bankruptcy.

33
34 Since the Trustee elected to sue in the context of the civil court, I find the Trustee and its
35 claims against the Perpetual Defendants are subject to the statutory and common law
36 jurisdiction of this Court.

37
38 2. Does this Court have jurisdiction to grant an order for Security for Costs?

39
40 A body corporate that holds a licence as a trustee may perform the duties and exercise the
41 powers of a trustee, albeit only through a director or officer of the body corporate who

1 holds a licence as trustee. It is the responsibility of the trustee, before accepting an
2 appointment, to protect itself against the contingency of having to bear its own expenses
3 of administering the estate because of the insufficiency of assets: *Re Hoyt* (1933), 14 CBR
4 486 at 491 (NB KB); *Re Auto Experts Ltd* (1921), 1 CBR 418 (Ont SC).

5
6 Section 254 of the ABCA is alleged by some to be the sole measure which applies if the
7 respondent in a Securities for Costs application is a corporation. The respondent is a
8 corporation. As a result, it follows that section 254 of the ABCA may govern this
9 application. Some say that in all other fact patterns, section 4.22 of the *Alberta Rules of*
10 *Court* is the template.

11
12 For completeness, I will address both frameworks because, in my opinion, the better view
13 is that the Court has authority to grant Security for Costs against a corporation under either
14 test: see *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018
15 ABQB 281 at paras 41-44, 49-53; and *ConocoPhillips Canada Operations Ltd v 1835651*
16 *Alberta Ltd*, 2020 ABQB 14 at paras 60-68. While I acknowledge there is conflicting
17 jurisprudence on the issue, I am of the view that the two frameworks are alternative grounds
18 for awarding Security for Costs against a corporate litigant.

19
20 a. Section 254 of the ABCA

21
22 Notwithstanding the Trustee's oral arguments to the contrary, I find that the plaintiff is a
23 corporation. As a result, 254 of the ABCA has potential application, provided the
24 prerequisites of that provision are met. I will have more to say about that in my written
25 decision, if I choose to do one. Section 254 of the ABCA reads as follows:

26
27 In any action or other legal proceeding in which the plaintiff is a body
28 corporate, if it appears to the court on the application of a defendant
29 that the body corporate will be unable to pay the costs of a successful
30 defendant, the court may order the body corporate to furnish security
31 for costs on any terms it thinks fit.

32
33 Section 254 only requires some evidence that a corporation will be unable to pay a costs
34 award: *North American* at para 41. Some evidence includes that the respondent is an
35 insolvent corporation or a small business engaged in expensive litigation: *North American*
36 at para 45.

37
38 The Trustees report to the Court disclosed that the Sequoia Estate only had \$1,776,109 of
39 available funds as at the date of bankruptcy and secured claims totalling \$7,054,630.
40 Further, in November 2019, the Trustee testified that it was guessing the estate had
41 approximately 2.3 million in cash but that the secured creditors' claims were greater than

1 the cash on hand.

2
3 An applicant is *prima facie* entitled to Security for Costs against a bankrupt litigant where
4 the bankrupt estate cannot pay costs: *Future Health Inc. (Trustee of) v State Farm Mutual*
5 *Automobile Insurance Co. of Canada*, 35 CPC (6th) 168 at para 8 (Ont SCJ). The burden
6 then shifts to the respondent who bears the very heavy onus to show that it is not able to
7 raise the security: *Future Health* at para 12-14; and *Trimove Inc v Serous Credit Union*,
8 2017 ABQB 50 at para 108. If the Trustee intended to attempt to meet its burden to show
9 why it should not be required to post security, it would have filed an affidavit. It did not.

10
11 Based on my review of the evidence, I find that the Sequoia Estate will not be able to pay
12 the costs award. Further, based on the fact that the Trustee did not file an affidavit in
13 response to this application, I find it did not address its burden to show why it should not
14 be required to post security.

15
16 The relevant statutory framework ranks a cost award against a bankrupt as a preferred
17 unsecured claim. As a result, a costs award in favour of the Perpetual Defendants will rank
18 behind: (i) all secured claims; and (ii) the Trustee's claim for its fees. In these
19 circumstances, I find the priority of a costs claim over unsecured claims to be irrelevant.

