



**SUPREME COURT OF CANADA**

**CITATION:** Resolute FP Canada Inc. v. Ontario  
(Attorney General), 2019 SCC 60

**APPEAL HEARD:** March 28, 2019  
**JUDGMENT RENDERED:** December 6, 2019  
**DOCKET:** 37985

**BETWEEN:**

**Resolute FP Canada Inc.**  
Appellant

and

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General and  
Weyerhaeuser Company Limited**  
Respondents

**AND BETWEEN:**

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General**  
Appellant

and

**Weyerhaeuser Company Limited and  
Resolute FP Canada Inc.**  
Respondents

**AND BETWEEN:**

**Weyerhaeuser Company Limited**  
Appellant

and

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General**  
Respondent

- and -

**Attorney General of British Columbia**  
Intervener

**CORAM:** Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** Abella, Moldaver, Karakatsanis and Martin JJ.  
(paras. 1 to 35)

**JOINT REASONS DISSENTING IN PART:** Côté and Brown JJ. (Rowe J. concurring)  
(paras. 36 to 165)

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RESOLUTE FP CANADA v. ONTARIO (A.G.)

**Resolute FP Canada Inc.**

*Appellant*

v.

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General and  
Weyerhaeuser Company Limited**

*Respondents*

- and -

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General**

*Appellant*

v.

**Weyerhaeuser Company Limited and  
Resolute FP Canada Inc.**

*Respondents*

- and -

**Weyerhaeuser Company Limited**

*Appellant*

v.

**Her Majesty The Queen as represented by  
the Ministry of the Attorney General**

*Respondent*

and

**Attorney General of British Columbia**

*Intervener*

**Indexed as: Resolute FP Canada Inc. v. Ontario (Attorney General)**

**2019 SCC 60**

File No.: 37985.

2019: March 28; 2019: December 6.

Present: Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Contracts — Interpretation — Indemnity — River system contaminated by mercury waste discharged by operation of pulp and paper mill — Action for damages commenced against mill owners in relation to contamination — Province granting indemnity in context of settlement of action to current and former mill owners in relation to environmental damage caused by mercury discharge — Remediation order later issued by provincial environment regulator in relation to waste disposal site on mill property — Whether indemnity applies to cover costs of complying with remediation order.*

In 1985, Ontario granted an indemnity (the “Indemnity”) to Reed Ltd. and Great Lakes Forest Products Limited, both former owners of a pulp and paper mill located in Dryden, Ontario, as well as to their successors and assigns, “from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them” after the date of the Indemnity, “as a result of any claim, action or proceeding, whether statutory or otherwise”, because of “any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises”, as set out in para. 1 of the Indemnity. The Indemnity was agreed to by the parties pursuant to the settlement of litigation brought by two First Nations in relation to the mercury waste contamination of two rivers caused by the operation of the Dryden mill.

Twenty-six years later, the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining a mercury waste disposal site at the Dryden mill. In the intervening period, ownership of the mill had changed hands in several transactions. The Director’s order was issued to both Resolute, Great Lakes’ corporate successor, and Weyerhaeuser, who also owned the Dryden property for a time. Weyerhaeuser commenced an action in Superior Court, seeking a declaration that the terms of the Indemnity required Ontario to compensate it for the cost of complying with the Director’s order. Resolute sought

leave to intervene in order to claim the same protection. Weyerhaeuser, Resolute and Ontario each moved for summary judgment.

The motion judge held that the Indemnity applied to a statutory claim brought by an agent of the Province and that both Resolute and Weyerhaeuser were entitled to indemnification for their costs of complying with the Director's order. He therefore granted summary judgment in their favour. Ontario appealed. The majority at the Court of Appeal agreed with the motion judge's finding that the Indemnity applied to the Director's order, but held that Resolute was not entitled to indemnification and remitted Weyerhaeuser's entitlement to indemnification to the Superior Court. The dissenting judge would have allowed Ontario's appeal. In his view, the motion judge made reversible errors in his interpretation of the Indemnity; properly construed, the Indemnity was intended to cover only pollution claims brought by third parties, not first party regulatory claims such as the Director's order. Ontario, Weyerhaeuser and Resolute appeal to the Court.

*Held* (Côté, Brown and Rowe JJ. dissenting in part): Ontario's appeal should be allowed and summary judgment granted in its favour. Resolute and Weyerhaeuser's appeals should be dismissed.

*Per* **Abella, Moldaver, Karakatsanis** and **Martin JJ.**: The Indemnity does not cover the Director's order. As the dissenting judge in the Court of Appeal concluded, the motion judge made palpable and overriding errors of fact and failed to

give sufficient regard to the factual matrix when interpreting the scope of the Indemnity, justifying appellate intervention.

The motion judge erred when he found that the waste disposal site continues to discharge mercury into the environment. His mistaken finding that discharges of mercury from the waste disposal site were an ongoing source of serious environmental liability undoubtedly drove his conclusion that these discharges could give rise to pollution claims, and that unless the Indemnity covered first party claims, Resolute and Weyerhaeuser would be exposed to significant liability. The motion judge misconstrued the purpose and effect of the waste disposal site — this site was not a source of ongoing mercury contamination or environmental liability, and therefore its creation would not give rise to a pollution claim. Rather, the waste disposal site was created and used as a solution to the mercury pollution problem, effectively as a burial site for mercury-contaminated waste. There was no evidence of mercury-contaminated waste being discharged from the waste disposal site. This erroneous factual finding was key to his conclusion that the Director's order was a pollution claim within the meaning of the Indemnity.

Furthermore, the Indemnity was a schedule to a broader settlement agreement, so its scope was limited to the issues defined in that agreement, namely the discharge by Reed and its predecessors of mercury and any other pollutants into the river systems, and the continued presence of any such pollutants discharged by Reed and its predecessors in the related ecosystems. The motion judge failed to

consider this context when interpreting the scope of the Indemnity. Properly interpreted, the Indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury in the related ecosystems, not those related to the mere presence of mercury contained in the waste disposal site.

The Indemnity must be read in the context of two prior indemnities given by Ontario in 1979 and 1982 in the context of the litigation brought by the First Nations. The Indemnity was given in partial consideration for Great Lakes and Reed releasing Ontario from its obligations under those prior indemnities. It is clear that the 1979 and 1982 indemnities were in response to the ongoing litigation, which involved claims brought by third parties, not by Ontario directly. There is no language in those indemnities that would imply Ontario intended to provide protection against the costs of regulatory compliance.

The motion judge's view of the importance of the phrase "statutory or otherwise" in the Indemnity and of why the parties entered into the Indemnity was materially affected by a palpable and overriding factual error. The motion judge found that the Indemnity was provided in consideration for commitments from Great Lakes to make significant financial investments in the Dryden plant. Given what he found to be the rationale for entering into the Indemnity, the motion judge concluded that it would be commercially absurd if Ontario could still impose remediation costs. However, Great Lakes' financial commitments were actually provided as part of the prior 1979 indemnity. Later, Great Lakes gave no new commitments to modernize in



consideration for the Indemnity. The motion judge thus premised his interpretation of the Indemnity on an incorrect factual basis — one that led him to place too much emphasis on a change in language and misconstrue the bargain actually struck in the Indemnity.

The motion judge also erred by failing to consider the Indemnity as a whole when determining whether or not the Director's order fell within its scope. Paragraphs 2 and 3 of the Indemnity are critical to its interpretation. Paragraph 2 provides that in any pollution claim, Ontario has the right to elect to take carriage of the defence or to participate in the defence and/or settlement of the claim and any proceeding relating thereto as it deems appropriate. Paragraph 3 requires the parties to cooperate with Ontario in the defence of a claim. These clauses would be utterly meaningless for first party claims. Their inclusion is completely inconsistent with the notion that para. 1 of the Indemnity contemplates first party claims. Nothing in the Indemnity suggests that pollution claims included both first and third party claims, but that the requirements of paras. 2 and 3 would apply only to the subset of pollution claims brought by third parties. To the contrary, para. 2 applies in "any Pollution Claim". The fact that the requirements of paras. 2 and 3 would be utterly meaningless in first party claims implies that pollution claims encompass only those brought by third parties. Properly interpreted, the Indemnity only applies to third party claims, and therefore does not cover the Director's order.

*Per Côté, Brown and Rowe JJ.* (dissenting in part): The appeals brought by Ontario and Weyerhaeuser should be dismissed and the appeal brought by Resolute should be allowed. The Indemnity enures to the benefit of the successors and assigns of the Province, Reed and Great Lakes. Resolute is entitled to rely on the Indemnity to cover past and future costs incurred in complying with the Director's order as a corporate successor of Great Lakes, but Weyerhaeuser is neither an assignee of the benefit of the Indemnity nor a corporate successor of either Great Lakes or Reed, and it has no entitlement to benefit under the Indemnity.

The Indemnity is a contract which must be interpreted with a view to ascertaining the objective intentions and reasonable expectations of the contracting parties with respect to the meaning of the contractual provision. The approach is rooted in practicalities and common sense. It considers the language that the parties employed to express their agreement, objective evidence of the background facts that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting, and the principle of commercial reasonableness and efficacy. The factual matrix cannot overwhelm the words of the contract and cannot change the words of the contract in a manner that would modify the rights and obligations that the parties assumed.

The Indemnity covers the costs of complying with the Director's order. The motion judge did not make any of the four errors alleged by the Province in interpreting the Indemnity.

First, he did not err in failing to consider the text of the Indemnity with reference to the factual matrix, including the two earlier indemnities, the asset purchase agreement in which Reed sold the entire property to Great Lakes, the settlement agreement to which the Indemnity was a schedule, and certain provisions added to the *Environmental Protection Act* in 1985. Like the Indemnity, the two earlier indemnities addressed the mercury contamination, but they represent distinct agreements given for distinct purposes in distinct sets of negotiations. The Indemnity captures a broad scope relative to the other indemnities. In addition, the earlier indemnities were replaced by the Indemnity, which suggests that the parties themselves did not view those earlier indemnities as being co-extensive in scope with the Indemnity. The Indemnity is a separate agreement and must be interpreted by considering the words the parties used in it, not a previous agreement. The asset purchase agreement is of substantially the same scope as the Indemnity, but it exempted the costs of complying with an earlier regulatory order. The Province was aware of its terms, and nothing prevented the parties to the Indemnity from expressly providing that such orders would not fall within the scope of the Indemnity, as the parties to the asset purchase agreement had done. As to the settlement agreement, the issues which that agreement was intended to address included government actions taken in consequence of the mercury contamination. Further, the Indemnity expressly applies in respect of the presence of mercury in the affected lands, and the settlement agreement cannot overwhelm the text in the Indemnity. As for the statutory amendments, even accepting that they are objective and admissible evidence of what the parties had or ought to have had in contemplation when entering into the

Indemnity, it is a far leap to the conclusion that they would have understood the reference to statutory claims in the Indemnity to refer solely to claims brought under the amendments or other third party statutory claims which could have been brought at that time. Moreover, reading the Indemnity as excluding first party claims cannot be reconciled with the amendments' creation of a right of action for the Province, or the Indemnity's references to "any province" and statutory actors.

Second, the motion judge did not err in failing to interpret the indemnification clause in para. 1 of the Indemnity in light of the agreement as a whole. His reading of that clause was consistent with the notice/control and cooperation provisions at paras. 2 and 3 of the Indemnity, which are typical of third party indemnities and are meaningful only for third party claims against the indemnified parties.

Third, the motion judge did not make any palpable and overriding errors in characterizing the reason Great Lakes expended certain money or in concluding that the waste disposal site was the source of the mercury contamination. To the extent that these were errors, they could not possibly have had an overriding effect on the conclusion reached by the motion judge. Such minor and collateral factual findings could not determine the outcome of the case, particularly where the motion judge's ultimate conclusion on the scope of the Indemnity rested on different factual and contextual considerations.

Fourth, the motion judge did not err in interpreting the Indemnity so as to impermissibly fetter the Legislature's law-making powers, thereby rendering the Indemnity unenforceable. As a matter of constitutional law, the executive of the Canadian state cannot bind or restrict the legislature's sovereign law-making power, whether by contract or otherwise. It follows that a contract entered into by the executive that purports to require that a certain law be enacted, amended or repealed cannot be enforced by way of injunction or specific performance. However, there is an important difference between a contract that impermissibly fetters the legislature's power to enact, amend and repeal legislation, and a contract whose breach by the Crown exposes it to liability. Where the legislature exercises its law-making power in a manner inconsistent with the terms of a contract, the Crown may still face consequences in the form of liability in damages. While the possibility of such liability may deter the legislature from acting in a manner that runs contrary to the Crown's contractual promises — sometimes referred to as an "indirect fetter" — the legislature is not thereby truly fettered.

In this case, the enactment of new statutory claims might expose the Province to greater liability under the Indemnity, but the Indemnity in no way prevents the Legislature from exercising its sovereign authority to make or unmake any law whatever, and deterring or otherwise discouraging the Legislature from exercising its law-making power in a certain way would not render it unenforceable at law. The Legislature's freedom of action is not impacted.

