SCC File No. 37985

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

RESOLUTE FP CANADA INC.

Appellant
(Respondent)

– and –

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE MINISTRY OF THE ATTORNEY GENERAL

Respondent
(Appellant)

AND BETWEEN:

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE MINISTRY OF THE ATTORNEY GENERAL

Appellant
(Appellant)

– and –

WEYERHAEUSER COMPANY LIMITED and
RESOLUTE FP CANADA INC.

Respondents
(Respondents)

AND BETWEEN:

WEYERHAEUSER COMPANY LIMITED

Appellant
(Respondent)

– and –

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE MINISTRY OF THE ATTORNEY GENERAL

Respondent
(Appellant)

FACTUM OF THE APPELLANT, WEYERHAEUSER COMPANY LIMITED

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3

Christopher D. Bredt
Markus F. Kremer
Alannah Fotheringham
Tel: 416-367-6165
416.367.6658
416.367.6394
Fax: 416-367-6749
Email: CBredt@blg.com
MKremer@blg.com |
AFotheringham@blg.com

Counsel for the Appellant/Respondent,
Weyerhaeuser Company Limited

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3520

Fax: 613.230.8842
Email: neffendi@blg.com

Agent for the Appellant/ Respondent,
Weyerhaeuser Company Limited

ORIGINAL TO: **THE REGISTRAR**
301 Wellington Street
Ottawa, ON K1P 0J1

COPIES TO:

Ministry of the Attorney General
Crown Law Office – Civil Law
8th Floor, 720 Bay Street
Toronto, ON M5G 2K1

Leonard Marsello
Tamara Barclau
Nansy Ghobrial
Tel: 416.326.4939
Fax: 416.326.4181
Email: leonard.marsello@ontario.ca

Counsel for the Appellant/Respondent
Her Majesty the Queen as represented by the
Ministry of the Attorney General

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Appellant/Respondent
Her Majesty the Queen as represented by the
Ministry of the Attorney General

Torys LLP
79 Wellington Street, 30th Floor
Box 270, TD South Tower
Toronto, ON M5K IN2

Crawford Smith
Jeremy R. Opolsky
Tel: 416.865.8209
Fax: 416.865.7380
Email: csmith@torys.com | jopolsky@torys.com

Counsel for the Appellant/Respondent,
Resolute FP Canada Inc.

Power Law
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel.: 613.702.5560
Fax: 888.404.2227
Email: mvincelette@powerlaw.ca

Ottawa Agent for the Appellatn/Respondent,
Resolute FP Canada Inc.

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

I. OVERVIEW

1. The Province of Ontario, as part of the settlement of a lawsuit, agreed to assume full responsibility for all environmental issues relating to a property. It did this by granting the owner an indemnity that enured to the benefit of the owner's successors and assigns.

2. Thirteen years later, the Appellant Weyerhaeuser purchased the property. Weyerhaeuser held the property for a number of years before reselling it. Weyerhaeuser did not cause or contribute to any environmental damage to the property.

3. Years after Weyerhaeuser sold the property, the province issued a Director's Order requiring current and past owners of the property, including Weyerhaeuser, to undertake certain environmental monitoring and reporting work in respect of a mercury waste disposal site located on the property.

4. Weyerhaeuser sued to enforce the indemnity. The majority of The Court of Appeal for Ontario erred in interpreting the indemnity's enurement clause, by failing to apply the ordinary principles of contractual interpretation. Those principles required the Court to consider the wording of the enurement provision in the context of the indemnity as a whole, the factual matrix, and the principle that commercially unreasonable results should be avoided. The Court disregarded those principles and instead applied what it described as two "general principles":

(a) when an assignee of an indemnity assigns the indemnity to another party, it loses the benefit of the indemnity; and

(b) the word "successor" in an indemnity given by a corporation applies only to corporate successors and not to successors in title to property.

5. The majority imposed upon Weyerhaeuser the onus to justify a departure from these "general principles". In effect, the majority applied legal presumptions, without using that term. Whether a court characterizes this approach as requiring Weyerhaeuser to justify an exception to a general principle or to rebut a legal presumption, it amounts to the same thing: the majority

erred by applying its "general principles" to ignore the factual matrix and override the intentions of the contracting parties.

6. The majority's interpretation of the indemnity leads to a commercially absurd result by eviscerating the value of this type of indemnity. It materially impedes the ability of property owners to transfer contaminated properties in a commercially reasonable manner. It would be very difficult for an indemnitee to sell a contaminated property if a purchaser knows that it will be exposed to liability upon becoming the property's owner. By the same token, few owners would be willing to sell a contaminated property if they know that, by doing so, they will lose the benefit of the indemnity.