20
21 In another Security for Costs application involving the same parties, the Alberta Court of
22 Appeal, in January of this year, concluded - as I read the case - on the balance of
23 probabilities, that the Sequoia Estate would not be able to pay costs: *Veldhuis Reasons* at
24 para 30 and 32.

25
26 Based on my review of the law, this is the type of case where section 254 of the ABCA
27 should apply. That is, it should apply in the case of an insolvent plaintiff or a plaintiff with
28 outstanding judgments against it, or with sufficient unpaid creditors: *Autoweld Systems*
29 *Ltd. v CRC-Evans Pipeline International Inc*, 2011 ABQB 265 at para 17. This conclusion
30 is supported by the comments of the Alberta Court of Appeal where it has stated that section
31 254 is founded in a concern that a limited liability company with few assets can enjoy the
32 proceeds of a lawsuit if it wins and walk away if it loses: 2011 ABCA 243 (O'Ferrall JA
33 in Chambers) at para 12.

34
35 b. Section 4.22 of the *Alberta Rules of Court*

36
37 As I noted above, I am of the view that Security for Costs can also be awarded under *Rule*
38 *4.22* notwithstanding the conflicting jurisprudence. Concerning the application of that
39 Rule, the issue is whether it is just and reasonable to grant Security for Costs. That Rule
40 reads as follows, and I quote: (as read)

41

1 The Court may order a party to provide security for payment of a costs
2 award if the Court considers it just and reasonable to do so, taking into
3 account all of the following:

- 4
- 5 (a) whether it is likely the applicant for the order will be
6 able to enforce the order or judgment against assets in
7 Alberta;
 - 8 (b) the ability of the respondent to the application to pay the
9 costs award;
 - 10 (c) the merits of the action in which the application is filed;
 - 11 (d) whether an order to give security for payment of a costs
12 award would unduly prejudice the respondent's ability
13 to continue the action;
 - 14 (e) any other matter the Court considers appropriate.
- 15

16

17 An order to post Security for Costs under *Rule 4.22* is discretionary. It requires the Court
18 to consider whether it is just and reasonable. The following principles apply.

19

20 First, *Rule 4.22* is intended to protect defendants from plaintiffs who have nothing to lose
21 by proceeding to litigation and are immune from execution: *1251165 Alberta Ltd v Wells*
22 *Fargo Equipment Financing Co*, 2013 ABQB 533 at para 46.

23

24 Second, the initial onus is on the Perpetual Defendants to show that the Trustee will
25 unlikely be able to pay the costs award. If that onus is satisfied by the Perpetual
26 Defendants, the burden shifts to the Trustee to establish why it should not be required to
27 post security: *Trimove* at para 1081; and *ConocoPhillips* at para 81.

28

29 Third, the parties' right to access the legal process does not mean they can advance
30 litigation without fear of costs consequences: *Veldhuis Reasons* at para 15; *Aski*
31 *Construction Ltd v Markos*, 2017 ABCA 341 at para 11.

32

33 I turn to address the just and reasonable aspects as required by *Rule 4.22*. In that regard, I
34 look at: first, financial capacity; second, the merits of the Action; and, third, whether there
35 is an undue prejudice concern.

36

37 i. Sequoia Estate Financial Capacity to Fund Costs Unlikely

38

39 Based on my review of the evidence, I find it extremely remote that the Perpetual
40 Defendants will be able to enforce a costs order against the Sequoia Estate. This finding
41 is supported by the following five factors. As a bankrupt corporation, Sequoia is not an

1 active operating company and has no employees or operating revenue. Second, the secured
2 claims against the Sequoia Estate exceed its exigible assets. Third, the Sequoia Estate has
3 limited resources. Fourth, the Sequoia Estate has significant ongoing costs.

4
5 Given the facts, findings, and analysis, I find that it is not likely the Perpetual Defendants
6 will be able to enforce an order or judgment against the assets in Alberta because the
7 respondent will not have the ability to fund an award of costs.

8
9 ii. The Merit Assessment

10
11 A meritorious defence is sufficient to weigh in favour of granting Security for Costs: *Attila*
12 *Dogan Construction v AMEC Americas Limited*, 2011 ABQB 175 at para 17. No in-depth
13 analysis of the defence is necessary: *Spectrum Centre for Physical Therapy and Athletic*
14 *Rehabilitation Ltd v Filipenko*, 2011 ABQB 340.

