**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Re Perpetual Energy Inc., 2016 ABASC 2** **Date: 20160105**

**Perpetual Energy Inc.**

**Appeal and Application by**
**Polar Asset Management Partners Inc.,**
**K2 & Associates Investment Management Inc. and**
**Cambridge Global Asset Management**

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| **Panel:** | Stephen Murison<br>Richard Shaw, QC |
| **Representation:** | Tristram Mallet and Robert Lehodey, QC<br>David Conklin and Tim Heeney<br>for the Appellants and Applicants<br><br>Daniel McDonald, QC, Paul Chiswell,<br>James Kidd and Jay Reid<br>for Perpetual Energy Inc.<br><br>Samir Sabharwal and Denise Weeres<br>for ASC Staff |
| **Submissions Completed:** | 23 December 2015 |
| **Oral Decision:** | 23 December 2015 |
| **Written Decision:** | 5 January 2016 |

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# I. INTRODUCTION

[1] The launch of a $25 million rights offering (the **Offering**) by Perpetual Energy Inc. (**Perpetual**) prompted an appeal (the **Appeal**) to the Alberta Securities Commissions (the **ASC**) and a concurrent application for an ASC cease-trade order (the **Application**). The Appeal and Application were made by three holders of Perpetual debentures (together, the **Applicants**): Polar Asset Management Partners Inc. (**Polar**); K2 & Associates Investment Management Inc. (**K2**); and Cambridge Global Asset Management., a division of CI Investments Inc. (**Cambridge**).

[2] The Offering was made by Perpetual under a final prospectus dated 7 December 2015 (the **Prospectus**) to holders of its common shares (**Shareholders** and **Shares**, respectively) of record at 16 December 2015. The Offering would entitle holders of the rights thereby granted (**Rightsholders** and **Rights**, respectively) to purchase Shares at a steep discount to prevailing market prices. The Appeal was from the decision of the ASC Executive Director (the **ED**) to issue a receipt for the Prospectus. The Application was for an order under section 198 of the *Securities Act* (Alberta) (the **Act**) that would bar trading in the Rights.

[3] In a two-day hearing we received evidence and submissions from the Applicants, Perpetual and ASC staff (**Staff**). The evidence included affidavits and testimony of five individuals: John Paul Sabourin (**Sabourin**), Chairman and Chief Investment Officer of Polar; Paul Potvin (**Potvin**), engaged for purposes of this proceeding on behalf of Polar; Geoffrey Merritt (**Merritt**), a director of Perpetual and chairman of an independent committee of its board of directors that recommended the Offering; Mark Caiger (**Caiger**), a Managing Director with BMO Nesbitt Burns Inc. (**BMO**), which had been engaged by Perpetual to advise it in respect of the Offering (among other things); and Alan Tambosso (**Tambosso**), President of Sayer Energy Advisors (**Sayer**), which had been engaged by Perpetual to provide a fairness opinion (the **Fairness Opinion**). Potvin, Caiger and Tambosso each described themselves as experts, assertions that were not disputed; as such, those individuals each gave opinion evidence. Other documentary evidence was entered either through affidavits or by common consent of all parties.

[4] The Offering was under way at the time of the hearing; separate public trading of the Rights on the Toronto Stock Exchange (the **TSE**) was then imminent. Cognizant of this, and of the parties' apparent shared wish that our decision issue promptly, we delivered our decision on the Appeal and Application orally on the evening of Wednesday 23 December 2015. We advised at that time that a written decision would follow in due course. This is that written decision.

# II. FACTUAL BACKGROUND.

## A. The Parties

### 1. Perpetual

[5] Perpetual is a public company and a reporting issuer under the Act. It described itself as "a Canadian energy company with a spectrum of resource-style opportunities spanning heavy oil, natural gas liquids and bitumen along with a large base of shallow gas assets". It owned 1 million shares of Tourmaline Oil Corp. (**TOC**).

[6] Perpetual was financed in part by a credit facility with a consortium of banks, $275 million (principal amount) of 8.75% "senior notes", and $34.9 million (principal amount) of 7.0% debentures maturing on 31 December 2015 (the **Debentures**).

[7] Both the shares and the Debentures were listed and traded on the TSE.

[8] The Debentures were governed by a trust indenture (the **Indenture**) dated as of 26 May 2010, later supplemented and amended in connection with a plan of arrangement which saw Perpetual substituted for the original borrowing entity. The Debentures were convertible into Shares, and Perpetual had the right at maturity to satisfy its obligation to redeem the Debentures by delivering Shares to the holders of the Debentures (**Debentureholders**) in lieu of cash.

[9] The number of Shares to be issued on such settlement of the Debentures (**Share Settlement**) was to be a function of the principal amount of the Debentures and the volume-weighted average price (**VWAP**) of Shares traded on the TSE over a period of 20 consecutive trading days ending on 22 December 2015, less a 5% discount. The principal amount being constant, the number of Shares thus issuable would vary inversely with the VWAP: the lower the VWAP, the more Shares would be issuable.

[10] The Indenture included adjustments to the conversion ratio for pre-maturity conversions of Debentures into Shares, to account for rights offerings (among other things). No such rights-offering adjustment was prescribed in respect of a Share Settlement at maturity.

### 2. The Applicants

[11] Polar is a hedge fund manager. Sabourin described it as "a major participant in the convertible bond market" in Canada and abroad, with its funds holding approximately $350 million of such instruments of Canadian issuers.

[12] Polar acquired control or direction over $1,416,000 principal amount of Debentures, after Perpetual announced the Offering. Sabourin testified that this acquisition (which he characterized as de minimis to Polar) was made to give Polar standing to launch the present Appeal and Application.

[13] We were told little about the other two Applicants, other than that Sabourin understood K2 to have controlled or directed $1,978,000 principal amount of Debentures both before the Offering was announced and at the time of the hearing, and that Cambridge controlled or directed $2,567,000 principal amount of Debentures before the Offering announcement, reduced to $1,847,000 at the time of the hearing.

## B. Chronology of Key Events

[14] By November 2015, Perpetual was facing financial challenges. The following chronology, based on disclosure in the Prospectus, sets out some of what followed (unless otherwise stated, all dates are in 2015).

- On 10 November Perpetual management reviewed for its board of directors (the **Board**) "the need for and principal elements of a series of transactions that could be undertaken in order to address [Perpetual's] near term debt payment obligations and its liquidity position". BMO presented to the Board a "concept" coupling the Share Settlement with a rights offering (we refer to these together as the **Equity Transactions**) designed to treat holders of both securities "equitably and fairly".