As to whether Resolute and Weyerhaeuser could benefit from the Indemnity as successors and assigns of Great Lakes, the motion judge made no error in interpreting the Indemnity as covering the costs imposed on the successors and assigns of Great Lakes by the Director's order. Although his analysis on this point was rooted primarily in the wording of the Indemnity, he also considered its meaning in light of the agreement as a whole and the circumstances surrounding its formation in 1985. However, he found that neither supported an interpretation of the Indemnity that would exclude coverage for first party claims.

However, the motion judge did err in principle in holding that a predecessor of Resolute had assigned the benefit of the Indemnity to Weyerhaeuser. He failed to read the impugned contractual term in light of the factual matrix and in a commercially sensible way, focussing his analysis solely on the text of the relevant provisions of the asset purchase agreement between the predecessor and Weyerhaeuser. Although an indemnified party cannot continue to enjoy the benefit of the Indemnity after it assigns its rights thereunder to a third party, the parties structured the agreement in a way that imposed all risk in relation to environmental liabilities on the predecessor while the predecessor relinquished its own protection. This risk-allocation structure makes commercial sense only if the predecessor's interests remained protected by the Indemnity.

The motion judge also committed a palpable and overriding error when he concluded that the Indemnity's enurement clause extended the benefit of the

Indemnity to successors-in-title of the Dryden Property. The Indemnity's enurement clause is a standard contractual term and certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect. When used in relation to corporations, a "successor" generally denotes another corporation which, through some type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation. Nothing in the language of the Indemnity or in the circumstances surrounding the formation of the contract suggests that "successor" in the Indemnity should extend to both corporate successors of Great Lakes and successors-in-title to the Dryden Property. However, it may be possible, in other circumstances, for the term "successors" to refer to a successor-in-title.

### **Cases Cited**

By Côté and Brown JJ. (dissenting in part)

*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Mandamin v. Reed Ltd.*, No. 14716/77, June 26, 1986; *Royal Devon and Exeter NHS Foundation Trust v. ATOS IT Services UK Ltd.*, [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535; *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744; *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*, [1985] 1 A.C. 191; *Interprovincial Co-operatives Ltd. v. The*

*Queen*, [1976] 1 S.C.R. 477; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919; *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42; *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550; *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 341 D.L.R. (4th) 520; *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79, 136 Man. R. (2nd) 170; *Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. 175; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *City of Toronto v. W.H. Hotel Ltd.*, [1966] S.C.R. 434; *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357; *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561; *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306.

### **Statutes and Regulations Cited**



*An Act to amend The Environmental Protection Act, 1971*, S.O. 1979, c. 91, s. 2.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

*English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986*, S.O. 1986, c. 23.

*Environmental Protection Act*, R.S.O. 1980, c. 141.

*Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7(1) [am. 1990, c. 18, s. 18], 18(1) [*Idem*, s. 21], 43 [*Idem*, s. 22], 44 [*Idem*, s. 23].

*Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23.

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APPEALS from a judgment of the Ontario Court of Appeal (Laskin, Lauwers and Brown JJ.A.), 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175, [2017] O.J. No. 6654 (QL), 2017 CarswellOnt 20156 (WL Can.), reversing a decision of Hainey J., 2016 ONSC 4652, 3 C.E.L.R. (4th) 278, 60 B.L.R. (5th) 237, [2016] O.J. No. 3900 (QL), 2016 CarswellOnt 11807 (WL Can.). Appeal of Resolute FP Canada Inc. dismissed, Côté, Brown and Rowe JJ. dissenting. Appeal of Her Majesty The Queen as represented by the Ministry of the Attorney General allowed, Côté, Brown and Rowe JJ. dissenting. Appeal of Weyerhaeuser Company Limited dismissed.

*Andrew Bernstein, Jeremy Opolsky and Jonathan Silver*, for the appellant/respondent Resolute FP Canada Inc.

*Leonard F. Marsello, Tamara D. Barclay and Nansy Ghobrial*, for the appellant/respondent Her Majesty The Queen as represented by the Ministry of the Attorney General.

*Christopher D. Bredt and Markus Kremer*, for the appellant/respondent Weyerhaeuser Company Limited.

*Elizabeth J. Rowbotham*, for the intervener the Attorney General of British Columbia.

The following is the judgment delivered by

ABELLA, MOLDAVER, KARAKATSANIS AND MARTIN JJ. —

[1] In 1985, the Province of Ontario granted an indemnity (the “1985 Indemnity”) to Reed Ltd. and Great Lakes Forest Products Limited, both former owners of a pulp and paper mill located in Dryden, Ontario, as well as their successors and assigns, for “any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises”. The 1985 Indemnity was agreed to by the parties in the context of the settlement of litigation brought by two First Nations in relation to mercury pollution caused by the operation of the Dryden mill.

[2] Twenty-six years later, the Director of the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining a mercury disposal site at the Dryden mill. In the intervening period, ownership of the mill had changed hands in several transactions. The Director’s Order was issued to both Resolute, Great Lakes’ corporate successor, and Weyerhaeuser, which also owned the Dryden property for a time. Both Resolute and Weyerhaeuser sought indemnification from Ontario for the costs of complying with the Director’s Order.

[3] Although the parties in these appeals raise a number of issues relating to Resolute and Weyerhaeuser's claims for indemnification, the threshold question is whether the 1985 Indemnity covers the Director's Order. In our view, and for the dissenting reasons of Laskin J.A. (2017 ONCA 1007, 77 B.L.R. (5th) 177), it does not. We would, therefore, allow Ontario's appeal, and grant Ontario's motion for summary judgment.

[4] In the 1960s, the Dryden Paper Company Limited owned and operated a pulp and paper mill in Dryden. As part of the operation of the paper mill, Dryden Paper — through a related company, Dryden Chemicals Limited — operated a mercury cathode chlor-alkali plant on property near the mill. The chlor-alkali plant released untreated mercury waste into the English and Wabigoon rivers, which resulted in harm to the health of some local residents, the closure of a commercial fishery and damage to the region's tourism industry. Many of the affected people were members of the Grassy Narrows and Islington First Nations who lived on reserves downstream.

[5] In 1971, Dryden Paper constructed a waste disposal site on its lands to serve as a burial site for mercury-contaminated waste from the chlor-alkali plant. Six monitoring wells were installed when the waste disposal site was created, with three additional wells installed in 2002, and one in 2010. These monitoring wells were sampled and analyzed twice per year. Since 1977, the waste disposal site has been the subject of various certificates under the *Environmental Protection Act*, R.S.O. 1990,

c. E.19. The initial Provisional Certificate of Approval required the monitoring of groundwater and surface water by the owner of the waste disposal site. In 2011, the site was thought to have 35 years remaining in its “contaminating lifespan”.

[6] In 1976, Dryden Paper and Dryden Chemicals amalgamated to form Reed.

[7] In June 1977, the two First Nations bands sued Reed, Dryden Paper and Dryden Chemicals for damages in relation to the mercury waste contamination of the rivers (the “Grassy Narrows Litigation”).

[8] In 1978, the Ministry of the Environment issued two further Provisional Certificates of Approval that required Reed to maintain the water monitoring program at the waste disposal site.

[9] By 1979, Reed wanted to sell its Dryden properties. Its prospective purchaser, Great Lakes, expressed reluctance to complete the sale because of the Grassy Narrows Litigation. Concerned that the local economy would suffer if the pulp and paper mill closed, Ontario intervened. It agreed to limit the combined liability of Great Lakes and Reed for any environmental damages caused by Reed prior to Great Lakes’ purchase of the Dryden operation to \$15 million. Great Lakes and Reed agreed to share the financial consequences of the Grassy Narrows Litigation up to that limit. Great Lakes also agreed to spend approximately \$200 million on the

expansion and modernization of the Dryden facilities in consideration for the indemnity granted by Ontario (the “1979 Indemnity”).

[10] On December 4, 1979, the Ministry of the Environment issued another Provisional Certificate of Approval. It required Reed to register the certificate against title to the waste disposal site. That same month, the sale of the Dryden properties to Great Lakes closed in accordance with the terms set out in a Memorandum of Agreement dated December 7, 1979.

[11] In January 1980, the Ministry issued another Provisional Certificate of Approval requiring Great Lakes to maintain the groundwater monitoring and testing program at the waste disposal site.

[12] Contemporaneously, the Governments of Ontario and Canada engaged in mediation with the Islington and Grassy Narrows First Nations to address the harms caused by mercury discharge. These discussions involved the Grassy Narrows Litigation. Great Lakes, meanwhile, was reluctant to contribute to any settlement of the litigation unless it obtained a release from liability. On January 28, 1982, the then Provincial Secretary for Resources Development wrote to Great Lakes, indicating that Ontario was “prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution” (the “1982 Indemnity” (A.R., vol. III, at p.176)). The 1982 Indemnity stated that Ontario would indemnify Great Lakes for any damages awarded by a court or any settlement above \$15 million. Any mercury

pollution-related actions were to be brought to the attention of Ontario, which would then become involved in the litigation.

[13] In late 1985, the Grassy Narrows Litigation settled. The terms of the settlement were set out in a Memorandum of Agreement dated November 22, 1985, entered into by Canada, Ontario, the Islington and Grassy Narrows First Nations, Reed and Great Lakes. The issues, as defined in the Memorandum of Agreement, pertained to “[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors . . . in the related ecosystems”. Significantly for the purposes of the present appeals, para. 2.4 of the Memorandum of Agreement stipulated that Ontario would indemnify Great Lakes and Reed with respect to the issues, and Great Lakes and Reed would provide Ontario releases in respect of the 1979 and 1982 Indemnities.

[14] The indemnification required by para. 2.4 of the Memorandum of Agreement is contained in a schedule to the settlement agreement entitled the “Ontario Indemnity” (referred to herein as the “1985 Indemnity”) which was signed by Ontario, Great Lakes, Reed and Reed International. These appeals involve the interpretation of the 1985 Indemnity, and particularly para. 1, which reads:

1. Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a

result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the Dryden Agreement (hereinafter referred to as "Pollution Claims"). It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expense incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International. [A.R., vol. IV, at pp. 189-90]

[15] Paragraph 2 of the 1985 Indemnity requires Great Lakes or Reed to give Ontario prompt notice of any Pollution Claim as defined in para. 1, at which point Ontario could take carriage of or participate in the litigation. Great Lakes and Reed must cooperate with Ontario in relation to the investigation of any Pollution Claims (para. 3). The 1985 Indemnity is "valid without limitation as to time" (para. 4). An enurement clause contained in para. 6 provided that: "[t]he indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto" (A.R., vol. IV, at pp. 191-92).



[16] In accordance with the Memorandum of Agreement, Reed and Great Lakes released Ontario from its obligations under the 1979 and 1982 Indemnities. The settlement of the Grassy Narrows Litigation was approved by the Supreme Court of Ontario on June 26, 1986.

[17] In subsequent years, both Reed and Great Lakes underwent corporate changes. After amalgamating with other corporations, Reed's successor corporation dissolved in 1993. In 1998, Great Lakes became Bowater which, in 2010, became part of Abitibi-Consolidated Inc. In 2012, it became Resolute.

[18] In August 1998, Weyerhaeuser entered into an agreement with Bowater, Great Lakes' corporate successor, to purchase certain assets used in the Dryden pulp and paper business. Given the potential environmental liabilities, Weyerhaeuser initially sought to exclude the waste disposal site from the purchased assets. However, this exclusion required severing the waste disposal site from title, which could not be effected before the closing of the sale. As a result, when the transaction closed, Bowater conveyed title to the waste disposal site to Weyerhaeuser, which then immediately leased it back to Bowater. When severance finally occurred some two years later, Weyerhaeuser reconveyed the waste disposal site to Bowater. Title was registered in Weyerhaeuser's name from September 30, 1998, to August 25, 2000. In 2007, Weyerhaeuser sold the Dryden paper plant to Domtar Inc.

[19] In April 2009, Bowater and its related companies filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

In the course of the CCAA proceedings, with court approval, the waste disposal site was abandoned in April 2011.

[20] On August 25, 2011, the Ministry of the Environment issued a Director's Order to Weyerhaeuser (as a former owner of the waste disposal site) and Bowater, Resolute's corporate predecessor. This order imposed three main obligations: (1) to repair certain site erosion, perform specific groundwater and surface water testing, and file annual reports containing specified information; (2) to deliver to the Ministry of the Environment the sum of \$273,063 as financial assurance in respect of the waste disposal site; and (3) to "take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements" (A.R., vol. IV, at p. 27).

[21] Weyerhaeuser filed a notice of appeal to the Environmental Review Tribunal, seeking to revoke or amend the Director's Order.

[22] In May 2013, Weyerhaeuser commenced an action in Superior Court seeking a declaration that the terms of the 1985 Indemnity required Ontario to compensate it for the cost of complying with the Director's Order. Resolute sought leave to intervene. Ontario submitted it was not responsible for the costs of complying with the Director's Order. All three parties moved for summary judgment.

[23] The motion judge held that the 1985 Indemnity clearly applied to a statutory claim or proceeding brought by an agent of the Province and that *both* Resolute and Weyerhaeuser were entitled to indemnification under the 1985 Indemnity for their costs of complying with the Director's Order. He therefore granted summary judgment in favour of Resolute and Weyerhaeuser (2016 ONSC 4652, 60 B.L.R. (5th) 237).