15
16 While I am certainly not in a position to comment on whether the Perpetual Defendants
17 will win, I acknowledge that there is substance to the various arguments currently being
18 advanced by them. In making this comment, I have reviewed and considered each of the
19 following points: first, arm's length issue; second, the transfer at under value issue; and,
20 third, the insolvency issue. That said, I state for the record that the Trustee's arguments as
21 reflected in the August 2018 Statement of Claim warrant careful consideration.

22
23 Given the facts and findings, I find the defence advanced by the Perpetual Defendants is
24 sufficiently meritorious to weigh in favour of granting Security for Costs.

25
26 iii. Unduly Prejudiced

27
28 It is for the Trustee to prove that it cannot raise the necessary security and no party can
29 underwrite or guarantee payment of the Sequoia Estate costs: *Future Health* at paras 8,
30 11-12 (Ont SCJ); *Autoweld CA* at paras 14-18. The evidence is that despite a written
31 request, PWC refused to acknowledge personal liability for any costs notwithstanding that
32 Canadian courts have held that a trustee in bankruptcy will be personally liable for costs
33 where a trustee brings on an action and the estate has insufficient assets to pay the costs if
34 the trustee is unsuccessful: *Future Health* at paras 9-12 (Ont SCJ).

35
36 Based on my review of the policy in this area, I find that it would be unjust for PWC Inc
37 and the Trustee to immunize themselves from the economic consequences of this litigation
38 or engage in litigation with a one-way risk.

39
40 Consistent with that determination, I find that it would be equally unjust for the Perpetual
41 Defendants to be successful in this litigation and be denied costs because the Trustee

1 pursued litigation without assuring any ability to pay costs awarded against it: *Crossing*
2 *Company Inc v Banister Pipelines Inc*, 2004 ABQB 56 at paras 18-19.

3
4 Given the facts, findings, and analysis I find no evidence that the Trustee's ability to pursue
5 this litigation will be unduly prejudiced by an order to post Security for Costs. I make this
6 determination in part because it did not meet its burden.

7 8 3. Summary Comments

9
10 Based on the facts and analysis, I find that the Court of Queen's Bench has the jurisdiction
11 to grant Security for Costs under two frameworks.

12
13 First, section 254 of the *Alberta Business Corporations Act* provides this Court with
14 authority to grant Security for Costs. For reasons noted above, the prerequisite tests under
15 that statutory provision have been met.

16
17 Second, section 4.22 of the *Alberta Rules of Court* provides this Court with authority to
18 grant Security for Costs. For reasons noted above, the prerequisite tests under that rule
19 have been met.

20 21 B. Is the application for Security for Costs an abuse of process by the Perpetual 22 Defendants?

23
24 The Trustee has drawn my attention to two different affidavits that the Perpetual
25 Defendants have provided to this Court. The Trustee alleges that there is an inconsistency
26 between the two affidavits. In particular, the Trustee asserts that the Perpetual Defendants
27 attempt to rely on two inconsistent versions of the same key facts in two affidavits sworn
28 by the same affiant on the same day.

29
30 The Perpetual Defendants assert that there are no inconsistencies.

31
32 While we can debate whether there are inconsistencies, I find the Trustee is raising an
33 irrelevant point. I make this finding because the Perpetual Defendants are simply seeking
34 Security for Costs as a protective mechanism in the event they are successful. In my view,
35 that is a financing issue.

36
37 To the extent that there are any inconsistencies between affidavits, I will deal with that
38 issue when the substance of the outstanding issues come before me and are addressed in
39 this court.

40
41 As a final comment on the alleged inconsistencies between affidavits, I find that there are

1 inconsistencies and misunderstandings concerning a number of aspects in this litigation.
2 Some of those confusions arise because of legitimate (or understandable) confusions in the
3 law. I expect this Court will need to address some of those inconsistencies and
4 misunderstandings as this litigation continues. I expect that I may have more to say about
5 the alleged abuse of process in the event I prepare a written decision on this application.
6

7 Given the facts, findings, and analysis, I find that this application for Security for Costs is
8 not an abuse of process by the Perpetual Defendants.
9

10 C. Will the Sequoia Estate be able to pay costs in the event the Perpetual Defendants are
11 successful in this action?
12