7. Allowing Weyerhaeuser to rely upon the indemnity not only accords with ordinary principles of contractual interpretation. It is also fair. The province assumed the obligation to fully indemnify the owners of the property in respect of any and all environmental liabilities associated with the mercury contamination. The burden imposed by that obligation was not dependent upon who owned the property at any given time. Having agreed to assume that liability, the province should not be allowed to resile from it now, simply because the property's owners changed over time. The province should be held to its bargain.

II. STATEMENT OF FACTS

A. The Property and the Site

8. In the 1960s and 1970s, Dryden Paper Company Limited maintained a pulp and paper mill on a property in Dryden, Ontario. Its affiliate operated a plant on the property that produced sodium hydroxide and chlorine used to bleach paper produced in the mill.

9. The Dryden companies discharged untreated mercury waste into the nearby river system. In 1971, they constructed a waste disposal site on the property to serve as a burial site for the mercury waste. The province has been aware of the contamination of the waste disposal site

since the 1970s and began imposing environmental compliance conditions upon its owners in 1977.[1]

B. The Grassy Narrows and Islington Band's Litigation

10. In 1977, members of two First Nations Bands affected by the waste disposal site contamination commenced a lawsuit against Dryden Paper and its successor, Reed Limited, for damages arising out of the contamination.[2]

11. Reed entered into negotiations to sell the property to Great Lakes in 1979. Great Lakes was reluctant to purchase the property without protection from environmental liability. The province was concerned that if Great Lakes did not purchase the property, the Dryden pulp and paper mill might close, damaging the local economy.[3]

12. In order to induce Great Lakes to purchase the property, and invest in the modernization of the pulp and paper mill's operations, the province granted an indemnity by entering into a letter agreement with Great Lakes.[4]

13. The First Nations settled the lawsuit with the province, Her Majesty the Queen (as represented by the Minister of Indian Affairs and Northern Development), Reed and Great Lakes in 1985.

14. Pursuant to the settlement:

(a) the parties agreed to settle all claims and causes of action, past, present and future, arising out of the mercury contamination of the local river system and related ecosystems;

---

[1] Motion Decision at para. 7 - Joint Appeal Record [JAR], Vol. 1, p. 2; Appeal Decision at paras. 9-11 and 14 - JAR, Vol. 1, pp. 30-31.

[2] Motion Decision at para. 7 - JAR, Vol. 1, p. 2; Appeal Decision at para. 15 - JAR, Vol. 1, p. 31.

[3] Motion Decision at paras. 8-9 - JAR, Vol. 1, p. 2; Appeal Decision at para. 17 - JAR, Vol. 1, p. 32.

[4] Motion Decision at para. 9 - JAR, Vol. 1, p. 2; Appeal Decision at paras. 19-20 - JAR, Vol. 1, pp. 32-33.

(b) Great Lakes and Reed agreed to pay $11.75 million collectively for the benefit of the First Nations Bands; and

(c) the parties agreed to replace the indemnity that the province had given Great Lakes and Reed in 1979 with a new indemnity in respect of the mercury contamination.[5]

15. The settlement received court approval on June 26, 1986. Both Parliament and the provincial Legislature enacted legislation approving the settlement.[6]

C. The Indemnity

16. In accordance with the terms of the settlement, the province granted Great Lakes and Reed a new Indemnity (the "Indemnity"). By its express terms, the Indemnity:

(a) applied to all claims, actions and proceedings, "whether statutory or otherwise";

(b) applied to any province or any agency, body or authority created by statutory or other authority; and

(c) was of unlimited duration.[7]

17. The motion judge and the majority of the Court of Appeal for Ontario agreed that the Indemnity was sufficiently broad to apply to environmental enforcement orders made by the province itself.[8]

18. The issue in this appeal is whether Weyerhaeuser was entitled to rely upon the Indemnity as a result of the enurement clause it contains, which provides:

> 6. The indemnity shall be binding upon and **enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great**

---

[5] Motion Decision, at paras. 11-13 - JAR, Vol. 1, pp. 2-3; Appeal Decision, at paras. 25-26 - JAR, Vol. 1, p. 36.

[6] Motion Decision, at paras. 14-15 - JAR, Vol. 1, p. 3; Appeal Decision at para. 36 - JAR, Vol. 1, p. 40.

[7] Motion Decision at paras. 17-18 - JAR, Vol. 1, p. 3-4; Appeal Decision at paras. 31-33 - JAR, Vol. 1, pp. 37-40.

[8] Appeal Decision at para. 128 - JAR, Vol. 1, p. 71.

> **Lakes**, provided however that Ontario shall not be entitled to assign the indemnity without the prior written consent of the other parties hereto.[9]

D. Weyerhaeuser's Purchase of the Dryden Property

19. On August 4, 1998, Weyerhaeuser purchased the property and associated manufacturing assets from Great Lakes' successor, Bowater Pulp and Paper Canada Inc., pursuant to an Asset Purchase Agreement (the "1998 Agreement").

20. The 1998 Agreement included a description of the assets that Weyerhaeuser was purchasing, including the contractual rights and indemnities relating to the Dryden operation.