[24] Ontario appealed. The majority at the Court of Appeal for Ontario agreed with the motion judge with respect to the scope of the 1985 Indemnity, namely that it applied to the Director's Order. The majority concluded, however, that Resolute was not entitled to indemnification and remitted the issue of Weyerhaeuser's entitlement to indemnification to the Superior Court.

[25] Justice Laskin, dissenting, would have allowed Ontario's appeal. In his view, the motion judge made reversible errors in his interpretation of the 1985 Indemnity. Properly construed, the 1985 Indemnity was intended to cover *only* pollution claims brought by third parties. First party regulatory claims, such as the Director's Order, did not fall within the scope of the 1985 Indemnity.

### Analysis

[26] The overriding issue in this case is the scope of the 1985 Indemnity. We would, with respect, allow Ontario's appeal substantially for the reasons of Laskin J.A. We conclude, as he did, that the motion judge made palpable and overriding

errors of fact and failed to give sufficient regard to the factual matrix when interpreting the scope of the 1985 Indemnity justifying appellate intervention. We find it difficult to improve on his reasons, and would add only the following brief comments.

[27] Both Laskin J.A. and the majority at the Court of Appeal agreed that the motion judge erred when he found that the waste disposal site continues to discharge mercury into the environment. In the words of Laskin J.A.:

The motion judge's mistaken finding that discharges of mercury from the [waste disposal site] were an ongoing source of "serious environmental liability" undoubtedly drove his conclusion that these discharges could give rise to "pollution claims", and that unless the 1985 Indemnity covered first party claims, the respondents would be exposed to significant financial liability. His conclusion is wrong.

The motion judge misconstrued the purpose and effect of the [waste disposal site]. The [waste disposal site] was not a source of ongoing mercury contamination or environmental liability. Its creation would not give rise to a pollution claim. Quite the opposite. The [waste disposal site] was created and used as a solution to the mercury pollution problem, effectively as a burial site for mercury-contaminated waste. Again, there was no evidence of mercury-contaminated waste being discharged from the [waste disposal site]. Neither respondent submitted otherwise.

[paras. 233-34]

[28] We agree that this erroneous factual finding was key to the motion judge's conclusion that the Director's Order, which imposed maintenance and monitoring obligations, was a "Pollution Claim" within the meaning of the 1985 Indemnity.

[29] Yet, as Laskin J.A. noted, the 1985 Indemnity was a schedule to the broader Memorandum of Agreement settling the Grassy Narrows Litigation. The scope of the 1985 Indemnity was limited to the issues defined in that agreement, namely, “[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors . . . in the related ecosystems” (A.R., vol. IV, at p. 140). The motion judge failed to consider this context when interpreting the scope of the 1985 Indemnity. We agree with Laskin J.A. that, properly interpreted, the 1985 Indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury *in the related ecosystems*, not those related to the mere presence of mercury contained in the waste disposal site.

[30] We also agree with Laskin J.A. that the 1985 Indemnity must be read in the context of the 1979 and 1982 Indemnities. Indeed, the 1985 Indemnity was given in partial consideration for Great Lakes and Reed releasing Ontario from its obligations under those prior Indemnities. It is clear that the 1979 and 1982 Indemnities were in response to the ongoing Grassy Narrows Litigation, which involved claims brought by *third parties*, not by Ontario directly. As Laskin J.A. observed, there is no language in those indemnities that would imply Ontario intended to provide protection against the costs of regulatory compliance.

[31] Although the motion judge concluded that the addition of the phrase “statutory or otherwise” in the 1985 Indemnity expanded the scope of protection beyond that provided previously, we agree with Laskin J.A. that the motion judge’s view of the importance of that phrase and *why* the parties entered into the 1985 Indemnity was materially affected by a palpable and overriding factual error. The motion judge found that the 1985 Indemnity was provided in consideration for commitments from Great Lakes to make significant financial investments in the Dryden plant. Given what he found to be the rationale for entering into the 1985 Indemnity, the motion judge concluded that it would be commercially absurd if Ontario could still impose remediation costs. However, Great Lakes’ financial commitments were actually provided as part of the prior 1979 Indemnity. Later, Great Lakes gave no new commitments to modernize in consideration for the 1985 Indemnity. The motion judge thus premised his interpretation of the 1985 Indemnity on an incorrect factual basis — one that, as Laskin J.A. noted, led him to place too much emphasis on a change in language and misconstrue the bargain actually struck in the 1985 Indemnity.

[32] Moreover, as Laskin J.A. found, the motion judge erred by failing to consider the 1985 Indemnity as a whole when determining whether or not the Director’s Order fell within its scope. Paragraphs 2 and 3 of the 1985 Indemnity are critical in this regard. Paragraph 2 provides that, in “any Pollution Claim . . . Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating

thereto as Ontario deems appropriate” (A.R., vol. IV, at p. 190). Paragraph 3 of the 1985 Indemnity also requires the parties to cooperate with Ontario in the defence of a claim. We agree with Laskin J.A. that these clauses would be “utterly meaningless for first party claims”.

[33] Indeed, the inclusion of paras. 2 and 3 in the 1985 Indemnity are completely inconsistent with the notion that para. 1 contemplates first party claims. Nothing in the 1985 Indemnity suggests that pollution claims included both first and third party claims, but that the requirements of paras. 2 and 3 would apply only to the *subset* of pollution claims brought by third parties. To the contrary, para. 2 applies in “*any* Pollution Claim” (emphasis added). The fact that the requirements of paras. 2 and 3 would be “utterly meaningless” in first party claims, implies that pollution claims encompass *only* those brought by third parties. It follows that we agree with Laskin J.A. that the motion judge erred by failing to read the 1985 Indemnity as a whole. Properly interpreted, the 1985 Indemnity only applies to third party claims.

[34] In sum, we agree with Laskin J.A.’s conclusion that the 1985 Indemnity does not cover the Director’s Order and we would allow Ontario’s appeal on that basis. As a result, we find it unnecessary to address the remaining arguments raised in these appeals.

### Conclusion

[35] We would allow Ontario’s appeal and grant summary judgment in its favour, with costs throughout. Resolute and Weyerhaeuser’s appeals are dismissed.

The reasons of Côté, Brown and Rowe JJ. were delivered by

CÔTÉ AND BROWN JJ. —

I. Overview

[36] During the 1960s, the owner of a pulp mill in Dryden, Ontario (the corporate predecessor of Reed Ltd.), stemmed the discharge of untreated mercury waste into a nearby river system by burying the waste at an adjacent disposal site. In 1979, Reed — by then the owner — sold the entire property (including the waste disposal site) and the pulp and paper operation to Great Lakes Forest Products Limited. As part of a settlement of claims related to the earlier mercury waste discharge, the Province of Ontario granted an environmental liability indemnity to both Reed and Great Lakes (the “Ontario Indemnity”). This indemnity was to inure to the benefit of those corporations’ successors and assigns.

[37] Our reasons address three appeals. At issue in the appeal brought by the Province is whether the scope of the Ontario Indemnity covers the costs of compliance with first party regulatory orders, including those made under legislation enacted after the execution of the agreement. The appeals brought by Weyerhaeuser



Company Limited and Resolute FP Canada Inc. go to whether either or both of those corporations can benefit from the Ontario Indemnity as successors and assigns of Great Lakes.

[38] These appeals also present an opportunity for this Court to apply the principles of contractual interpretation articulated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, to a series of complex commercial arrangements. The Province's appeal also invites us to consider the doctrine of fettering as it applies to the legislature's law making powers.

[39] For the reasons that follow, we would dismiss the appeals brought by the Province and Weyerhaeuser, and allow the appeal brought by Resolute.

## II. Factual Background

### A. *Mercury Contamination of the English and Wabigoon Rivers in the 1960s and 1970s*

[40] During the 1960s and 1970s, Dryden Chemical Limited and Dryden Paper Company Limited operated a mercury cathode chlor-alkali plant and a pulp and paper mill, respectively, on property located in Dryden (the "Dryden Property"). Together, their operations produced various pollutants, including untreated mercury waste, which they released into the nearby English and Wabigoon rivers, harming the

health and industry of those nearby, including members of the Grassy Narrows and Islington First Nations. To dispose of these environmental contaminants, Dryden Paper constructed a waste disposal site on the Dryden Property in 1971. Since 1977, the waste disposal site has been subject to compliance requirements imposed by the Province.

[41] In 1976, Dryden Paper and Dryden Chemical amalgamated to form Reed.

[42] In 1977, the Grassy Narrows and Islington First Nations sued Reed, Dryden Paper and Dryden Chemical for damage they say was caused by the contamination of the rivers (the “Grassy Narrows Litigation”).

B. *The Sale of the Dryden Property to Great Lakes in 1979*

[43] In 1979, Reed entered into negotiations to sell the operations at the Dryden Property to Great Lakes. Great Lakes was reluctant to proceed with the purchase, however, due to potential liabilities relating to the mercury contamination, including the Grassy Narrows Litigation. At the same time, the Province was anxious to see a successful sale, to ensure the continuing viability of Dryden’s local economy. It therefore agreed to indemnify both Reed and Great Lakes for any environmental damages caused by Reed in excess of \$15 million (the “1979 Indemnity”). In exchange, Great Lakes and Reed agreed to spend around \$200 million to modernize and expand the pulp mill. The terms of this agreement were set out in a letter dated

November 6, 1979, from the Treasurer of Ontario to the President of Great Lakes.

The relevant portion of this letter reads as follows:

The continued viability of the Dryden facilities and the undertaking of major modernization expenditures with respect to them are of considerable importance to the people of this Province. The substantial and beneficial employment and economic effects that the operation of a modernized facility will have on the population and economy of Dryden is of real significance.

In the event that Great Lakes negotiations with the Reed group of companies are successful then in the event that Great Lakes is required to pay any monies as a result of any final decision of a court against Great Lakes, Reed Ltd. or any other person prior to the year 2010 in respect of pollution caused by Reed Ltd. or any of its predecessor companies in the Dryden area prior to the date upon which Great Lakes acquires the assets and undertaking of the Dryden complex of Reed Ltd. or in the event that any settlement with any claimant is made the amount of which settlement has been approved by the Attorney General of Ontario, I have been authorized by the Executive Council of Ontario to advise you that I will make a Recommendation to the Executive Council of Ontario that the Government of Ontario take effective steps to ensure that Great Lakes Forest Products Limited will not be required to pay any monies in excess of the maximum amount of \$15 million referred to in paragraph 2 of this letter, provided that over the next three to four years Great Lakes expends in the order of \$200 million for the modernization and expansion of the Dryden facilities.

(A.R., vol. IV, at pp. 135-36)

[44] Great Lakes purchased the pulp mill in December 1979 by way of an asset purchase agreement (the “1979 Dryden Agreement”). That agreement addressed, among other things, environmental responsibilities respecting the Dryden Property. In particular, clause 5.3 of the 1979 Dryden Agreement created a regime for the sharing of costs arising from pollution claims, pursuant to which Reed and Great Lakes were to share the costs of environmental liabilities up to \$15 million, leaving

Great Lakes exclusively responsible for anything exceeding that amount. Clause 11.4 carves out of this regime the costs of compliance with a control order that the Province had issued in 1979 (the “Control Order”), making Great Lakes solely responsible for those costs.

C. *The Settlement of the Grassy Narrows Litigation in 1985*

[45] The Governments of Canada and Ontario initiated a mediation process with the Islington and Grassy Narrows First Nations to address the problems regarding the mercury contamination and to settle the Grassy Narrows Litigation. Great Lakes was reluctant to participate in any such settlement without releases from liability in relation to the mercury pollution caused by Reed and its predecessors. To overcome this impasse, Ontario’s Provincial Secretary for Resources Development, the Honourable R. H. Ramsay, wrote to Great Lakes on January 28, 1982 (the “1982 Ramsay Letter”), stating that the Province would indemnify Great Lakes against any claims related to mercury pollution:

The purpose of this letter is to facilitate a settlement of current negotiations . . . .

The Government of Ontario recognizes the distinct advantage of the Indian people obtaining a settlement in the very near future. Accordingly, the Government is prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution such that the Company’s total payments to all claimants in respect of damages awarded by any court or for any settlement approved by the Attorney General of Ontario attributable to the operations of Reed Paper Ltd. or any of its predecessor companies in the Dryden area will be limited to \$15 million. The Government of Ontario will assume responsibility for any damages awarded by any court or for any settlement approved by the

Attorney General of Ontario, after \$15 million has been paid by the Great Lakes Forest Products Limited, Reed Ltd., Reed International Ltd., Dryden Chemicals Ltd. and Dryden Paper Co. Ltd. in connection with the above mentioned mercury pollution claims. Such claims include personal injury, property damage and economic claims of any claimants, including adults, minors and those yet unborn, related to mercury pollution.

It must be understood that any legal proceedings which could result in the Government of Ontario becoming liable to make payments pursuant to this undertaking must be brought to the attention of the Government of Ontario immediately upon such proceedings being launched, and the Government of Ontario shall have the right either to take carriage of or to participate in the defence and/or settlement of the litigation. Failure to give such notification or to allow the Government of Ontario to either take carriage of or to participate in the defence and/or settlement of the litigation will preclude the making of any payments by the Province with regard to the action in question.