13 I addressed this above, but for summary purposes, I will comment again. Based on the
14 evidence, findings, and analysis, I find that the Sequoia Estate will be unable to pay a costs
15 award concerning this litigation in the event the Perpetual Defendants are successful in
16 their defence of this action. That finding is premised on the comments of: (i) the Court of
17 Appeal; (ii) the Trustee; and (iii) the officers of the Perpetual Defendants that swore an
18 affidavit.
19

20 D. If the Sequoia Estate will not be able to pay costs in the event that the Perpetual
21 Defendants are successful, should Security of Costs be ordered under either *Section*
22 *4.22 of the Alberta Rules of Court* or section 254 of the *Alberta Business*
23 *Corporations Act*?
24

25 Based on the facts, findings, and analysis above under jurisdiction, I find that Security for
26 Costs should be ordered in favour of the applicants insofar as the prerequisite tests have
27 been met under both frameworks (i.e. *Rule 4.22* or section 254). I will leave it to counsel
28 to draft an order as they see fit.
29

30 E. If an order for Security for Costs is granted, should this Court direct PWC to advance
31 the security to the clerk of the Court of Queen's Bench of Alberta?
32

33 In response to that question, I direct PWC to advance the security to the clerk of the Court
34 of Queen's Bench of Alberta.
35

36 F. Quantum of Security for Costs
37

38 The fixing of quantum is a discretionary decision. There are no specific rules. A court
39 must decide quantum on a case-by-case basis: *Veldhuis Reasons* at para 47.
40

41 Based on the evidence, the Perpetual Defendants' legal fees to trial are likely to be an

1 additional \$2,000,000 or at least in that range. This estimate is based on the stage of the
2 current litigation. Based on my observations today within the courtroom, I infer that the
3 Perpetual Defendants will spare no expense to defend a claim seeking damages of
4 approximately \$220,000,000.

5
6 Security for Costs can be awarded on a solicitor-and-own-client basis where it appears that
7 the litigants' costs will likely be awarded: *Hamza v Hamza*, 1997 ABCA 263 at para 17.
8 The appropriateness of a solicitor and own-client costs in this action is set out in the
9 Perpetual Energy defendant's brief in support of its costs application and I touched on it in
10 my earlier decision today dealing with the Rose Costs Application.

11
12 I noted that the Trustee's Statement of Claim requests costs on a solicitor and own-client
13 full indemnity basis, also.

14
15 The Perpetual Energy Defendants have prepared a draft bill of costs in support of an
16 alternative quantum requested on the basis of five times Column 5, Schedule 'C', and that
17 amount is \$741,900.

18
19 I acknowledge that the Security for Costs in a multiple of Column 5 was awarded by Chief
20 Justice Wittmann, as he then was, in *Attila Dogan: Attila Dogan* at para 27, 31. He
21 reasoned that the amount of the security was justified by the claim's significance and
22 complexity and directed Security for Costs in the amount of 1.6 million. Other complex
23 or high-quantum claims have also attracted Security for Costs on a multiplier of Column
24 5: *Mudrick Capital Management v Wright*, 2018 ABQB 648 at paras 45-48.

25
26 In making a costs award in the *Hill v. Hill* decision, the Court of Appeal commented that a
27 large claim may itself be the basis for a costs award in a multiple of Column 5, even where
28 the proceeding ran smoothly and without misconduct and was not unusually complex: *Hill*
29 *v Hill*, 2013 ABCA 39, 50.

30
31 Justice Veldhuis ordered the trustee to post an equivalent of approximately 7.5 times of
32 Column 5 in her decision earlier this year: *Veldhuis Reasons* at paras 46, 48.

33
34 The Perpetual Energy Defendants also anticipate disbursements and other charges, and
35 estimate the amount to be in the range of \$349,150. That consists of \$300,000 for three
36 experts on the following subjects: (a) fair market value of the consideration received and
37 given by PEOC under the Asset Transaction and the Aggregate Transaction; (b) ARO
38 associated with the Goodyear assets; and (c) PEOC solvency at the time of as a result of
39 the Asset Transaction, as well as the cause of Sequoia's ultimate insolvency and
40 bankruptcy.