- That same day, the Board established a committee of directors independent of Perpetual management (the **Committee**, chaired by Merritt) "to consider strategic alternatives . . . and to consider, supervise, negotiate and recommend a course of action to the Board".

- On 12 November Perpetual management gave the Committee, its legal advisors, Sayer and BMO "a comprehensive presentation and review" of major company assets, "its liquidity position" and various financial and other arrangements and obligations.

- On 13 November (according to Perpetual's submissions) the Committee formally engaged Sayer "to provide an assessment of the value of [Perpetual's] equity" both before and after the Equity Transactions, and to provide "a public opinion as to the fairness, from a financial point of view[,] of the Equity Transactions" to Shareholders and to Debentureholders. The rights offering element of the Equity Transactions was to raise $25 million; a "backstop" by the chairman of Perpetual's Board (already a substantial Shareholder) would ensure that the full amount would be subscribed, by him (indirectly) if not by other Rightsholders.

- Several meetings between Sayer and the Committee ensued. Sayer applied numerous inputs – we were assured that market trading prices were among them – and assumptions, in multiple "scenarios", to compute a dozen high or low figures (ranging from $1.62 to a negative $0.23) for the value of a Share. Sayer then took the simple average of those figures – "as it does not put any undue weighting on any one particular item" – to generate a "Valuation Average Price" of $0.64. This figure was presented to and adopted by the Committee. (The Prospectus stated that this was the Committee's own assessment, but testimony indicated that the Committee accepted what Sayer presented to it; we do not criticize the Committee for having done so.)

  Multiplying $0.64 per Share by 153 million Shares outstanding produced a pre-Equity Transactions total Share value of roughly $98 million. (This computation was suggested in the Prospectus but it was unclear which figure was generated first, the per-Share value or the aggregate.) Adding the $34.9 million principal amount of the Debentures and $25 million to be raised from the Offering produced an aggregate figure of roughly $158 million – of which the Debenture principal amount represented approximately 22%.

- Sayer issued its Fairness Opinion, dated 19 November. This was stated to be subject to numerous assumptions and without "expressing … any opinion as to the price at which the Shares will trade". It concluded that "the Equity Transactions . . . [are] fair, from a financial point of view, to the Shareholders and to the holders of the [Debentures]".

  According to the Prospectus, the Committee "determined that ensuring holders of [Debentures] receive approximately 22% of the pro forma equity after the Equity Transactions is fair to the [Debentureholders]".

  In light of that determination, the Fairness Opinion and advice from Sayer and BMO (among other things), the Committee found the Equity Transactions to be "in the best interest of" Perpetual, and recommended that the Board approve them. That recommendation was apparently given on 19 November.

- Some 72,000 Shares traded on the TSE that day, closing 19 November at $0.445 per Share. Debentures had last traded on 16 November, on modest volume to close at $95 per $100 principal amount.

- On 20 November Perpetual issued a news release disclosing a package of "recapitalization transactions" (the **Announcement**). These included an extension of Perpetual's banking arrangements and the sourcing of $18.2 million "collateralized by" its TOC shareholding. Most pertinent to this proceeding was the disclosure of the Equity Transactions – Perpetual's election to make a Share Settlement of the Debentures at their year-end maturity date, and the "fully backstopped" $25 million Offering. The Announcement stated that the recapitalization transactions would give Perpetual added liquidity and reduce its indebtedness by $55 million.

  The Announcement noted that the Rights would enable holders to buy Shares at their VWAP "less a discount of 80.7%". It disclosed that Perpetual's chairman then owned approximately 22.9% of the outstanding Shares, which would drop to some 17.8% if all other Rightsholders fully exercised their Rights, but which could rise if instead his backstop were called upon.

- On 23 November Perpetual's preliminary short-form prospectus for the Offering was receipted by the ED (through his delegate; references in this decision to the ED include his delegates).

- Correspondence ensued between ASC Corporate Finance Department personnel and Perpetual's filing counsel, mostly involving ASC analyst comments on the preliminary prospectus disclosure and responses from filing counsel.

- On 27 November legal counsel for Polar and K2 wrote to Perpetual, criticizing the Offering as "oppressive and unfairly prejudicial to Polar, K2 and the other holders of [Debentures]", and as an "unprecedented and flagrant abuse of the capital markets in Canada". Perpetual, through its legal counsel, responded on 30 November with a letter setting out its perspective that the "Equity Transactions are not at all abusive".

- On 1 December legal counsel for Polar and K2 wrote to the ED, setting out their concerns in respect of the Equity Transactions and requesting that a receipt for the offering final prospectus be denied or, in the alternative, requesting a hearing.

- The Equity Transactions both involved a calculation of the VWAP of the Shares, based on TSE trading from 25 November through 22 December.

- Perpetual's final prospectus for the Offering was receipted by the ED and issued with a 7 December date. The Prospectus reproduced the Fairness Opinion. The ED emailed counsel for Polar and K2 that day, advising of the receipting decision and summarizing the rationale.

- On 11 December the Applicants issued a notice launching the present proceeding.

- 16 December was the record date for determining eligibility, as a Shareholder, to receive Rights.

- The hearing of the Appeal and Application was held on 22 and 23 December.

- The Rights were to begin trading apart from the Shares on 23 December, but Perpetual arranged with the TSE to defer that to 24 December.

- The Debentures (as mentioned) matured on 31 December, and were to be settled in Shares.

- The Offering was set to end on 15 January 2016.

## III. THE PARTIES' POSITIONS GENERALLY

### A. Position of the Applicants

[15] Although there was no suggestion that Perpetual had contravened the Act, the Applicants asserted that Perpetual's behaviour was nonetheless so unfair, and so antithetical to the efficient operation of the capital market, that it was either (or both) contrary to the public interest for the ED to have receipted the Prospectus, and in the public interest for us to cease-trade the Rights.

[16] The Applicants contended that Perpetual, through the Equity Transactions, was undermining their status as debt investors and their legitimate expectations as Debentureholders. More specifically, the Applicants suggested that the essence of the arrangement for which Debenture investors had contracted and which they, and the capital market generally, expected Perpetual to fulfil – namely their entitlement at maturity to the repayment of the Debenture principal amount either in cash or in Shares of equivalent worth – was being thwarted by the launch of the concurrent Offering. The Applicants noted that the Equity Transactions would give Rightsholders collectively more Shares than the Debentureholders at a much lower effective

cost per Share, and that irrespective of Share trading prices and numbers of Shares issuable under the Equity Transactions, the Shares issuable to Debentureholders under the Share Settlement would account for only a fixed 22% of the Shares outstanding after the transactions. (Correspondence in evidence mentioned a 21.2% figure, but 22% was the figure generally used in submissions and, therefore, in this decision).