(A.R., vol. III, at pp. 175-76)

[46] The Grassy Narrows Litigation was settled on terms formalized in a Memorandum of Agreement (the "Settlement Agreement") executed on November 22, 1985, by Canada, the Province, the Grassy Narrows and Islington First Nations, Reed, and Great Lakes. Its terms were approved by the Supreme Court of Ontario in 1986 (*Mandamin v. Reed Ltd.*, No. 14716/77, June 26, 1986), and were given effect by both Parliament and the Ontario Legislature (*Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23; *English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act*, 1986, S.O. 1986, c. 23).

[47] The Settlement Agreement provides that "the parties agree, without admission of liability by any party and subject to the terms of this Agreement, that the

settlement is to settle all claims and causes of action, past, present and future, arising out of the issues” (A.R., vol. IV, at p. 140 (emphasis added)). The “issues” were defined in the recitals as follows:

The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise concerns in respect of the social and economic circumstances and the health of the present and future members of the Bands (the “issues”).

(A.R., vol. IV, at p. 140)

[48] The Settlement Agreement also required the Province to indemnify Great Lakes and Reed “in respect of the issues” (para. 2.4(a)), which led to the Ontario Indemnity (A.R., vol. IV, at p. 6). That indemnity was incorporated into Schedule F of the Settlement Agreement. In return, Great Lakes and Reed released the Province from any obligations under the 1979 Indemnity and the 1982 Ramsay Letter (para. 2.4(b); (A.R., vol. IV, at p. 6).

[49] Paragraph 1 of the Ontario Indemnity — the meaning of which lies at the heart of this appeal — reads, in part, as follows:

Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date [December 17, 1979] a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the

date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement (hereinafter referred to as "Pollution Claims").

(A.R., vol. III, at pp. 189-90)

[50] Paragraph 2 of the Ontario Indemnity requires the party seeking indemnification to promptly notify the Province of the receipt of any notice of "Pollution Claims" (defined in para. 1), and gives the Province the right either to take carriage of the defence, or to participate in the pollution claim's defence and settlement; para. 3 requires Great Lakes to cooperate with the Province in the investigation, defence and settlement of a pollution claim; para. 4 states that the indemnity shall be valid without limitation as to time; and para. 6 provides that the indemnity enures to the benefit of the parties' respective successors and assigns. That provision reads as follows:

The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto.

(A.R., vol. III, at pp. 191-92)

[51] Great Lakes provided an indemnity to Reed in respect of environmental liabilities contemporaneously, as part of the Settlement Agreement. The parties contemplated that these two indemnities (this indemnity and the Ontario Indemnity) would operate in tandem; to the extent that Reed claimed on its indemnity against Great Lakes, Great Lakes would be indemnified under the Ontario Indemnity. This linkage was expressly recognized in the closing words of para. 1 of the Ontario Indemnity:

It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International.

(A.R., vol. IV, at p. 190)

[52] After the parties executed the Settlement Agreement but before they signed the Ontario Indemnity, the *Environmental Protection Act*, R.S.O. 1980, c. 141, was amended to confer a statutory right of action on the Province and third parties against certain polluters. The amendments arose out of *An Act to amend The Environmental Protection Act, 1971*, S.O. 1979, c. 91, also known as the "Spills Bill". Although the Spills Bill never came into force, elements of it were incorporated into the 1980 *Environmental Protection Act*. The relevant provisions came into force



in November 1985. For convenience, those amendments will be referred to as the “Spills Bill”.

D. *The Changes in Corporate Status between 1985 and 1998*

[53] Reed subsequently amalgamated with other corporations, and its successor corporation was dissolved in 1993. For its part, Great Lakes became Bowater Pulp and Paper Canada Inc. in July 1998.

E. *Weyerhaeuser’s Purchase of the Dryden Property in 1998*

[54] On September 30, 1998, Weyerhaeuser bought the Dryden Property from Bowater, along with certain assets used in the pulp and paper operation. This sale was recorded in the “1998 Asset Purchase Agreement”. Because of possible environmental liabilities associated with the waste disposal site, Weyerhaeuser initially sought to exclude the parcel of land on which it was constructed from the transaction, and Bowater agreed to this. This parcel could not be severed from the property before the closing date, however, and the deal was therefore re-structured such that Bowater conveyed title to the entire Dryden Property — including the waste disposal site — to Weyerhaeuser. Weyerhaeuser then immediately leased the waste disposal site back to Bowater. Once title to the waste disposal site was severed from the rest of the Dryden Property, it was to be transferred back to Bowater.

[55] The lease agreement between Bowater and Weyerhaeuser in respect of the waste disposal site (the “Lease Agreement”) required Bowater to indemnify Weyerhaeuser for, among other things, “the presence or release of mercury and any other contaminant, substance or waste on or in the land” (A.R., vol. V, at p. 126). This indemnity was to survive the term of the lease.

[56] Bowater and Weyerhaeuser acknowledged that they had entered into the Lease Agreement “solely as an interim agreement pending severance approval under the *Planning Act*”, at which time title to the waste disposal site was to be transferred back to Bowater (*ibid.*, at p. 123). Approval of the severance was obtained around two years later, and Weyerhaeuser re-conveyed the waste disposal site to Bowater on August 25, 2000.

[57] In 2007, Weyerhaeuser sold the Dryden pulp mill to Domtar Inc.

#### F. *Bowater’s Corporate Restructuring*

[58] In April 2009, Bowater (which by then had become Bowater Canadian Forest Products Inc.) and a number of related companies filed for creditor protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). At this point, Bowater still owned the waste disposal site. As part of the CCAA proceedings, Bowater was granted an order authorizing it to transfer the waste disposal site to 4513541 Canada Inc. in October 2010. Several months later,

4513541 Canada Inc.'s receiver obtained court approval to abandon the waste disposal site, with no associated liability.

[59] In 2012, Bowater became Resolute FP Canada Inc.

G. *The 2011 Director's Order*

[60] On August 25, 2011, the Province, through its Ministry of the Environment, issued a Director's Order against 4513541 Canada Inc., Weyerhaeuser, Bowater, and several of Bowater's directors, requiring them:

(i) to repair certain site erosion, perform specified groundwater and surface water testing, and file annual reports containing specified information; (ii) to deliver to the [Ministry of the Environment] the sum of \$273,063 as financial assurance in respect of the [Waste Disposal Site]; and (iii) to take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements.

(C.A. reasons, at para. 50, citing the Director's Order, A.R., vol. IV, at p. 27)

Paragraph 3.1 of the Director's Order described these requirements as "minimum requirements only", adding that their discharge would not relieve the named parties from "complying with any other applicable Order, Statute or Regulation", or from "obtaining any approvals or consents not specified in [the Director's] Order" (A.R., vol. IV, at p. 28).

[61] The Director's Order was issued under the *Environmental Protection Act*, R.S.O. 1990, c. E.19. That statute had been amended in 1990 to empower the Director to impose certain obligations upon *former* owners and those who *previously* held management or control of a given undertaking or property (see *An Act to amend the Environmental Protection Act*, S.O. 1990, c. 18, ss. 18(1) and 21-23).

[62] Both Weyerhaeuser and Resolute appealed the Director's Order to the Environmental Review Tribunal. The Province says that these appeals are in abeyance. Weyerhaeuser also filed a proof of claim in Bowater's CCAA proceedings (which were still ongoing at the time) for indemnification under the Lease Agreement for the present value of the work required by the Director's Order and estimated legal costs, amounting to approximately \$373,063. In settlement of its claim, Weyerhaeuser received shares in a company that emerged from CCAA protection, which shares were subsequently sold in May 2015.

### III. Proceedings Below

[63] Shortly after being served with the Director's Order, counsel for Weyerhaeuser provided notice thereof to Ontario's Ministry of the Attorney General, invoking paras. 2 and 6 of the Ontario Indemnity, and claiming indemnity as a successor and assignee of Great Lakes. In response, the Attorney General denied that the costs of complying with the Director's Order fell within the scope of the Ontario Indemnity. Weyerhaeuser sued the Province for an order declaring that it is entitled to be indemnified under the terms of the Ontario Indemnity "for the costs that it has

incurred and may incur as a result of [the] Director's Order made effective on September 6, 2011" (A.R., vol. II, at p. 3). Resolute was granted leave to intervene as a party to that proceeding.

A. *Decision of the Ontario Superior Court of Justice, 2016 ONSC 4652, 60 B.L.R. (5th) 237*

[64] All parties brought various motions for summary judgment before the Ontario Superior Court of Justice. At issue was whether the Ontario Indemnity covered the costs of complying with the Director's Order and, if so, whether Weyerhaeuser and Resolute are entitled to benefit thereunder.

[65] The motion judge found in favour of Weyerhaeuser and Resolute, holding that the scope of the Ontario Indemnity, as set out in its own first paragraph, covered first party regulatory orders. He further held that the Ontario Indemnity did not improperly fetter the Ontario Legislature's law-making powers.

[66] The motion judge also held that the enurement clause extended the rights and obligations under the Ontario Indemnity to Resolute and Weyerhaeuser — Resolute as a corporate successor to Great Lakes, and Weyerhaeuser as both a successor-in-title to the Dryden Property and an assignee of the Ontario Indemnity from Bowater pursuant to s. 3.1(xiv) of the 1998 Asset Purchase Agreement.

B. *Decision of the Court of Appeal, 2017 ONCA 1007, 77 B.L.R. (5th) 175*

[67] The Province appealed, arguing the motion judge erred in holding that the Ontario Indemnity covers the costs of complying with the Director's Order, and that Weyerhaeuser and Resolute enjoyed the benefit of indemnification thereunder.

[68] At the Court of Appeal, the majority found no error in the motion judge's finding that the Ontario Indemnity covered the costs of complying with first party claims, including the Director's Order. Nor did the majority disturb the finding that the 1998 Asset Purchase Agreement had the effect of transferring the full benefit of the Ontario Indemnity from Bowater to Weyerhaeuser. Given that Weyerhaeuser had subsequently sold the Dryden pulp mill to Domtar in 2007, however, the issue of what rights, if any, Weyerhaeuser possessed as an assignee of the Ontario Indemnity at the time the Director's Order was issued in 2011 was returned to the Ontario Superior Court of Justice for decision. The majority did, however, find palpable and overriding error in the motion judge's conclusion that Weyerhaeuser could claim the benefit of the enurement clause in the Ontario Indemnity, holding that this clause applies only to *corporate* successors.

[69] As to Resolute, the majority held that the motion judge erred in finding that Resolute could claim the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, following the assignment of the Ontario Indemnity from Bowater to Weyerhaeuser under the 1998 Asset Purchase Agreement. The effect of this assignment was to extinguish Bowater's interest therein, such that Bowater could not then pass that interest on to Resolute as its corporate successor.

[70] In dissent, Laskin J.A. would have found that the Ontario Indemnity did not cover the Director's Order, because it was not intended to cover first party claims, and because the Director's Order does not constitute a "Pollution Claim" as defined in that document. Having so concluded, he found it unnecessary to address the question of whether Resolute and Weyerhaeuser (or either of them) could benefit from the Ontario Indemnity as successors and assignees.

#### IV. Issues and Positions of the Parties

[71] The Province, Resolute and Weyerhaeuser each appeal to this Court. Although they raise various interrelated issues, these appeals can be resolved by answering the following two questions:

1. Did the motion judge err in concluding that the Ontario Indemnity covers the costs of complying with the Director's Order?
2. Did the motion judge err in concluding that Resolute and Weyerhaeuser benefit from the Ontario Indemnity as successors and assigns of Great Lakes?

[72] The Province argues that the motion judge erred in both these respects and, further, that his interpretation of the Ontario Indemnity has the effect of impermissibly fettering the Ontario Legislature's law-making power. Resolute and

Weyerhaeuser seek to uphold the motion judge on both questions, and further argue that the Province's obligation under the Ontario Indemnity does not impose an impermissible fetter upon the Ontario Legislature.

## V. Analysis

### A. *Principles of Contractual Interpretation*

[73] The Ontario Indemnity is a contract. Today's lawyers are fortunate to live in "an age when there is a galaxy of high appellate guidance on how to interpret contracts" (*Royal Devon and Exeter NHS Foundation Trust v. ATOS IT Services UK Ltd.*, [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, at para. 45). While not wishing to add more gas and dark matter to the "galaxy", we do find it helpful here to stress certain first principles which we see as important in interpreting this particular contract.

[74] This Court has described the object of contractual interpretation as being to ascertain the objective intentions of the parties (*Sattva*, at para. 55). It has also described the object of contractual interpretation as discerning the parties' "reasonable expectations with respect to the meaning of a contractual provision" (*Ledcor*, at para. 65). In meeting these objects, the Court has signalled a shift away from an approach to contractual interpretation that is "dominated by technical rules of construction" to one that is instead rooted in "practical[ities and] common-sense" (*Sattva*, at para. 47). This requires courts to read a contract "as a whole, giving the



words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” (*ibid.*).

[75] We recognize that this Court’s references to the *objective intentions* of the parties at the time they entered into the contract, and to parties’ *reasonable expectations*, may leave a degree of uncertainty respecting the objects of contractual interpretation (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 671-916). Since there is no suggestion here of a divergence between the parties’ *intentions* and their *expectations*, we do not find it necessary to resolve this here, but we simply note the inconsistency.

[76] Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in *Sattva*, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).