1 Given the facts, inferences, and analysis, and noting the discretion that I have in respect of
2 these matters, I direct a quantum of Security for Costs be in the amount of 1.3 million, plus
3 the estimated disbursements in the amount of \$349,150 (collectively, I will refer to that as
4 the "Security Amount").
5

6 I calculated the Security Amount by reference to the \$2,000,000 at 60 percent, plus the
7 estimated disbursements of \$349,150. For the reference of all parties, the \$2,000,000
8 component reflects the estimated solicitor-client full indemnity balance the Perpetual
9 Defendants expect to incur in this action.
10

11 **Decision (Security for Costs Application)**

12 13 V. Conclusion

14
15 The conclusions below track the sequence of the issues as I framed them above.
16

17 First, given the facts and analysis, I find this Court has the jurisdiction to grant an order for
18 Security for Costs.
19

20 Second, given the facts and analysis, given the facts and analysis, I find this application for
21 Security for Costs is not an abuse of process by the Perpetual Defendants.
22

23 Third, given the facts and analysis, I find the Sequoia Estate will be unable to pay the costs
24 award concerning this litigation in the event the Perpetual Defendants are successful in
25 their defence of this action.
26

27 Fourth, given the facts and analysis, I find that the Security for Costs should be ordered in
28 favour of the applicants as stated above insofar as the prerequisite tests have been met for
29 both frameworks, i.e. *Rule 4.22* and section 254. I leave it to counsel to draft the order as
30 they see fit.
31

32 Fifth, I direct PWC Inc to advance the Security Amount to the clerk of the Court of Queen's
33 Bench of Alberta in respect of this action.
34

35 Sixth, I direct the quantum of the Security for Costs be the amount of 1.3 million, plus the
36 estimated disbursements in the amount of \$349,150, which I referred to above as the
37 Security Amount. I calculated the Security Amount by reference to the \$2,000,000 at 60
38 percent of the estimated disbursements, plus the estimated disbursements of \$349,000.
39

40 Finally, I direct the Security Amount be held by the clerk until further order of this Court
41 as security for any costs award in favour of the Perpetual Defendants in this action.

1
2 **Discussion**

3
4 I turn to other business. In respect of the Rose Costs Decision - and this is no longer part
5 of the judgment, just part of the narrative, the Rose Costs Decision, I ask Mr. Leidl to draft
6 the appropriate order and have his friends review it.
7

8 In respect of the Perpetual Costs Decision, I ask Mr. de Waal to draft, since he is the winner
9 in that case, the appropriate order and have his friends review the matter before it comes
10 before the Court.
11

12 And in respect of the Security for Costs, I ask Mr. McDonald to take the pen and draft the
13 appropriate order.
14

15 If the parties need to speak to costs of any of these three applications, they have leave to
16 bring it back before me. I acknowledge that I did not deal with two lines in the application
17 of the Security for Costs application which stated that if security is not posted within 30
18 days of the date of the resulting order, this action is to be dismissed without further order.
19 I did not address that only because it was not dealt with in either brief. That said, subject
20 to any comments from the parties, I would propose to adjourn that component of the
21 application *sine die* unless they have further requests.
22

23 And, finally, is there any other business that we need to deal with or address today?
24

25 MR. LEIDL: My Lord, if I may? It's Mr. Leidl. Thank you for
26 those decisions.
27

28 We had put in our application for costs that we would be seeking costs of the application
29 itself and you have just mentioned that. Is it fair to say, then, that the determination is that
30 Ms. Rose gets costs of the costs application, and if we can't agree on those with Mr. de
31 Waal, we'll come back?
32

33 THE COURT: Correct, sir.
34

35 MR. LEIDL: Thank you.
36

37 THE COURT: Any other business?
38

39 Hearing none, we will adjourn for the day. Thank you very much.
40

41 UNIDENTIFIED SPEAKER: Thank you, Sir.

1
2 UNIDENTIFIED SPEAKER: Thank you, My Lord.
3

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7 PROCEEDINGS CONCLUDED
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1 Certificate of Record

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3 I, Presyana Petrova, certify that this recording is the record of the evidence in the proceedings
4 in the Court of Queen's Bench, held in courtroom number 1201, at Calgary, Alberta, on the
5 26th of August, 2020, and that I was the court official in charge -- in charge of the sound-
6 recording machine during the proceedings.
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1 **Certificate of Transcript**

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3 I, Norma Lynn Gibbon, certify that

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5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8
9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11
12
13 Norma Lynn Gibbon, Transcriber
14 Order Number: AL51
15 Dated: September 17, 2020
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