[17] This was not, according to the Applicants, what Debentureholders had bargained for, even if it did not breach the express terms of the Indenture. Moreover, the Applicants (pointing to a Perpetual website presentation, among other things) argued that this fixed proportionate Shareholding was deliberate. The Applicants suggested that the result would not deliver Debentureholders anything close to $34.9 million in value, and contended that it was therefore unfair to them, and egregiously so.

[18] The Applicants also asserted that Perpetual's conduct jeopardized the efficiency of, and confidence in, the broader Canadian market for convertible debentures (or convertible securities generally). According to the Applicants, capital-market expectations would be upended were the Offering allowed to proceed – "The finance textbooks would have to be rewritten", according to Potvin – and other issuers of convertible debentures could be prompted to follow Perpetual's example, to the detriment of their respective debentureholders.

### B. Positions of Perpetual and Staff

[19] Perpetual and Staff both opposed the Appeal and the Application, on largely shared grounds. Both asserted that the Applicants failed to establish either abuse of Debentureholders or jeopardy to the capital market; such evidence as there was on the latter point amounted, in their submissions, to mere speculation.

[20] Without conceding that the Equity Transactions were unfair, Perpetual and Staff both argued that even were there an element of unfairness, an ASC hearing was not the appropriate venue for dealing with it (the commercial courts would be more appropriate), and that neither overturning the Prospectus receipt nor a cease-trade order would be an appropriate remedy.

### C. Parties' Positions on Our Public Interest Authority

[21] The parties agreed – and we concurred – that the principles and factors governing the exercise of our public interest authority, in the absence of a proved contravention of the Act, were set out in past decisions to which we were directed.

[22] The Applicants pointed to the following passages (paras. 74 and 88) of *Re Canadian Tire Corp*. (1987), 10 O.S.C.B. 857 (affirmed (1987), 35 B.L.R. 117 (Ont. Div. Ct.), leave refused (1987), 35 B.L.R. xx (Ont. C.A.), in support of their contention that we must exercise our public interest authority here:

> To accede to counsel's contention that a specific breach of the legislation or of a policy statement must be shown before section 123 can be invoked would not only be contrary to the plain wording of section 123, but also would be a failure by the Commission to exercise the mandate vested in it by the Legislature. There are few areas in our public life that are as dynamic and as innovative as our capital markets. For the most part, that dynamism and innovation enure to the benefit of the economy at large and individual investors in particular. But that same dynamism and innovation can, and does, lead to abuse. A regulatory agency charged with oversight of the capital markets

must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets. Regardless of its rate of production, the Commission cannot possibly issue policy statements that cover, much less keep up with, the types of transactions that are conceived in the marketplace. It is in that sense that we adopt and reaffirm the statement quoted above from [*Re Cablecasting Ltd.*, [1978] O.S.C.B. 37].

. . .

In these circumstances, we have no hesitation in saying that this transaction is contrary to the public interest, as that term is used in section 123 of the Act. When the public market is sold some $100 million of Class A non-voting shares consequent upon a reorganization that, among other things, provides takeover protection to those shares and the controlling shareholders, some three years later, devise a scheme in conjunction with those who wish to obtain control of the Corporation, to circumvent the coattail while, in effect, receiving the full price for their shares, regulatory intervention to stop an abusive transaction is called for. A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here, and this is as grossly abusive a transaction as the Commission has had before it in recent years, are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sense, it is in the public interest that this Offer be cease traded along with the Billeses' tendering of their common shares to the Offer.

[23] All parties acknowledged limits on the public interest authority, as discussed in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (at paras. 41-45):

However, the public interest jurisdiction of the OSC [the Ontario Securities Commission] is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" <u>and</u> "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. [in the Ontario Court of Appeal decision appealed from, at (1999), 43 O.R. (3d) 257] that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as [*Canadian Tire*], in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc*., [1991] 3 S.C.R. 154, at p. 219.

Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair

> and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
>
> More specifically, s. 122 makes it an offence to contravene the Act and, though the OSC's consent is required before a proceeding under s. 122 can commence, the provision authorizes the courts to impose fines and terms of imprisonment. Under s. 128, the OSC may apply to the Ontario Court (General Division) for a declaratory order. In making such an order, the courts may resort to a wide range of remedial powers detailed in that section, including an order for compensation or restitution which would be aimed at providing a remedy for harm suffered by private parties or individuals. In addition, further remedial powers are available under Part XXIII of the Act which deals with civil liability for misrepresentation and tipping and creates rights of action for rescission and damages.
>
> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.

[24] The Applicants drew our attention specifically to the opening sentence of the final paragraph just quoted from *Asbestos*. Perpetual would have us focus on the remainder of that paragraph.

[25] The public interest authority was also considered by the ASC in *Re ARC Equity Management (Fund 4) Ltd.*, 2009 ABASC 390 (at paras. 64-70 and 116):

> None of the parties alleged that any of the circumstances or conduct surrounding the Transaction involved contraventions of Alberta securities laws. That, however, does not dispose of the application or preclude us from taking action we consider appropriate in the public interest.
>
> The Commission is charged with administering Alberta securities laws in the public interest with a view to protecting investors, facilitating a fair and efficient capital market, and fostering confidence in that capital market and among capital market participants generally. Our authority to make orders under section 198(1) of the Act is not restricted to instances in which we find a specific contravention of a specific provision of securities laws; the test, always, is whether the public interest is best served by the making of an order. We have, therefore, a broad public interest jurisdiction. It is sufficiently broad to enable us, were we to consider it appropriate, to effect the result sought by ARC.
>
> That said, our public interest jurisdiction is to be exercised with care. The scope of the comparable jurisdiction in Ontario, and its use, have been discussed in several OSC [Ontario Securities Commission] decisions. Thus, in [*Cablecasting*] (at 43) the OSC gave guidance as to when it might intervene in a transaction through the exercise of its public interest jurisdiction in the absence of a contravention of securities laws:
>
> > If the transaction under attack was of an entirely novel nature, Commission action might seem more appropriate. Another relevant consideration in

> assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements. Where this is the case the Commission will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.