[77] This is not to say that the words of the contract are to be read in isolation. This Court’s direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances — sometimes referred to as the “factual matrix” — which consists of “objective evidence of the background facts at the time

of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting” (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is “literally correct” (*Canadian Contractual Interpretation Law*, at p. 9; see also *Sattva*, at para. 57). Put simply, contractual text derives its meaning, in part, from the context.

[78] We stress that text derives its meaning from context *in part*. This leads to an important caveat: the context — that is, the factual matrix — cannot “overwhelm the words” of the contract or support an interpretation that “deviate[s] from the text such that the court effectively creates a new agreement” (*Sattva*, at para. 57). The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).

[79] As we will explain below, contractual interpretation also requires courts to consider the principle of commercial reasonableness and efficacy. Contracts ought therefore to be interpreted “in accordance with sound commercial principles and good business sense” (*Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744, at p. 770). As Lord Diplock explained in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*, [1985] 1 A.C. 191 (H.L.), at p. 201, “if detailed semantic and

syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense”. The principle that requires contracts to be read in a commercially reasonable and efficient manner is therefore an important interpretive aid in construing contractual terms.

[80] Ultimately, contractual interpretation involves the application of various tools — including consideration of the factual matrix and the principle of commercial reasonableness — in order to properly understand the meaning of the words used by the parties to express their agreement.

B. *The Province’s Appeal*

[81] At issue in the Province’s appeal is whether the motion judge erred in concluding that the Province’s obligation to indemnify under para. 1 of the Ontario Indemnity extends to the costs of compliance with first party regulatory orders, such as the Director’s Order. In so finding, the motion judge placed considerable emphasis on the text of para. 1, which referred to “any claim, action or proceeding, whether statutory or otherwise . . . whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body, or authority created by statutory or other authority)” (A.R., vol. IV, at p. 189 (emphasis added)). In his view, neither a reading of the contract as a whole nor the surrounding circumstances supported reading the Ontario

Indemnity as excluding from coverage the costs of compliance with first party regulatory orders.

[82] The Province sees it differently. It says that para. 1, properly interpreted, covers only “third party claims, whether statutory or at common law, in the nature of those settled in 1985” (Ontario A.F., at para. 3). Because the Director’s Order was made in 2011 by the Province’s Ministry of the Environment using provisions of the 1990 *Environmental Protection Act*, which was enacted five years after the Settlement Agreement was executed, the Province says that the obligation to indemnify does not extend to the resulting compliance costs to Weyerhaeuser and Resolute.

[83] More specifically, the Province says the motion judge made four errors: (1) failing to consider the text of the Ontario Indemnity with reference to the factual matrix, which, the Province says, includes the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement, and the Spills Bill; (2) failing to interpret para. 1 of the Ontario Indemnity in light of the remainder of the Ontario Indemnity; (3) making palpable and overriding errors in two factual findings; and (4) interpreting the Ontario Indemnity so as to impermissibly fetter the Legislature’s law-making powers, thereby rendering the Ontario Indemnity altogether unenforceable.

[84] Like the majority at the Court of Appeal, we reject each of these arguments, and would dismiss the Province’s appeal. The motion judge made no error

in interpreting the Ontario Indemnity as covering the costs imposed on the successors and assigns of Great Lakes by the Director's Order. Although his analysis on this point was rooted primarily in the wording of para. 1 of the Ontario Indemnity, the motion judge also considered para. 1's meaning in light of the agreement as a whole, and with reference to the circumstances surrounding its formation in 1985. Far from excluding the context of the agreement as a whole or the surrounding circumstances from consideration, he *considered* them, and then simply found that neither supported an interpretation of the Ontario Indemnity that would exclude coverage for first party claims.

(1) Did the Motion Judge Err in His Appreciation of the Factual Matrix?

[85] The Province submits that the motion judge erred by focusing on the text of the Ontario Indemnity and that, in so doing, he “failed to appreciate that events going back to 1979 significantly informed the meaning of the [Ontario] Indemnity” (Ontario A.F., at para. 71). He ought, the Province says, to have considered the interrelationship between the Ontario Indemnity and the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement (inclusive of an escrow agreement and schedules), and the enactment of the Spills Bill.

[86] The motion judge's appreciation of the factual matrix in these circumstances is entitled to deference on appeal (*Sattva*, at para. 52). The Province bears the burden of showing that any error in this respect is of a palpable and overriding nature.

(a) *The 1979 Indemnity and the 1982 Ramsay Letter*

[87] The Province notes that the 1979 Indemnity, which can only be invoked in the case of a court decision requiring the payment of monies or a settlement approved by the Province, and the 1982 Ramsay Letter which contains similar terms, both evidence an intention, on its part, to indemnify only third party claims. A proper consideration of these elements of the factual matrix, it says, should have led the motion judge to find that the Ontario Indemnity likewise extends only to costs associated with third party obligations arising from court orders or settlements in respect of mercury contamination claims, and does not cover the costs of compliance with first party regulatory orders.

[88] Although he did not specifically refer to the 1982 Ramsay Letter in his analysis, the motion judge did reject any comparison between the Ontario Indemnity and the 1979 Indemnity on the basis that the former “is a separate agreement and must be interpreted by considering the words used by the parties in it, not a previous agreement” (para. 48). We see no error in this holding. While it is true that the three indemnities address the same underlying problem (the mercury contamination), our colleagues in the majority do not recognize that they each represent *distinct* agreements given for *distinct* purposes in *distinct* sets of negotiations. Specifically, the 1979 Indemnity was given to encourage Great Lakes to purchase the Dryden Property; the indemnity in the 1982 Ramsay Letter was given to encourage Great

Lakes to settle the Grassy Narrows Litigation; and the Ontario Indemnity was given as part of a final settlement of those claims.

[89] Significantly, the Ontario Indemnity — unlike the 1979 Indemnity or the 1982 Ramsay Letter — captures much more than just court orders and settlements relating to the Reed-era mercury contamination, applying to “any obligation, liability, damage, loss, costs or expenses incurred . . . as a result of any claim, action or proceeding, whether statutory or otherwise” (A.R., vol. IV, at p. 189). This breadth of scope, relative to the other indemnities, is significant to the interpretive exercise.

[90] Additionally, the fact that the parties replaced the 1979 Indemnity and the commitment in the 1982 Ramsay Letter with the Ontario Indemnity suggests that the parties *themselves* — whose intentions the motion judge was called upon to discern — did not view those earlier agreements as being co-extensive in scope with the Ontario Indemnity. Tellingly, there would have been no point served by Great Lakes and Reed releasing the Province of its obligations under the 1979 Indemnity and the 1982 Ramsay Letter in Schedule E of the Settlement Agreement, only then to bind the Province to the same terms by executing the Ontario Indemnity at Schedule F of that same agreement.

[91] We therefore see no palpable and overriding error in the motion judge’s refusal to restrict the scope of the Ontario Indemnity on the basis of the prior indemnities.

(b) *The 1979 Dryden Agreement*

[92] The scope of the Ontario Indemnity is substantially the same as the scope of the indemnity given to Reed by Great Lakes in clause 5.3 of the 1979 Dryden Agreement as part of its cost-sharing regime. As we have already explained, clause 11.4 of that agreement exempted the costs of complying with the Control Order issued by the Ministry of the Environment in 1979, making those costs the responsibility of Great Lakes exclusively. The motion judge found that the existence of this “specific provision that excluded the cost of regulatory compliance supports the conclusion that the Ontario Indemnity includes these costs because it does not contain a similar provision” (para. 48 (emphasis added)).<sup>1</sup>

[93] Before this Court, the Province observes that the 1979 Dryden Agreement “was a private contractual arrangement made between Reed and Great Lakes”, such that the absence of any specific exemption in the Ontario Indemnity does not mean that the Province intended to cover regulatory costs (Ontario A.F., at para. 83). While it is true that the Province was not a party to the 1979 Dryden Agreement, it was aware of its terms when it agreed to the Ontario Indemnity (as para. 7 of the Ontario Indemnity makes clear). Moreover, the text used in the indemnity in clause 5.3 of the 1979 Dryden Agreement is almost identical to that used in para. 1 of the Ontario Indemnity. Given the term exempting the Control Order from the scope of the cost-

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<sup>1</sup> The motion judge stated that the 1979 indemnity contained that “specific provision”, but given the context, it is clear that he misspoke and was instead referring to the 1979 Dryden Agreement. The Province does not take the position that this amounts to a palpable and overriding error of fact (Ontario A.F., at paras. 81-83).



sharing regime in the 1979 Dryden Agreement, the parties must have understood that this regulatory order would otherwise have constituted a “Pollution Claim” for the purpose of clause 5.3. And, because para. 1 of the Ontario Indemnity defines the term “Pollution Claim” in near-identical terms, the motion judge did not err in placing weight on the absence of a similar exemption in the Ontario Indemnity as supporting the conclusion that regulatory orders — like the Director’s Order — would fall within the scope of that indemnity.

[94] In his dissenting reasons, Laskin J.A. says that “similar carve out language was not needed” in the Ontario Indemnity, since by 1985, neither Reed nor Great Lakes had any obligations under the Control Order (para. 256). But, and with respect, the parties must have been aware that a new regulatory order could easily have been made subsequent to the execution of the Ontario Indemnity. Nothing prevented them from expressly providing — as did the parties to the 1979 Dryden Agreement — that such orders would not fall within the scope of the indemnity.

(c) *The Settlement Agreement*

[95] Under para. 2.4(a) of the Settlement Agreement, the Province was to indemnify Reed and Great Lakes in respect of “the issues” — a term that was defined in the recitals to the Settlement Agreement as follows:

The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its

predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise concerns in respect of the social and economic circumstances and health of the present and future members of the Bands (the “issues”). [Emphasis added.]

(A.R., vol. IV, at p. 140)

[96] The Province says the motion judge failed to appreciate the importance of these portions of the Settlement Agreement to the interpretation of para. 1 of the Ontario Indemnity. Preventative orders — like the Director’s Order — do not fall within the scope of “the issues” that the Settlement Agreement was intended to address, the Province says, since the waste disposal site was not a source of the discharge. We note, however, that among those “issues” are “governmental actions taken in consequence” of the mercury contamination by Reed and its predecessors. The record provides ample indication that the Province was aware of Dryden Paper’s construction of the waste disposal site for the purpose of containing mercury waste, and that it had been the subject of oversight by governmental agencies since 1977 (A.R., vol. IV, at pp. 35-36; A.R., vol. VI, at pp. 2-3). It follows that such oversight falls well within the scope of the “issues” which the Settlement Agreement was intended to address.

[97] In any event, the Ontario Indemnity expressly applies in respect of (among other things) the “presence of any pollutant . . . including mercury or any other substance . . . in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement”

(A.R., vol. IV, at p. 190). Irrespective, then, of how one understands the scope of the issues set out in the Settlement Agreement, that element of the factual matrix cannot “overwhelm” or be used to “deviate from” the text of the Ontario Indemnity (*Sattva*, at para. 57).

(d) *The Spills Bill*

[98] Paragraph 1 of the Ontario Indemnity closely tracks the language of the indemnity given by Great Lakes to Reed as part of the cost-sharing regime in clause 5.3 of the 1979 Dryden Agreement, with one important difference: while the scope of the former expressly covers claims, actions and proceedings, “whether statutory or otherwise”, the latter does not. The Province explains this specific reference to statutory claims in the Ontario Indemnity as reflecting the enactment of the Spills Bill, which created a new statutory right of action against polluters in favour of both the government and private parties, and which was proclaimed only two weeks before the parties executed the Settlement Agreement and the Ontario Indemnity. This language, it says, “addressed a significant new statutory cause of action created by the Spills Bill, along with other third party statutory claims which could have been brought at that time” (Ontario A.F., at para. 88). The Province’s submission is therefore that the courts below erred by construing those terms as capturing the costs of compliance with (a) first party regulatory claims made under statutory powers, and (b) other kinds of claims arising from legislation enacted *after*

the closing date in 1985 — like the Director’s Order, which was made under provisions of the *Environmental Protection Act* that came into force in 1990.

[99] The motion judge did not consider the Spills Bill. (Neither, for that matter, do our colleagues in the majority). He did, however, rely on the text of para. 1 of the Ontario Indemnity in concluding that it applies to “a statutory claim or proceeding brought by an agency of the Province such as the [Director’s Order] issued by the [Ministry of the Environment]” (para. 47). The majority at the Court of Appeal saw no error in this: “it was not open to the motion judge to consider evidence of the parties’ specific intentions or negotiations, including whether they discussed the Spills Bill during the negotiations that culminated in the execution of the Ontario Indemnity” (para. 112). This, the majority explained, was rooted in the principle that evidence of the parties’ specific negotiations is inadmissible for the purpose of contractual interpretation. Justice Laskin, however, instead characterized the enactment of the Spills Bill as an objective fact that the parties would have or reasonably ought to have known about when entering into their agreement, and concluded that “[t]he timing of the Spills Bill relative to the [Ontario] Indemnity demonstrates that the Spills Bil[l] was undoubtedly the reason why the [Ontario] Indemnity contained the added words relied on by the motion judge and the respondents” (para. 249).