In [*Canadian Tire*] the OSC commented on the same issue. There the OSC recognized that it should "move with caution" (at [75]) but would act if necessary to prevent an abusive transaction from occurring (at [90-91]):

> . . . Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the Commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness through the use of the cease trade power . . . . The Commission's mandate under section 123 [the counterpart to our section 198] is not to interfere in market transactions under some presumed rubric of [ensuring] fairness.
>
> The Commission was cautious in its wording in [*Cablecasting*] and we repeat that caution here. To invoke the public interest test of section 123, particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.

More recently, the OSC in *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267 (affirmed (2006), 21 B.L.R. (4th) 311 (Ont. Div. Ct.)) similarly ruled (at paras. 304-08) that, in the absence of a contravention, it would intervene on public interest grounds only if there were a finding that the conduct under scrutiny was abusive of shareholders particularly and the integrity of the capital market generally.

In our view, this cautious approach recognizes the danger that a well-intentioned panel minded to address a harm discerned in a particular set of facts could inadvertently respond too aggressively or with too broad a brush, with unintended and undesirable consequences, including consequences for participants in other, unobjectionable transactions or circumstances. Accordingly, we believe that a panel would be ill-advised to rely solely on its public interest authority to intervene in a transaction and interfere with negotiated, and otherwise legal, arrangements or outcomes unless there is compelling evidence that a failure to intervene would truly be abusive to investors and the integrity of the capital market.

In short, our public interest jurisdiction is available to address a clearly demonstrated abuse of investors and the integrity of the capital market, even in the absence of a contravention of Alberta securities laws. However, our public interest jurisdiction is to be exercised with restraint.

. . .

Having concluded that this is not a clear case of an abuse warranting the exercise of our public interest jurisdiction, we consider that ARC has raised issues worthy of analysis and debate. Private placements of voting securities negotiated in such circumstances may come under

> deserved scrutiny. Depending on all the circumstances, a future effort to follow Paramount's approach might encounter not just serious challenge, but possibly also a different outcome.

[26] Perpetual and Staff suggested that *ARC* was instructive for the Application. The Applicants thought the two cases distinguishable.

## D. Parties' Positions Particular to the Appeal

### 1. Applicants' Position on the Appeal

[27] In their Appeal of the ED's issuance of a receipt for the Prospectus, the Applicants argued that the standard to be applied by this panel was "correctness". In support, they cited *Re Workum*, 2006 ABASC 1099, and pointed to the broad range of possible appeal outcomes contemplated by section 36(3) of the Act.

[28] Concerning their standing to appeal, the Applicants cited *Re Canada Malting Co.*, 1986 LNOSC 224 (at page 9) for the proposition that "[t]hose whose rights or whose economic interests have been affected by decisions . . . are . . . 'directly affected' by a decision". The Applicants argued that this reasoning applied here, to them.

[29] In respect of the actual decision appealed, the Applicants pointed to *Re Guard Inc.*, 1996 LNONOSC 242 for the proposition "that the public interest discretion to refuse to issue a receipt is broader than the . . . public interest jurisdiction".

### 2. Staff's Position on the Appeal

[30] Staff disputed the Applicants' standing in the Appeal. In particular, Staff submitted that theoretical "adverse incidental consequences" to Debentureholders from the Offering did not alone render them "directly affected" (a precondition to an appeal under section 35 of the Act) by the ED's decision to receipt the Prospectus.

[31] Were we nonetheless to grant the Applicants standing, Staff argued that the Appeal should be "on the record" – that is, based on the material that was before the ED when the receipting decision was made, but not on other subsequently-appearing material adduced in this hearing.

[32] Staff contended that the Appeal standard should be "reasonableness". Staff observed that *Workum* predated the Supreme Court of Canada's prescription of the reasonableness standard in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Staff also noted that the Alberta Court of Appeal applies a reasonableness standard in appeals from ASC panel decisions (*Alberta (Securities Commission) v. Lavallee*, 2009 ABCA 52). Section 38(6) of the Act, which governs such appeals, sets out a range of possible outcomes parallel to the list in section 36(3).

### 3. Perpetual's Position on the Appeal

[33] Perpetual shared and adopted Staff's position concerning the Appeal.

## IV. THE APPEAL: ANALYSIS AND CONCLUSIONS

## A. Standing

[34] We began our analysis on the Appeal with the question of standing.

[35] We considered Staff's view to be perhaps narrower than intended by the Act. In practical terms, it might be (as Staff suggested) that a prospectus receipt would directly affect (in the sense of section 35 of the Act) only the filing issuer. However, that need not necessarily be the case; it would depend on the circumstances.

[36] The circumstances here were likely atypical. The terms of the Offering (for which the Prospectus was required) would have a direct, and potentially significant, effect on the proportion of Perpetual's equity that Debentureholders could anticipate under the Share Settlement. Counsel for at least two of the Applicants complained to the ED, as the prospectus review process was under way, about this perceived direct effect on their clients' economic interests or expectations.

[37] The evidence indicated that the ED considered the complaint and factored it into his ultimate decision to receipt the Prospectus.

[38] In the circumstances, we were satisfied that the Applicants (including Cambridge, which joined the other two Applicants in the Appeal under common legal representation) had standing to appeal the ED's decision.

## B. Appeal on the Record

[39] We agreed with Staff's position that the Appeal should be on the record. That record excluded much material presented in this hearing but not before the ED at the time the Prospectus was receipted. We had no difficulty in disabusing ourselves of that later-compiled information when considering the Appeal.

## C. Standard of Review

[40] We were persuaded, for the reasons argued by Staff, that the appropriate standard of review in the Appeal was reasonableness.

## D. Analysis

[41] We considered the information that the ED had before him at the relevant time. We also considered his responsibilities under the Act, the discretion available to him, and the provisions of the Act (notably, sections 121(1) and (2)) that specifically address the issuance or denial of a prospectus receipt.

[42] The evidence satisfied us that the ED performed a reasonable and diligent review of matters relevant to the Prospectus-receipting decision; that in that regard he asked reasonable questions of Perpetual, and imposed reasonable requirements on it; and that he received satisfactory responses and assurances from or on behalf of Perpetual. We therefore did not consider the ED's decision-making process to have been unreasonable. More importantly, we were satisfied that his ensuing decision to receipt the prospectus was reasonable.

## E. Conclusion on the Appeal

[43] The ED's decision having been reasonable in the circumstances, we discerned no grounds to interfere with it. We therefore dismissed the Appeal.

## V. APPLICATION FOR A CEASE-TRADE ORDER

[44] We turned next to the Application for an order under section 198(1)(a) of the Act that trading in Rights cease.

### A. Our Public Interest Authority

[45] This panel clearly had the authority, even in the absence of a contravention of the Act, to issue such an order in the exercise of our regulatory responsibilities to protect investors and to foster fairness, and confidence, in our capital market – if we considered it to be in the public interest to do so. However, that public interest authority must be exercised with care and caution, giving due attention to principles enunciated (as quoted above) in *Canadian Tire*, *Asbestos*, and *ARC*. Although some of those decisions referred expressly to a different province or a different securities commission, the principles apply equally in Alberta (*Re TransCap Corporation*, 2013 ABASC 326 (at para. 14)).

[46] Care and caution do not preclude the exercise of the public interest authority, but some animating principles bear reiteration. "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to . . . capital markets" (*Asbestos*, adopting the statement of Laskin JA, at para. 42). Our mandate "is not to interfere in market transactions under some presumed rubric of [ensuring] fairness"; "the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general", and "abuse . . . goes beyond a complaint of unfairness" (*Canadian Tire*, at 90-91).

### B. Interaction of the Offering and the Share Settlement

[47] The Offering stood at the heart of the dispute between the Applicants and Perpetual, but this was because of its interaction with the Share Settlement. As noted, a feature of the Debentures was the method prescribed by the Indenture for determining the number of Shares issuable in the Share Settlement – a number whose aggregate value would approximate the principal amount of the Debentures. We use the word "approximate" advisedly, because the Indenture calculations applied not a particular Share trading price on the date of the Share Settlement, but instead a VWAP. The required volume-weighting would force some smoothing from actual trading prices over the formula period, such that the VWAP price might not match the TSE Share price for any particular trade, and probably would not match the closing price at the end of the VWAP computation period. Moreover, that period ended (and the result was therefore locked in) several days before the Debenture maturity date. During that interval, normal-course market trading alone might accentuate a deviation between the principal amount of the Debentures and the trading value of the Shares issuable in settlement.

[48] There appeared nothing troubling about any of this. Those involved – seller and buyers – in the original issuance of the Debentures and subsequent trading in them (at least before the Announcement) can in our view reasonably be presumed to have understood the variables at play, but to have accepted (and perhaps preferred) an element of price smoothing to reliance on a single day's trading price (with the potentially anomalous results that might produce) as well as the scope for market-derived variation in the final days before the maturity date. While the result did not ensure the Debentureholders would receive, at maturity, Shares with a realizable (trading) value precisely equal to what they would have realized were the Debentures settled in

cash ($34.9 million), the Applicants argued that Debentureholders bargained for, and could reasonably expect, something quite close. In our view, that position was reasonable.

[49] The parties seemed not to dispute that the inverse relationship between the Share price (as reflected in the VWAP) and number of Shares issuable on the Share Settlement was likely to depress the trading price of the Shares once Perpetual's election for the Share Settlement was announced. This would be a natural response of market participants to knowledge of an imminent dilution through the issuance of the new Shares, but also a process capable of building on itself through altered trading considerations and behaviour. Existing Shareholders might be prompted to sell before the Share price dropped further, while prospective buyers might delay in expectation of lower prices to come. While there was disagreement as to whether this warranted the description "death spiral" (we considered the nomenclature essentially irrelevant), we accepted that the effect was real – and a foreseeable part of the bargain between Perpetual and its Debenture investors. Even so, under the terms of the Indenture (absent the Offering) the price-depression should be largely offset (subject to the smoothing and time-interval factors mentioned) by the greater number of Shares issuable in the Share Settlement.

[50] We understood Caiger to consider that this price-depressing effect meant that the trading market for Shares ceased to be efficient, and that trading prices were therefore an unreliable indicator of Share value. We return to this issue below.

[51] The second factor at issue here was the Offering. By its timing and design, it was bound to affect the Debentureholders as well as Perpetual's existing Shareholders.

[52] The Offering would itself involve significant dilution, in terms of numbers of Shares. The Rights would entitle the holders to buy new Shares at their VWAP (the same VWAP as used for the Share Settlement) – less an 80.7% discount (only a 5% discount would be used for the Share Settlement). Full exercise of the Rights was effectively assured by the backstop. The Offering would thus prompt the same sort of price-depressing effect as the Share Settlement.

[53] The timing of the Offering – concurrent with the imminent, simultaneously announced Share Settlement – meant a double dose of Share dilution and foreseeable associated Share price declines. Some of this was occurring during the VWAP calculation period. The Applicants suggested that it would continue beyond that period. This could accentuate any difference between the Debenture principal amount and the trading value of the Shares issuable in the Share Settlement.

[54] One particular aspect of the Offering structure – the aspect most offensive to the Applicants – seemed likely to accentuate that difference, and the associated detriment to Debentureholders. This was the locking in, at 22%, of the number of Shares issuable in the Share Settlement as a proportion of the total outstanding Shares on completion of the Equity Transactions. No matter how many Shares were outstanding, or how low their trading price, that proportion would not vary. Nor would the corresponding proportion of the aggregate trading value of outstanding Shares. In that sense, the Offering blocked what would otherwise be a substantially self-compensating feature of the Indenture (Debentureholders would receive more

Shares – and with them, absent the Offering, a greater proportion of Perpetual's equity – the lower the VWAP fell).

[55] The Applicants presented this as a betrayal of the bargain they made as debt investors, an abuse of Debentureholders and (if not halted) a tactic likely to be repeated by other issuers of convertible securities, to the detriment of capital market efficiency and confidence.

## C. Perpetual's Motivation

[56] Perpetual, as noted, denied any abuse and conceded no unfairness. It maintained – as it had communicated in both the Announcement and the Prospectus – that the Debentureholders were being treated fairly. Perpetual asserted that the Equity Transactions together will deliver to Debentureholders exactly what they bargained for.

[57] Perpetual's position emphasized the financial challenges it was facing before the Announcement. Settling the Debentures would remove $34.9 million of indebtedness, but a cash settlement would have to be funded; a Share Settlement would obviate that need. There was discussion in the hearing about whether Perpetual could have, or should have, sold its TOC shares to fund such cash settlement. Perpetual suggested that this would be problematic (although not necessarily impossible) given security arrangements already in place for other of its indebtedness. This debate was inconclusive and of limited assistance to our analysis; our task, after all, was not to determine Perpetual's best course of action, but rather whether the actions it took warranted the remedy sought by the Applicants.