[100] We note that the “general rule” that renders evidence of the parties’ specific negotiations and subjective intentions inadmissible sits uneasily next to the

rule that the circumstances surrounding the formation of the agreement inform contractual interpretation. As was noted in *Canadian Contract Law*:

The difficulty in Canada in now giving content to or even acknowledging the continued existence of the rule stems from Rothstein J.'s statement in *Sattva Capital* that a court must look at the surrounding circumstances or "factual matrix". It seems very difficult to separate what happened during the negotiations from the "surrounding circumstances"; in fact and notwithstanding the decision of the House of Lords in *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [[2009] UKHL 38,] it is hard to imagine where or how the line could be drawn. [Footnote omitted; p. 746.]

The majority of the Court of Appeal may have been alluding to this difficulty when it suggested that the rule may be in need of change "as a matter of policy" (para. 112). Although we recognize the uncertainty surrounding this point of law, we would leave its resolution for another day, where it is both necessary to the disposition of the appeal and more directly addressed by the courts below and the parties in their submissions.

[101] Even accepting that the proclamation of the Spills Bill in November 1985 is objective and admissible evidence of what the parties did or ought to have had in contemplation when entering into the Ontario Indemnity, it is a far leap from that premise to the conclusion that they would have understood "statutory or otherwise" to refer solely to claims brought under the Spills Bill, "or other third party statutory claims which could have been brought at that time" (Ontario A.F., at para. 88). This element of the factual matrix does not support the position that the indemnity excludes claims, actions or proceedings brought under legislation enacted following

the execution of the Ontario Indemnity — particularly given that it is expressly said to cover those “existing at December 17, 1979 or which may arise or be asserted thereafter” (A.R., vol. IV, at p. 189 (emphasis added)).

[102] Moreover, the proposition that the enactment of the Spills Bill as a surrounding circumstance supports reading the Ontario Indemnity narrowly — as excluding the costs of first party claims — cannot be reconciled with the Spills Bill’s creation of a right of action for private persons *and for the Province of Ontario*. On this point, s. 68*i*(2) of the Spills Bill states:

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right of compensation,

(a) for loss or damage incurred as a direct result of,

- (i) the spill of a pollutant that causes or is likely to cause adverse effects,
- (ii) the exercise of any authority under subsection 1 of section 68*j* or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
- (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under the Part,

from the owner of the pollutant and the person having control of the pollutant.

Indeed, if the parties had (or, at least, ought to have had) the Spills Bill in contemplation when executing the Ontario Indemnity, they would have known that it created first *and* third party liability.

[103] In a similar vein, the Province also advances the curious argument that first party claims should be excluded from the scope of the Ontario Indemnity because its reference to claims, actions and proceedings brought by any “province” does not include those brought by the Government of Ontario (Ontario A.F., at paras. 43 and 93). With respect, the notion that the parties would not have understood the reference to “any province” as including the province in which the Dryden Property is located, and which clearly has the constitutional authority to enact and pursue statutory claims in circumstances such as these, is simply absurd (see motion judge’s reasons, at para. 48). Indeed, Ontario may be *the only* “province” to which this provision could apply since, in *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, this Court held that Manitoba lacked the constitutional jurisdiction to enact and pursue a statutory claim against Dryden Chemical in respect of the mercury contamination into the rivers.

[104] Finally, the suggestion that the scope of the indemnity excludes the costs of complying with first party regulatory orders is further undermined by its express application to claims, actions and proceedings brought by “any agency, body or authority created by statutory or other authority” (A.R., vol. IV, at p. 189). The role of such agencies, bodies or authorities is to act under the authority of Ontario statutes or

regulations by, in this case, issuing regulatory orders such as that at issue in this appeal.

[105] In light of the foregoing, we see no reversible error in the motion judge's consideration of the factual matrix, nor, therefore, in his interpretation of the Province's obligation under para. 1 of the Ontario Indemnity as extending to first party claims, including those brought under subsequently-enacted legislation.

(2) Did the Motion Judge Err in Failing to Read Paragraph 1 of the Ontario Indemnity in Light of the Agreement as a Whole?

[106] In support of its second argument, the Province submits that paras. 2 and 3 of the Ontario Indemnity, which give Ontario the right to take carriage of a pollution claim and oblige the companies to cooperate with Ontario in relation to a pollution claim, are typical of third party indemnities, such that it should be clear that the Ontario Indemnity was not meant to address first party claims as well. Those two provisions read as follows:

2. Upon the receipt of notice of any Pollution Claim directed to Great Lakes or Reed or any predecessor in title of Reed, Great Lakes or Reed or failing Reed, International, as the case may be, shall promptly notify Ontario in writing of receipt of such notice giving reasonable particulars thereof, and Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating thereto as Ontario deems appropriate.



3. Where a Pollution Claim is brought against any of the companies referred to in paragraph 1 hereof, the said companies shall fully cooperate with Ontario in the investigation and defence and settlement of any such Pollution Claim and shall use their best efforts to obtain the cooperation of all personnel having any knowledge or information relevant to any such Pollution Claim and shall make available to Ontario all information. . . .

[107] We agree with Laskin J.A. that these provisions “are meaningful only for third party claims” against the indemnified parties, and are “utterly meaningless” in the context of first party claims and orders, such as the Director’s Order (para. 268). Nor did this escape the motion judge. Rather, he viewed the notification requirement in para. 2 as being “not inconsistent with the Province’s obligation to indemnify Weyerhaeuser and Resolute for their costs of complying with the [Director’s Order]” (para. 48). In other words, while para. 2 does not provide for first party indemnity, it did not exclude it either, and does not oust the language in para. 1 which clearly includes it. As Weyerhaeuser points out, “the fact that some procedural provisions may be unnecessary or redundant in the case of certain types of claims does not mean that a [c]ourt should ignore clear language confirming that those claims are covered by the [Ontario] Indemnity” (Weyerhaeuser R.F. (Ontario Appeal), at para. 55). (This reasoning would also apply to para. 3, given its similarity to para. 2.) Again, we see no reversible error here.

(3) Did the Motion Judge Commit Palpable and Overriding Errors of Fact in His Findings of Fact?

[108] The Province's third submission relies upon what it says were two palpable and overriding errors of fact by the motion judge. It points, first, to the motion judge's suggestion that Great Lakes "continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden" as part of the Settlement Agreement (para. 48). This statement shows, the Province says, that he failed to appreciate that such modernization efforts were given in exchange for the 1979 Indemnity, and that they formed no part of the consideration given by Great Lakes for the Ontario Indemnity. The second putative error is said to be found in the motion judge's conclusion, unsupported by evidence, that the waste disposal site was the source of the mercury contamination into the English and Wabigoon rivers.

[109] We begin by rejecting the proposition that the motion judge erred when he stated that the Ontario Indemnity "replaced the 1979 Indemnity and was part of the settlement of the lawsuit in which Great Lakes agreed to pay millions of dollars, and also continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden" (para. 48). Specifically, and contrary to the position taken by our colleagues in the majority, the motion judge did not actually find that the modernization commitment was given to the Province *as part of the settlement in 1985*. Rather, he simply observed that Great Lakes continued to invest in the Dryden pulp and paper mill through to 1985, as it was required to do in exchange for the 1979 Indemnity (which, as the motion judge properly found, was subsequently replaced by the Ontario Indemnity). We agree with the Court of Appeal that there is ample

evidence in the record supporting these findings, and that no basis for appellate intervention is disclosed.

[110] In any event, and to the extent that either of these are “errors”, or even “palpable” errors, we again agree with the majority at the Court of Appeal that they could not possibly have had an overriding effect on the conclusion reached by the motion judge. In our respectful view, neither the Province nor our colleagues remotely justify the exaggerated claim that such minor and collateral findings of fact somehow acquired an overriding significance so as to determine the outcome of the case (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46) — particularly where the motion judge’s ultimate conclusion on the scope of the indemnity rested on *different* factual and contextual considerations. This ground of appeal must fail.

- (4) Did the Motion Judge’s Interpretation of the Ontario Indemnity Render the Agreement Unenforceable as an Impermissible Fetter on the Legislature’s Law-Making Powers?

[111] The Province’s argument here is that the motion judge’s interpretation of the Ontario Indemnity — that it extends to the cost of compliance with first party statutory claims made under legislation enacted *after* the indemnity was given to Great Lakes and Reed in 1985 — has the impermissible effect of indirectly fettering the legislature’s law-making power. *Ex hypothesi*, the expense that the Province would incur by indemnifying Great Lakes and Reed for compliance with such

statutory claims would deter the legislature from enacting the enabling legislation in the first place. Based on the “presumption of law in favour of a legal, enforceable interpretation of a contract”, the Province says that the motion judge’s interpretation should be rejected and the Ontario Indemnity should instead be read as excluding the costs of complying with the Director’s Order and other first party statutory claims based on legislation enacted post-1985 (Ontario A.F., at para. 132).

[112] This argument rests on two key premises. The first is that the motion judge “implied a term into [the Ontario Indemnity] under which [the Province] is required to compensate for costs incurred to comply with an order made under future legislation” (Ontario A.F., at para. 116 (emphasis added)). The second is that a contract that *implicitly* discourages legislative action is invalid and unenforceable. As to this second point, the Province says that an indirect fetter of legislative power — which occurs where a contract imposes an obligation on the government to compensate the other contracting party in the event of future legislative action or inaction — “should only be permitted where there is an express intention to allocate commercial risk” in this manner (Ontario A.F., at para. 115).

[113] We agree with the majority at the Court of Appeal. The Province’s argument rests on a mischaracterization of the terms of the Ontario Indemnity, and a significant misunderstanding of the doctrine of fettering.

- (a) *The Motion Judge Did Not Imply Any Terms Into the Ontario Indemnity Regarding the Effect of Orders Pursuant to Subsequently-Enacted Legislation*

[114] We begin by rejecting the Province’s stated but unelaborated premise that the motion judge’s conclusion rested on the implication of terms. Rather, his conclusion was drawn from a straightforward interpretation of the scope of the Province’s obligation, expressly stated in para. 1 of the Ontario Indemnity as extending to “any obligation, liability, damage, loss, costs or expenses incurred . . . as a result of any claim, action or proceeding . . . existing at December 17, 1979 or which may arise or be asserted thereafter” (A.R., vol. IV, at p. 189 (emphasis added)). The motion judge’s conclusion is fortified by para. 4, which provides that the indemnity is valid “without limitation as to time” (*ibid.*). These provisions contemplate that Reed and Great Lakes are to be indemnified in respect of *all* Pollution Claims, as defined, *whenever asserted*. Neither the text nor the surrounding circumstances support the restricting that the Province would seek to have recognized.

[115] The majority at the Court of Appeal was correct. There was no error — let alone a palpable and overriding error — in the motion judge’s conclusion that the Ontario Indemnity requires the Province to indemnify the costs of compliance with an order made under subsequently-enacted legislation. More to the point, the motion judge implied no term into the agreement.

- (b) *The Fettering Doctrine Does Not Render Unenforceable Any Contract that Discourages Legislative Action or Inaction, Whether Implicitly or Explicitly*

[116] As a matter of constitutional law, the executive of the Canadian state cannot bind or restrict the legislature's sovereign law-making power, whether by contract or otherwise. As this Court affirmed in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, "Ministers of State cannot . . . by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations" (p. 560, quoting *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, at p. 390). Similarly, this Court recently explained in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, that "the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation", with the result being that "[a]n executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have any such effect" (para. 53).

[117] It follows that a contract entered into by the executive that purports to require that a certain law be enacted, amended or repealed cannot be enforced by way of injunction or specific performance. The legislature's sovereign power to "make or unmake any law whatever" means that it can never be bound by such an order (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 324). This is sometimes referred to as the rule against "direct fettering".

[118] At the same time — and this is the point that eludes the Province — there is an important difference between a contract that impermissibly *fetters* the legislature’s power to enact, amend and repeal legislation, and a contract whose breach by the Crown exposes it to *liability*. Where the legislature exercises its law-making power in a manner inconsistent with the terms of a contract, the Crown may still face consequences in the form of liability in damages. While the possibility of such liability may deter the legislature from acting in a manner that runs contrary to the Crown’s contractual promises — sometimes referred to as an “indirect fetter” — the legislature is not thereby truly *fettered*. Its freedom-of-action in these circumstances “is not diminished by holding that the enactment of a particular piece of legislation gives rise to an action for damages for breach of contract” (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at pp. 453-454; see also K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 2-10). As is explained in *Liability of the Crown*:

While a contract entered into by the Crown (or anyone else) cannot validly impose a *direct* fetter on legislative power, an exercise of legislative power in breach of contract will give rise to an obligation on the Crown to compensate the private contracting party for any loss suffered by the breach of contract. That obligation is an *indirect* fetter on legislative power, but it is not forbidden by the rule against fettering; on the contrary, it is required by the rule of law. [Emphasis in original; p. 325.]

[119] We say nothing new here: the same point emerges from *Wells v. Newfoundland*, [1999] 3 S.C.R. 199. There, the claimant Wells served as a commissioner on a statutory board, under a contract which entitled him to hold office

during good behaviour until the age of 70. By legislation, the board was restructured and Wells' office was abolished. When he was not reappointed to the new board, he sued for breach of contract.

[120] While accepting that the legislature had throughout retained *unfettered* authority to restructure the Board and eliminate Wells' office, this Court nonetheless found for Wells by applying the "crucial distinction . . . between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so" (para. 41). The Court went on to explain that:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations — rights of the highest importance to the individual — those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada, this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens [para. 46].

[121] *Wells* therefore affirms the distinction between *fettering* and *exposure to liability*. A legislature must be free — that is, *unfettered* — to exercise its law-making powers as it sees fit, within constitutional bounds. But where the legislature exercises its powers in such a way as to breach a government contract (that is, a contract between the executive and a counterparty), the Crown is, as a general rule, liable, unless the legislature also expressly and unambiguously extinguished the counterparty's rights of action or excluded Crown liability.



[122] *Even if*, therefore (to return to the facts of this appeal), the Ontario Indemnity has the effect of imposing liability upon the Province to indemnify against first party claims — or even of deterring or otherwise discouraging the legislature from exercising its law-making power in a certain way — *Wells* makes it clear that these effects do not render the agreement unenforceable at law. *Wells* also undermines the proposition, advanced by the Province, that indirect fettering “should only be permitted where there is an express intention to allocate commercial risk” (Ontario A.F., at para. 115), since there was no such express allocation in that case. Even though *Wells*’ employment contract was silent on the point of compensation in the event of abolition of his office, this Court had no difficulty finding that “[t]he most plausible interpretation of the respondent’s terms of employment is that while his position, and the authority flowing from it, could be eliminated, he could not be deprived of the benefits of the job except by virtue of age or bad behaviour” (para. 36).

[123] For its part, the Province relies heavily on this Court’s decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 (“*Pacific National No. 1*”). At issue in that case was a contract between Pacific National Investments (“PNI”) and the City of Victoria, which required PNI to redevelop a seaside neighbourhood and required the City to pass the necessary zoning and to grant subdivision. Bowing to public pressure, the City subsequently down-zoned to limit further development, thereby scuttling PNI’s redevelopment. PNI sued, arguing that its contract implicitly prohibited the City from re-zoning the lands until

the expiry of a reasonable amount of time, and that the City breached this implicit term when it re-zoned the land.

[124] In finding for the City, this Court explained that, as a creature of statute, the City could only agree to the implied term posited by PNI if it had the statutory authority to do so. And even accepting that such a term might be read into the contract, such a term would nevertheless have been invalid as “an illegal fetter on [the City’s] discretionary legislative powers” (para. 66). Indeed, the Court went as far as to reject the distinction between direct and indirect fettering, stating that “an agreement to compensate for a legislative decision . . . is no more acceptable than an outright restriction on the legislative power” (para. 63). Here, the Court was responding to an argument that a “duty to compensate . . . along these lines would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the community of which [PNI] is undoubtedly also a part” (para. 64).

[125] The difficulty is that this reasoning is irreconcilable with the Court’s decision only one year earlier in *Wells*. If the law commands that Wells be entitled to compensation for the breach of his employment contract that resulted from legislative action, we struggle to explain why the law would not operate similarly so as to entitle PNI to compensation for the breach of its development contract with the City when the City Council decided to “down-zone” the seaside lands. We note that the reasoning in *Pacific National No. 1* has been the subject of heavy criticism on this

very issue of fettering. The authors of *Liability of the Crown* take the view that “the decision is wrong, even if it is limited to the exercise of municipal legislative powers” (p. 328 (emphasis added)); see also *Government Liability*, at pp. 2-10; and *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42, at paras. 34-41). Likewise, Perell J. in *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550, said there is “a very strong argument that *Pacific National No. 1* is wrong and inconsistent with other equally binding and authoritative Supreme Court of Canada’s decisions” (para. 153 (CanLII) (emphasis added)); see also *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356, at paras. 53-59).

[126] Significantly, this Court in *Pacific National No. 1* did not purport to overrule *Wells*, and instead distinguished it on two bases. First, the majority observed that *Wells* “did not deal with a contract governing the exercise of municipal legislative powers” (para. 61). The logic appears to be that, unlike a province, a municipality cannot indirectly fetter its law-making powers in the absence of “legislation expressing a public policy permitting it to do so” (para. 65). With great respect, and while the failing may well be ours, this distinction eludes us. As Bastarache J. observed in dissent, public policy would tend to work the other way — there is no reason why the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to (as was stated in *Wells*, at para. 46) should not apply with equal force in the context of municipalities (see *Pacific National No. 1*, at para. 112). In any event, this distinction

would not assist the Province here, since it — and not a municipality — agreed to the Ontario Indemnity. Meaning, the circumstances of this appeal are analogous to *Wells*, and not to *Pacific National No. 1*.

[127] The second way that the majority in *Pacific National No. 1* distinguished *Wells* was to describe Wells’ employment agreement as “a business contract in relation to the hiring of senior civil servants” (para. 61). In other words, a distinction was drawn between “business contracts” which *can* have the effect of indirectly fettering law-making powers, and other kinds of contracts which *cannot*. Again with great respect, we do not see the significance of this distinction — particularly since the contract in *Pacific National No. 1* for land redevelopment could hardly have been seen as less of a “business contract” than Wells’ employment contract. In any event, if the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to is to be cast aside, we see no reason for doing so in respect of one kind of contract and not another.

[128] We also note that the statements in *Pacific National No. 1* regarding fettering were called into question only four years later when that dispute found its way back to this Court in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (“*Pacific National No. 2*”). In its action against the City, PNI had also claimed in unjust enrichment for the \$1.08 million that it had spent on improvements made in performing the failed development contract. In finding for PNI, a unanimous Court rejected the City’s argument that the obligation to make

restitution in those circumstances would constitute an indirect fetter on the City legislative power, explaining that “[t]he power to down-zone in the public interest does not immunize the City against claims for unjust enrichment” (para. 52). Commenting on this case, the authors of *Liability of the Crown* had the following to say:

[In *Pacific National No. 2*], Binnie J. said: “Municipalities are subject to the law of unjust enrichment in the same way as other individuals or entities”. We would add: what a shame that the same cannot be said about the law of contract! [Footnote omitted; p. 329.]

[129] Bearing all of this in mind, and to the extent that *Pacific National No. 1* can be taken as holding that the Crown will not be liable in damages for the breach of a governmental contract where that breach was caused by legislative action (or inaction), we are of the respectful view that it does not state the law as it relates to the fettering doctrine. On this point, we consider ourselves bound by *Wells*, and not *Pacific National No. 1*.

(c) *Conclusion on the Fettering Issue*

[130] It follows that we reject the Province’s arguments that invoke the doctrine of fettering. Even if the Ontario Indemnity was to be interpreted as deterring the legislature from enacting new first party statutory claims, which would then be covered by the Province’s obligation under para. 1 when asserted against Great Lakes and Reed, such an effect does not render the contract unenforceable or invalid such

that the legislature was fettered. This accords with the authority of this Court’s judgment in *Wells*.

[131] It also follows that we do not view the motion judge’s interpretation of the Ontario Indemnity as requiring the Province to indemnify the cost of complying with orders made under subsequent legislation — as impermissibly fettering the Ontario Legislature’s law-making power. While the enactment of new statutory claims might expose the Province to greater liability under the Ontario Indemnity (which might therefore discourage such enactments in the first place), the Ontario Indemnity, as interpreted by the motion judge, in no way prevents the legislature from exercising its sovereign authority to “make or unmake any law whatever” (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at p. 40, cited in *Reference re Pan-Canadian Securities Regulation*, at para. 54).

### C. *The Resolute and Weyerhaeuser Appeals*

[132] The appeals brought by Resolute and Weyerhaeuser ask whether either or both of them enjoy the benefit of the Ontario Indemnity by operation of the enurement clause (para. 6) of that agreement. That clause states that the indemnity “shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes” (A.R., vol. IV, at p. 191 (emphasis added)).

[133] The parties' submissions on this question are directed to three separate, but related, issues, which we will address below, in turn. The first is whether the benefit of the Ontario Indemnity extends to all of Great Lakes' successors and assigns, in perpetuity, irrespective of whether those successors and assigns had themselves assigned their benefits thereunder to third parties. Resolute and Weyerhaeuser say it does, while the Province (like the Court of Appeal) says that that the assignor of a chose in action — such as a right to indemnity — loses the benefit thereunder upon assignment (see C.A. reasons, at paras. 194 and 196-98).

[134] The second issue is whether Bowater actually assigned the benefit of the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Resolute says it did not, and that both the motion judge and the majority of the Court of Appeal erred in concluding otherwise. Weyerhaeuser and the Province both say no such error was made by the courts below.

[135] The final issue is whether Weyerhaeuser may benefit under the Ontario Indemnity as Great Lakes' successor-in-title to the Dryden Property, independently of whether it can also benefit as an assignee of the rights thereunder. Weyerhaeuser says the motion judge correctly interpreted the term "successor" in the enurement clause as extending to Great Lakes' corporate successors (like Resolute) *and* to successors-in-title to the Dryden Property.

- (1) Can an Indemnified Party Continue to Enjoy the Benefit of the Ontario Indemnity After It Assigns Its Rights Thereunder Absolutely to a Third Party?

[136] Resolute and Weyerhaeuser say that all of Great Lakes' successors and assigns may continue to benefit in perpetuity from the Ontario Indemnity, even where they have assigned the benefit of the indemnity to third parties. In other words, they say that the enurement clause contemplates (1) Resolute's continued enjoyment of the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, *even if* it had assigned its interest thereunder to Weyerhaeuser under to the 1998 Asset Purchase Agreement, and (2) Weyerhaeuser's continued enjoyment of the same as a successor-in-title to the Dryden Property and assignee of the Ontario Indemnity, *even if* it had subsequently assigned its interest thereunder to a third party. According to Resolute:

There is no legal principle that required the Court of Appeal to apply [a] "hot potato" theory, in which only the singular legal owner of an indemnity may rely on it. This Court relaxed the requirement of privity more than 25 years ago. Rather, the relevant question is what the parties to the Ontario Indemnity objectively intended. The only reasonable interpretation of the indemnity is that the parties intended to protect Great Lakes and its successors *and* assigns, in perpetuity. Any other interpretation is fundamentally inconsistent with the nature of the environmental liability that the Ontario Indemnity was given to protect against. [Emphasis in original.]

(Resolute A.F., at para. 64)

[137] We disagree. Our starting position is that of the majority of the Court of Appeal: the effect of an absolute assignment of contractual right is to extinguish the assignor's right to call upon the obligation for him or herself, and to place that right in the hands of the assignee:



The party making the assignment was a promisee but became an assignor who assigned the contract right he had against a promisor. Unless the assignment is made to secure the payment of a debt, it extinguishes the contract right in the assignor (former promisee) and the right is recreated in the assignee to whom the party with the correlative duty (the promisor) made no promise. There is no longer any promisee since the former promisee has surrendered the right previously created by his promise by becoming an assignor.

(J. E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007), vol. 9, at p. 130)

See also C.A. reasons, at para. 194; G. Tolhurst, *The Assignment of Contractual Rights* (2nd ed. 2016), at § 3.10.

[138] The enurement clause alters none of this. By referring to “successors and assigns”, it simply affirms that the rights and obligations thereunder continue to the benefit of successors and assigns. We see nothing in either the text of para. 6 or its surrounding circumstances, and Resolute and Weyerhaeuser direct our attention to nothing in this respect that would allow the indemnity to apply to those who have alienated their interest. We therefore find no error in the conclusion of the Court of Appeal on this point.

(2) Did Bowater Transfer the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement?

[139] On this issue, Resolute says that a proper consideration of the context in which the 1998 Asset Purchase Agreement was made by the parties, in accordance with the modern approach to contractual interpretation rather than a purely textual reading of the relevant provisions, should have led the motion judge to conclude

Bowater did not absolutely assign the Ontario Indemnity to Weyerhaeuser under that agreement. We agree with Resolute. By failing to read the impugned contractual term in light of the factual matrix and in a commercially sensible way, the motion judge erred in holding that Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. We would therefore allow Resolute's appeal. Resolute is entitled to rely on the Ontario Indemnity to cover past and future costs incurred in complying with the Director's Order.

(a) *The Motion Judge Erred in Principle in His Approach to Interpreting the 1998 Asset Purchase Agreement*

[140] Generally, the interpretation of negotiated contracts involves questions of mixed fact and law, such that appellate review is confined to seeking out palpable and overriding error. Extrinsic questions of law, however, are reviewed for correctness (see *Sattva*, at para. 53). Such questions include “the application of an incorrect principle, the failure to consider a required element of a legal test, . . . the failure to consider a relevant factor”, or questions with respect to substantive legal rules of contract (*Sattva*, at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 341 D.L.R. (4th) 520, at para. 21).

[141] We accept Resolute's submission that the motion judge erred *in law* by failing to properly apply the rules of contractual interpretation in determining whether Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Indeed, the motion judge gave no reasons in support of his

conclusion on this point, which was stated in a somewhat peremptory manner, and grounded solely on an analysis of the text of the relevant provisions of the 1998 Asset Purchase Agreement (motion judge reasons, at paras. 20 and 64). In our respectful view, he was required to consider both the context and circumstances surrounding the formation of the 1998 Asset Purchase Agreement, as well as the commercial reasonableness of any purported assignment. As he failed to apply the proper approach to contractual interpretation, his conclusion that the Ontario Indemnity was assigned from Bowater to Weyerhaeuser is entitled to no appellate deference.