[58] The Share Settlement was apparently considered an insufficient response to Perpetual's financial challenges, as indicated by the other measures (apart from the Equity Transactions) also disclosed in the Announcement. Even with those, there was apparently a view that Perpetual needed a sizeable near-term cash infusion. We accepted that Perpetual operated on this understanding.

[59] While a $25 million rights offering might deliver that cash infusion, Perpetual suggested that success was not assured. The mentioned backstop would deliver funding assurance, but Perpetual submitted that the backstop commitment would not be forthcoming if Rightsholders lacked certainty as to their proportionate post-investment equity interest. Locking in the Debentureholders' equity position at 22%, we were told, was meant to overcome this obstacle. Perpetual presented this as reasonable and necessary – and, more importantly, as something achievable without unfairness to the Debentureholders.

[60] The Applicants and Perpetual were thus far apart in their assessments of the unfolding reality. So, too, were their respective witnesses Potvin and Caiger (the latter acknowledged having designed the Offering structure). These two experts maintained their divergent perspectives, and did so with some eloquence. At times, though, they seemed not to be addressing the same topics.

## D. The Question of Value

[61] At the core of the disagreement appeared to be divergent views on the concept of value.

[62] The Applicants, who directed us repeatedly to market trading prices, seemed to concentrate – not, in our view, unreasonably – on the notion of what the Shares they would soon receive in the Share Settlement might fetch on the TSE.

[63] Perpetual sought to cast doubt on the importance or reliability of trading prices, especially in the face of what they portrayed as market inefficiency spawned, or aggravated, by the Share dilution portended by the Announcement. Caiger, using the "death spiral" term, suggested that the anticipation of Share price declines had a coercive effect on market participants, to the extent that trading prices would not reflect fair value. (Potvin, for the Applicants, maintained that trading prices remained the best measure of value.)

[64] According to Perpetual, it was therefore appropriate to seek a measure of value other than TSE trading prices. To that end, Sayer applied methods of analysis that Tambosso suggested were widely used for purposes including securities laws.

[65] We understood Sayer (and therefore Perpetual's Committee and Board) to have concentrated on what might be termed fundamental enterprise value – the worth of Perpetual's assets and business (net of debt), expressed either as a global aggregate or as a per-Share amount. We referred to this value as a notional value. In so doing we were implying nothing derogatory, but simply reflecting Sayer's "Valuation Average Price" per Share as something less tangible, or at least less readily subject to confirmation, than the market trading price.

[66] Although the mechanics Sayer applied to arrive at the $0.64 notional value per Share were rather obscure (at least from the evidence before us), the Applicants did not prove Sayer's process to have been flawed or the result clearly wrong. It certainly produced a number markedly different from the then-current share trading price – Shares closed on the TSE at $0.445 on 19 November 2015 (the last trading day before the Announcement) – but Sayer was not attempting, with this notional value, to reproduce the trading price.

## E. Implications of the Notional Share Value

[67] The $0.64 notional Share value – or, more accurately, the corresponding notional aggregate equity value, adjusted to take into account the Equity Transactions – would assume immense importance, even though it was unclear that either Sayer or the Committee fully appreciated its significance. It was this notional aggregate value that Perpetual allocated (apparently on the advice of BMO) between the Debentureholders on the one hand, and existing Shareholders and any to whom they might sell their Rights on the other. As discussed, the $34.9 million principal amount of the Debentures represented 22% of this notional aggregate value, and the structuring of the Equity Transactions locked in that proportion irrespective of the numbers of Shares involved, or their trading price.

[68] Perpetual asserted that this was fair to the Debentureholders, because it delivered them their $34.9 million in value. Using the notional value as the starting point, the numbers indeed matched. That was unsurprising, as it simply involved working the same calculations in reverse order.

[69] To the extent that we accepted the notional value as the value that mattered, the logic held: 22% of post-transaction equity would give Debentureholders their $34.9 million in value. But Perpetual's argument told us nothing about the more tangible – in the sense of being realizable – value of what the Debentureholders would be given. We understood the Applicants to anticipate ending up with Shares whose market value would fall short (perhaps far short) of $34.9 million. Staff rightly pointed out that this involved speculation about events that yet to unfold, but they did not appear to reject the Applicants' view outright. There was also some corroboration from the capital market: the Debenture price on the TSE had dropped to $31 (per $100 of principal) by 21 December 2015.

[70] Sayer's Fairness Opinion – and Perpetual's communication of its tenor to Staff, to the Applicants and in the hearing – were, on their face, unambiguous. The Equity Transactions would be fair from a financial point of view, including to the Debentureholders. The Fairness Opinion essentially communicated that Perpetual's equity value was being fairly allocated as between Debentureholders and others.

[71] The assurance seemingly offered by the Fairness Opinion seemed to diminish considerably on closer examination. It was (perhaps inevitably) based on numerous assumptions – some expressly stated, some not – but it expressly excluded any opinion as to Share trading prices. In context, that was a significant caveat. Also critical to the Fairness Opinion, even if not clearly presented as such, was the assumption that Perpetual had an aggregate equity value of $98 million (or a per-Share equity value of $0.64) on 19 November 2015.

[72] If that latter – unstated – assumption were correct, and if suitable adjustments were made from that starting point to reflect consummation of the Equity Transactions, we consider that the Fairness Opinion conclusion (both Shareholders and Debentureholders were being treated fairly) was defensible, and so therefore was the company's decision to proceed with the Offering.

[73] However, we perceived a gap between "defensible" and "fair". The Fairness Opinion seemed to embody yet another crucial, but unstated, assumption: that fairness to Debentureholders turned on notional equity value as distinct from Share trading prices.

[74] Accordingly, if either of these key assumptions was wrong – if the notional value ascribed to Perpetual's equity was incorrect, or if (however reasonable Sayer's calculations) fairness to Debentureholders depended on the realizable trading value of the Shares they were to receive – then in our view the Fairness Opinion was not of much assistance.

[75] Whether this was fully appreciated by all at Perpetual is unclear. The Applicants clearly perceived a great wrong, and we found that understandable.

## F. The Probable Debenture Bargain

[76] We inclined to the Applicants' view as to the "bargain" implicit in a Debenture investment (at least, an investment predating the Announcement), and we think the basic terms of that bargain should have been obvious to both Debenture investors and Perpetual. Stated simply, that bargain was that Debentureholders would receive, at maturity, something – either cash or Shares, depending on how settlement were effected – of a realizable value equal or

(given the scope for variation previously discussed) close to the principal amount of their Debentures. Absent some better measure of realizable value, we think TSE trading prices informative, and relevant to the investment bargain. (In our view, this was consistent with the Indenture's use of a VWAP formula applying those trading prices, albeit with adjustment.) We doubt that the true business bargain underlying the Debentures was for the delivery of Shares with a corresponding notional value but a significantly lower realizable value.

[77] Staff observed that the Indenture specifically addressed the possibility of rights offerings through the mentioned adjustment of pre-maturity conversion ratios, but made no similar adjustment for a Share Settlement at maturity. In Staff's submission, we could infer that something like the Offering was contemplated and accepted as part of the Debenture bargain. We were not persuaded. We agreed that the Indenture could have been drafted differently (while noting also the Applicants' observation as to the difficulty of addressing every eventuality in advance). However, that sort of insight through hindsight does little to illuminate the expectations and intentions of past Debenture investors.

[78] We considered it pertinent to consider prior convertible debenture settlements. Although the parties quibbled over whether Perpetual's conduct was "unique", Perpetual (through Caiger) referred us to only a single example of a rights offering concurrent with a conversion, apparently in or about 2002. We considered that an insufficient basis from which to infer either that the Indenture was drafted, or that Debenture investors invested, with that precedent in mind.

[79] We concluded, therefore, that Perpetual's decision to conduct a rights offering overlapping in time with the Share Settlement (and which, owing to the timing, would not be open to Debentureholders) reasonably would have come as a surprise to Debentureholders who invested before the Announcement.

**G. The Question of Unfairness**

[80] Once launched, the Indenture-prescribed process for a Share Settlement was effectively formula-driven and automatic. Debentureholders themselves would have little ability to affect the outcome, and there was no suggestion that they expected any. The unexpected element was Perpetual's timing and structuring of the Offering, with the results discussed.

[81] Perpetual opted for the Share Settlement; that was its decision. Given the advice available to it, Perpetual must be presumed to have understood that the foreseeable consequences would include a significant Share price decline, a significant dilution of existing Shareholdings, and (absent the Offering) a concomitant rather large shift in proportionate Share ownership toward the outgoing Debentureholders. All of that would have been part of what we perceived as the Debenture bargain. Yet Perpetual advanced these foreseeable consequences (coupled with what we accepted as its belief in the need for a near-term cash injection) as justifying, and indeed demanding, the peculiar structure of the Offering.

[82] It was our view that the recapitalization of Perpetual (at least that portion undertaken through the Equity Transactions) amounted to a compromise of the Debentures – but a compromise (if indeed the term can be used in such circumstances) imposed unilaterally by Perpetual.

[83] Debenture trading prices subsequent to the Announcement – specifically, their decline from near par to far below par – tended, in our view, to corroborate our conclusion that the Offering came as a surprise, and not only to Debentureholders.

[84] All of this led us to agree with the Applicants that Debentureholders – at least those who invested before the Announcement – had reason to consider themselves treated unfairly by Perpetual.

**H. The Question of Abuse**

[85] Applying the reasoning of *Canadian Tire*, unfairness is not the same thing as abuse, and not alone a sufficient basis for exercising our public interest authority.

[86] In assessing whether the unfairness we perceived here also amounted to abuse, we considered it appropriate to consider the circumstances in which the Equity Transactions were launched, and the rationale behind it.

[87] As discussed, we accepted that Perpetual acted in response to real financial challenges and a genuine belief that it needed a near-term cash injection. We also accepted – there was no contrary evidence – that the Offering could reliably deliver that cash injection only with a backstop and with something assuring subscribers (including Perpetual's chairman and intended Offering backstopper) concerning their proportionate post-transaction equity holding. We accepted, in other words, that Perpetual had a genuine and legitimate business purpose for the Equity Transactions.

[88] We were not convinced that the Equity Transactions, as structured, were the only route to addressing Perpetual's financial challenges. However, the possibility (if such there was) that other action could have been taken did not establish that Perpetual acted abusively.

[89] The evidence persuaded us that, before the Equity Transactions were launched, the Committee sought (notably through its retainer of Sayer) and (with the full Board) received assurance from its advisors that Perpetual could achieve its funding objective through the Offering while simultaneously treating Debentureholders fairly. There was no evidence that the Committee or the Board disbelieved this. This, then, was not a case of obvious *mala fides*.

[90] There was, moreover, a certain internal logic to the Equity Transactions, a logic that by its own terms cast an essentially benign light on the structuring of the Offering. As noted, it made defensible the depiction of the Equity Transactions as fair to all affected. All of this depended on notional value being both indicative and determinative of fairness. We explained above why we did not find this entirely compelling, from the perspective of pre-Announcement Debenture investors. Still, there was no evidence that the Sayer-derived notional value, taken for what it was, was wrong. Any who accepted this as reasonable, and as a reasonable foundation for decision-making – and the evidence persuaded us that it was so accepted, by Perpetual, the Committee and the full Board – had a basis for believing that they were treating the Debentureholders fairly.

[91] Indeed, this internal logic offered a basis for believing that the Offering structure was necessary to avert a result opposite to what the Applicants complain of: overcompensation of the Debentureholders. Caiger's evidence was that Share Settlement without the Offering would see the Debentureholders receive $72.5 million in notional value for their $34.9 million Debenture principal amount, assuming a $0.20 VWAP.

[92] We did not find the notional value premise an ideal driver of Perpetual's dealings with its Debentureholders, and (as discussed) we perceived unfairness in the result. However, given the effort made to obtain assurance concerning fairness to Debentureholders, given the internal logic of the structured Offering, and given the advice and opinions (including on the topic of fairness) obtained from external advisors, we concluded that the Applicants had failed to establish that they or other Debentureholders were the targets or victims of abuse in the *Canadian Tire* sense.

## I. The Question of Capital Market Impact

[93] The Applicants attributed the fixing of Debentureholders' share of post-transaction equity ownership to "a deliberate effort by [Perpetual] to manipulate the market's determination". Lest any inappropriate inferences be drawn from the terms used, we rejected any suggestion of market manipulation of the sort prohibited by section 93 of the Act.