(b) *Bowater Did Not Assign the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement*

(i) Contracts Must Be Interpreted With a View to Commercial Reasonableness

[142] As we have already observed, commercial reasonableness is a crucial consideration in interpreting a contract (see *Canadian Contractual Interpretation Law*, at p. 55). This is simply a corollary of the object of discerning the parties' intentions: when interpreting commercial contracts, courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties (see *ibid.*, at p. 57; *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79, 136 Man. R. (2nd) 170, at para. 34). Simply put, courts safely assume that those who enter into commercial contracts intend for their contracts to "work" (*Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. 175, at para. 15).

[143] Discerning commercial reasonableness entails, like all contractual interpretation, an objective analysis (see *Canadian Contractual Interpretation Law*, at p. 57). Courts should therefore read commercial contracts in a “positive and purposive manner”, seeking to understand the structure of the agreement reached by the parties, the purpose of the transaction and the business context in which the contract was intended to operate (*Humphries*, at para. 15). As Lord Wilberforce said in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, and as quoted with approval by this Court in *Sattva*, at para. 47:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries*, at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61, “[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by

rational commercial actors in making their bargain, absent some explanation to the contrary”. See also *City of Toronto v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, at p. 440.

(ii) It Was Not Commercially Reasonable for Bowater to Transfer the Ontario Indemnity to Weyerhaeuser

[145] In light of the foregoing — and, in particular, based on an interpretation of the 1998 Asset Purchase Agreement that properly reflects the factual matrix and which is consistent with the principle of commercial reasonableness — we find ourselves in respectful disagreement with the conclusions reached by the courts below. We would instead hold that the Ontario Indemnity was *not* assigned by Bowater to Weyerhaeuser as part of the 1998 Asset Purchase Agreement. The manner in which the parties structured the transfer of the Dryden Property from Bowater to Weyerhaeuser reveals an intention that Bowater would both continue to bear the risk associated with the waste disposal site and indemnify Weyerhaeuser in respect of any environmental liabilities that the latter may incur in relation to the Reed-era mercury contamination.

[146] Section 3.1(vii) and (xiv) of the 1998 Asset Purchase Agreement recorded Bowater’s agreement to sell certain intangible assets forming part of the Dryden Property to Weyerhaeuser. As already noted, the motion judge relied on both provisions in concluding that the benefit of the Ontario Indemnity was assigned to Bowater as part of the asset sale. The majority at the Court of Appeal agreed, citing the “plain and unambiguous language of s. 3.1(xiv)”, and the commercial

reasonableness of Weyerhaeuser's seeking to "maximize its protection against environmental liabilities associated with the [waste disposal site]" (paras. 156 and 159).

[147] But s. 3.1(xiv) of the 1998 Asset Purchase Agreement cannot be read in isolation. Instead, as we have stressed throughout these reasons, contractual text must be interpreted in light of the surrounding circumstances and with a view to commercial reasonableness, taking into account the commercial purpose and the structure of the agreement.

[148] Further, commercial reasonableness must be assessed *from the perspective of both parties*. After all, a commercial arrangement that makes sense for one party but no sense for another makes no sense as a commercial arrangement at all. As the Court of Appeal for Ontario explained in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357, at para. 27:

Where . . . the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

[Emphasis added; citations omitted.]

[149] This point looms large in considering the text of s. 3.1(xiv), which, at first glance, appears to transfer to Weyerhaeuser the full benefit of *all* of the intangible

rights that Bowater enjoys under the representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and security that it has received upon the acquisition of the Dryden Property or “otherwise”. Read literally, “otherwise” suggests that Bowater would be stripped of all of its contractual benefits by operation of s. 3.1(xiv) *even if* those benefits were unconnected to the Dryden Property. This simply could not have been the intention of the parties: Weyerhaeuser could not reasonably have expected to enjoy rights unrelated to the assets it was purchasing. Such an arrangement would be commercially absurd.

[150] The meaning of the term “otherwise” in s. 3.1(xiv) — and, specifically, whether it captures the benefit of the Ontario Indemnity — becomes evident, however, once the structure of the agreement between Bowater and Weyerhaeuser, and how they chose to allocate risk as between them is understood. The latter is a key consideration, since the allocation of contractual risk is an attempt by one party to shape the other’s expectations in light of what they are prepared to do (see *Canadian Contract Law*, at p. 731).

[151] Here, the parties structured the 1998 Asset Purchase Agreement in a way that imposed *all risk* in relation to environmental liabilities — especially in relation to the waste disposal site — *on Bowater*, and not on Weyerhaeuser. First and foremost, as part of the deal, Bowater provided to Great Lakes a broad environmental indemnity in respect of the entire Dryden Property, in the following terms:

#### 10.7 Environmental Indemnity

The Vendor shall indemnify the Purchaser from and against any Claim wherein the Claimant alleges that any Loss, or any damages of any nature whatsoever, was suffered or incurred as a result of a release or discharge of any Hazardous Substance that occurred prior to the Time of Closing, which Hazardous Substance leaves or left the Purchased Assets prior to the Time of Closing and which originated from the Purchased Assets (the "Claim"). For purposes of this paragraph, Claimant shall not include the Purchaser. The carriage and defence of the Claim shall be conducted in accordance with Section 18.4. There shall be no limitation period and no maximum amount for the Indemnity under this Section 10.7.

(A.R., vol. V, at p. 70)

[152] Further, by s. 9.01 of the 1998 Lease Agreement, Bowater also provided to Weyerhaeuser a separate indemnity for *all claims* relating to the presence or release of mercury in relation to the waste disposal site:

9.01 **Tenant's Indemnity**

[Bowater] covenants to indemnify and save harmless [Weyerhaeuser] from all claims, actions, costs and losses of every nature arising during the Term or thereafter relating to or arising in any way from this lease of the Lands and the Access Area except to the extent caused by the Landlord's negligence or wilful misconduct. The foregoing indemnity extends without limitation to all claims, actions, costs or losses arising out of or relating to:

- (1) the presence or release of mercury and any other contaminant, substance or waste on or in the Lands;

...

The obligations of the Tenant to indemnify the Landlord under the provisions of this section are to survive the termination or expiry of this lease.

(A.R., vol. V, at p. 126-27)



[153] These two broadly-worded indemnities reveal with absolute clarity the risk allocation structure that Bowater and Weyerhaeuser intended to achieve. Once the indemnity in the 1998 Lease Agreement was provided, Weyerhaeuser was protected from any and all environmental liability resulting from its temporary ownership of the waste disposal site, in addition to the protection that it enjoyed in relation to the rest of the Dryden Property. The parties clearly intended that any claim against Weyerhaeuser in respect of the presence or release of the mercury waste would be covered by either the indemnity in s. 10.7 of the 1998 Asset Purchase Agreement or in s. 9.01 of the Lease Agreement (assuming, of course, that any such claim falls within the scope of either provision).

[154] This risk-allocation structure makes commercial sense, however, if *and only if* Bowater's interests remained protected by the Ontario Indemnity. The Province acknowledged as much during the hearing in this Court and in its factum in the Superior Court of Justice (see hearing transcript, at p. 121; A.R., vol. VIII, at p. 24). As Resolute says, such an interpretation of the 1998 Asset Purchase Agreement makes sense because "Weyerhaeuser would have recourse against Bowater, and Bowater would have recourse against [the Province]", the result being that "[e]veryone would be protected" (Resolute A.F., at para. 101).

[155] Weyerhaeuser also conceded that "it would have been commercially absurd for Bowater to assign the indemnity if, by doing so, Bowater (and its successor, Resolute) would lose the benefit of the Indemnity" (Weyerhaeuser R.F.

(Resolute Appeal), at para. 28). It argues, however — and the majority at the Court of Appeal accepted — that it was “perfectly reasonable” for Weyerhaeuser to seek both an assignment of the Ontario Indemnity *and* a separate indemnity from Bowater under the Lease Agreement (*ibid.*, at para. 27; see also C.A. reasons, at para. 159). While this is undoubtedly so, this submission views the commercial reasonableness of the transaction exclusively from the standpoint of Weyerhaeuser. But, again, commercial reasonableness has to be assessed from the standpoint of *each party*, and not just one of them. And, as Weyerhaeuser concedes, from the standpoint of *Bowater*, this arrangement would be ridiculous, leaving Bowater (and its successors) responsible for *two* contractual indemnities *vis-à-vis* Weyerhaeuser, and completely exposed to all environmental liabilities in respect of both the Dryden Property and the waste disposal site.

[156] It follows that, in our view, for the purpose of applying s. 3.1(xiv) of the 1998 Asset Purchase Agreement, the contractual rights and indemnities “otherwise” received by Bowater and its corporate predecessors must not be read so as to confer on Weyerhaeuser *all* the rights and indemnities enjoyed by Bowater. Both the factual matrix (which includes the indemnities in the 1998 Asset Purchase Agreement and in the Lease Agreement) and the principle of commercial reasonableness indicate that this provision did not effect a transfer of Bowater’s rights under the Ontario Indemnity to Weyerhaeuser. The parties could not reasonably have intended that Bowater would be obliged to indemnify Weyerhaeuser for all environmental

liabilities in relation to the Dryden Property and the waste disposal site, while relinquishing its own protection.

[157] We would therefore allow Resolute's appeal.

(3) Is Weyerhaeuser a "Successor" of Great Lakes for the Purpose of the Enurement Clause at Paragraph 6 of the Ontario Indemnity?

[158] While Weyerhaeuser is not an assignee of the benefit of the Ontario Indemnity, it also says that it may still benefit thereunder as a successor owner of the Dryden Property. In its submission, the term "successor" in para. 6 of the Ontario Indemnity includes both corporate successors of Great Lakes *and* successors-in-title to the Dryden Property. Relying on *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, Weyerhaeuser argues that the enurement clause extends the benefit of the Ontario Indemnity to a *class* of beneficiaries, all of whom may simultaneously benefit from the agreement.

[159] Like the majority at the Court of Appeal, we are of the respectful view that the motion judge made a palpable and overriding error in concluding that the enurement clause extended the benefit of the Ontario Indemnity to successor owners of the Dryden Property (i.e., successors-*in-title*). In our view, the term "successors" clearly refers only to *corporate* successors. It is worth noting that this clause is a standard contractual term — that is, "boilerplate" — that solicitors use in order to protect their clients' interests and expectations (see *Canadian Contract Law*, at

pp. 741-42). Certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect.

[160] In *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410, this Court observed that, “when used in relation to corporations a ‘successor’ generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation” (p. 423). Indeed, this common understanding of the term “successor” has been recognized in considering enurement clauses like the one at issue here (see C. L. Elderkin and J. S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (1998), at pp. 250-251; M. H. Ogilvie, “Re-Defining Privity of Contract: *Brown v. Belleville (City)*” (2015), 52 *Alta. L. Rev.* 731, at p. 736). Again, bearing in mind that the object of contractual interpretation is to discern the parties’ objective *intentions*, the commonly-accepted meaning of that term provides a helpful starting point to considering what the parties understood the words in the enurement clause to mean.

[161] We agree with the majority at the Court of Appeal that, in these particular circumstances, “nothing in the language of the Ontario Indemnity or in the circumstances surrounding the formation of the contract” supports Weyerhaeuser’s interpretation of the enurement clause (para. 184). To the contrary, in reading the enurement clause together with the rest of the Ontario Indemnity, it becomes clear

that the parties intended to restrict the term “successors” to *corporate* successors. Paragraph 2 of the Ontario Indemnity refers to Reed’s “predecessor[s] in title”, while para. 6 uses the term “successors” without any such qualification. As this Court remarked in *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 47, “[m]eaning must be given to the choice to use one term in one clause and a different term in a different clause of the same agreement”. Had the parties to the Ontario Indemnity intended the enurement clause to apply to all successors-in-title over the Dryden Property, they could have made those intentions clear.

[162] This is not to say that our conclusion with respect to the word “successors” in this specific enurement clause sets out a universal definition of that term. It may be possible, in other circumstances, for the term “successors” to refer to successors-in-title (e.g. *Belleville*).

[163] For these reasons, Weyerhaeuser is neither an assignee of the benefit of the Ontario Indemnity nor a corporate successor of either Great Lakes or Reed. Notwithstanding its rights under the 1998 Asset Purchase Agreement and the Lease Agreement, it has no entitlement to benefit under the Ontario Indemnity, and we would dismiss its appeal.

[164] Given this conclusion, it is unnecessary for us to decide whether the enurement clause operates to the benefit of a class of beneficiaries (being Great Lakes’ successors *and* assigns).

## VI. Conclusion

[165] We would dismiss the appeals of the Province and of Weyerhaeuser. We would allow Resolute's appeal and declare that Weyerhaeuser enjoys no benefit under the Ontario Indemnity. Resolute is entitled to its costs in this Court and throughout, including costs before the motion judge on the terms he ordered (*Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONSC 1814).

*Appeal of Resolute FP Canada Inc. dismissed, CÔTÉ, BROWN and ROWE JJ. dissenting.*

*Appeal of Her Majesty The Queen as represented by the Ministry of the Attorney General allowed with costs throughout, CÔTÉ, BROWN and ROWE JJ. dissenting.*

*Appeal of Weyerhaeuser Company Limited dismissed.*

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