[94] The Applicants asserted that Perpetual was "seeking to defeat the spirit and intention of the [Indenture] ... in a manner that . . . will have a negative impact on the quality of the markets in Canada generally". We were warned that unless we halted the Offering, it "could effectively become a roadmap" that "other issuers of convertible debentures will see . . . as a legitimate way to repay convertible debt at maturity while avoiding the dilution that such a decision has on its shareholders when based on market prices".

[95] Sabourin testified to the effect that these or similar concerns about market efficiency and confidence were what prompted Polar to invest in Perpetual's Debentures, post-Announcement – so as to have standing to launch the present proceeding and block the Offering. Be that as it may, and even accepting that Polar's expressed concerns were shared by its fellow Applicants, the Applicants failed to prove widespread concern among investors about Perpetual's approach being followed by other issuers.

[96] Even were there such widespread concern in the capital market, we considered that the terms of future convertible securities could readily be negotiated, and trust indentures or other instruments readily drafted, to explicitly address (and preclude, if that be the negotiating parties' wish) a future equivalent of the Offering.

[97] For already-issued and still-outstanding convertible securities, it might be too late for drafting changes. The Applicants suggested that there were several examples of which this might be said. Although no specific examples were cited, we accepted this as plausible. The Applicants argued that issuers of these other outstanding convertible securities can be expected to emulate Perpetual's Offering. Again, the only evidence was Potvin's seeming concurrence with that expectation. We considered this too tenuous and speculative a foundation for a finding of harm to the capital market.

**J. Newly Informed Future Responses**

[98] The cease-trade order sought by the Applicants would apply only to the Rights issued by Perpetual. It would not bar another issuer from implementing its own equivalent of the Offering.

[99] A cease-trade order can, of course, have a general deterrent effect, sending a message to other issuers that their emulation of another's conduct could attract a similar response. In the circumstances here, we considered that an insufficient basis for exercising our public interest authority.

[100] Moreover, we considered that a general deterrent effect might follow from this proceeding even were the Application to fail. The hearing aired important issues, and we expressed our concern about unfairness occasioned by the Offering. All of this could reasonably inform those involved in future transaction design and decision-making, and prompt questions that perhaps were not asked when the Offering was designed and approved. This proceeding could also prove informative to Staff or another ASC hearing panel asked in future to consider similar facts. We observed, therefore, that a (hypothetical) future arrangement designed, and likely, to thwart a negotiated bargain could well face an unwelcome regulatory response – irrespective of the outcome of this Application.

**K. Limitations of a Cease-trade Order**

[101] The tools available to us under section 198(1) of the Act can be powerful, but at the same time (as Staff acknowledged) blunt.

[102] The cease-trade order sought by the Applicants under that provision would halt the Offering in its entirety. As discussed, we accepted that the Offering was conceived and implemented when Perpetual faced real financial challenges, and in the genuine belief that it would deliver a necessary near-term capital infusion. Halting the Offering would halt that cash infusion while the financial challenges remained. The availability of alternative solutions was uncertain; the evidence indicated that Perpetual's situation could be problematic.

[103] The cease-trade order sought could, therefore, have potentially grave implications for Perpetual – and, therefore, for its existing Shareholders. There was, though, no evidence that the Shareholders (other than Perpetual's chairman) played a part in structuring the Offering. It followed that a cease-trade order would foreseeably have an adverse effect on investors who did not instigate the conduct complained of.

[104] Some Debentureholders (Polar was one) may have invested only after the Announcement. They may therefore be presumed to have invested (Polar acknowledged that it did invest) with full awareness of how Perpetual intended events to unfold, including the consequences complained of here. Halting the Offering would change those consequences, uncapping the proportion of Perpetual's equity that would accrue to Debentureholders (both as a class and individually), foreseeably enabling them to realize greater value.

[105] For Debentureholders who invested pre-Announcement, that outcome might simply represent a reversion to the original bargain they invested in. But for Polar and other post-Announcement investors, this would represent a benefit delivered by the ASC but inconsistent

with the terms on which they had invested – a regulatory windfall. We did not consider this consistent with the public interest.

[106] To summarize, the cease-trade order sought by the Applicants would be a clumsy instrument. It would foreseeably harm Shareholders uninvolved in the conduct complained of, while delivering a windfall to some Debentureholders. To persuade us that such outcomes would serve the public interest we would require compelling proof of abusive conduct and harm to the capital market, for which no other remedy was available.

**L. Alternative Recourse**

[107] As discussed, the Applicants – K2 and Cambridge at least – contended that the structured Offering will deprive them and other Debentureholders of the bargain they negotiated and in which they had invested. (Polar, having invested after the Announcement and therefore with knowledge of the terms of the Equity Transactions, was in a different position; Sabourin's explanation, noted above, suggested that it perhaps saw itself more as an advocate than a victim.)

[108] In our view, the harm to which the Applicants allude would be essentially monetary, and quantifiable. A cease-trade order would not deliver monetary compensation – certainly not in any direct sense – and it would not distinguish between the varying circumstances of Debentureholders and their investments (with the mentioned regulatory windfall a prospect for some).

[109] By contrast, were unfairness amounting to oppression established in a commercial court, the arsenal of remedies available to a court could more directly address the harm done, while allowing greater precision and differentiation among claims and claimants than the order sought here.

**M. Conclusion on the Application**

[110] We found the structured Offering troubling. As explained, we discerned unfairness to Debentureholders who had invested before the Announcement.

[111] However, we accepted that the Offering (and the Share Settlement) were implemented for a genuine business purpose, on the advice of financial advisors and with assurances that Debentureholders were being treated fairly. There was a logic to the transaction structure that, even if not entirely compelling to the panel, rendered the expressed opinion of fairness defensible. There was no evidence that Perpetual or its directors disbelieved the opinion. In the circumstances, the Applicants did not establish abuse of Debentureholders.

[112] Nor did the Applicants establish harm to the capital market.

[113] We were mindful of the Applicants' plea that we not be seen to condone unfair behaviour. We did not do so. But we considered the cease-trade order sought by the Applicants a blunt instrument that could harm innocent Shareholders while delivering a windfall to some Debentureholders. By contrast, alternative recourse appeared to lie with the commercial courts, whose tools might more directly – and more selectively – remedy any proved oppression.

[114] Given all of this, and appreciating the importance of exercising our public interest authority with due caution, we concluded that the circumstances here did not warrant the order sought by the Applicants. We therefore denied the Application.

[115] This proceeding is now concluded.

5 January 2016

**For the Commission:**

"original signed by"
Stephen Murison

"original signed by"
Richard Shaw, QC