21. The motion judge and the majority of the Court of Appeal agreed that the effect of the following language was to assign to Weyerhaeuser the full benefit of the Indemnity:

> 3.1 Property and Assets to be Purchased and Sold
>
> Subject to the terms and conditions hereof, **the Vendor agrees to** sell, **assign** and transfer **to the Purchaser** and the Purchaser agrees to purchase as, at and from the Effective Time the following property and assets of the Business:
>
> …
>
> (vii) Agreement, Contracts and Commitments – the full benefit of all unfilled orders received by the Vendor relating to the Business and **all right**, title and interest of the Vendor in, to and **under all agreements, contracts** and commitments **and other rights** of or relating to the Business, whether written or oral, including, without limitation, the full benefit and advantage of all forward commitments by the Vendor for supplies or materials entered into in the Ordinary course of the Business which are exclusively for use in the Business whether or not there are any written agreements, contracts or commitments with respect thereto (individually a "Contract" and collectively, the "Contracts")
>
> …
>
> (xiv) Warranty Rights – **the full benefit of all** representations, warranties, guarantees, **indemnities**, undertakings, certificates, covenants, agreements and the like and all security therefore received by the Vendor on the purchase or other acquisition of any part of the Purchased Assets or otherwise.[10] [emphasis added]

---

[9] Motion Decision at para. 19 - JAR, Vol. 1, p. 5; Appeal Decision at para. 34 - JAR, Vol. 1, pp. 39-40 [emphasis added].

[10] Motion Decision at para. 20 - JAR, Vol. 1, p. 5; Appeal Decision at para. 151 - JAR, Vol. 1, pp. 77-78.

E. The Waste Disposal Site, the Director's Order and Resulting Lawsuit

22. Weyerhaeuser purchased the property almost thirty years after the waste disposal site had been built to try to contain the mercury contamination. Weyerhaeuser did not want to purchase the waste disposal site and the 1998 Agreement initially provided that Bowater would retain it. This required a severance of the waste disposal site pursuant to Ontario's *Planning Act.*

23. Due to a delay in obtaining the severance, Weyerhaeuser held legal title to the waste disposal site for approximately two years (until August 25, 2000). During this time, Weyerhaeuser leased the waste disposal site back to Bowater, so that Bowater remained in control and possession of the waste disposal site. Weyerhaeuser did not in any way cause or contribute to the waste disposal site's contamination.[11] At the end of the two year lease, Bowater obtained the severance and resumed legal title to the waste disposal site (of which it had retained possession throughout).[12]

24. Weyerhaeuser sold the Dryden pulp and paper operation (not including the waste disposal site) to Domtar Inc. in 2007.[13]

25. In 2011, more than ten years after Weyerhaeuser had ceased to hold legal title to the waste disposal site, the Director of the Ministry of the Environment and Climate Change issued a Director's Order, which requires Weyerhaeuser, Resolute and others, to provide mandatory environmental monitoring, reporting and financial assurance in respect of the waste disposal site. Weyerhaeuser appealed the Order to the Environmental Review Tribunal.[14]

---

[11] Motion Decision at para. 22 - JAR, Vol. 1, p. 6

[12] Motion Decision at para. 23 - JAR, Vol. 1, p. 6.

[13] Motion Decision at para. 24 - JAR, Vol. 1, p. 6; Appeal Decision at para. 42 - JAR, Vol. 1, p. 41.

[14] Motion Decision at paras. 26-27 - JAR, Vol. 1, p. 6; Appeal Decision at paras. 50-52 - JAR, Vol. 1, pp. 43-44.

26. Weyerhaeuser commenced an action against the province in May 2013 seeking an order requiring the province to indemnify Weyerhaeuser for all costs it incurred, and may be required to incur in the future, as a result of the Director's Order.[15]

III. PROCEDURAL HISTORY

A. The Decision of the Motion Judge (Hainey J.)

27. The province brought a motion for summary judgment, seeking to have Weyerhaeuser's action dismissed. Weyerhaeuser responded with a cross-motion for summary judgment. Resolute intervened and brought its own motion for summary judgment.

28. The three issues before the motion judge were:

(a) Does the Indemnity apply to the province's own regulatory actions, such as the Director's Order?

(b) Can Weyerhaeuser rely upon the Indemnity as a successor or an assignee of the original indemnitee?

(c) Assuming the Indemnity would otherwise apply, is it unenforceable under the fettering doctrine?[16]

29. The motion judge found in favour of Weyerhaeuser on each of these issues, granted summary judgment to both Weyerhaeuser and Resolute, and dismissed the province's motion for summary judgment.

30. The motion judge found that, when it granted the Indemnity, the province intended to assume liability for all aspects of the property's mercury contamination:

> The ordinary and grammatical meaning of these words makes it clear that the Province agreed to indemnify Great Lakes for any costs or expenses resulting from any claim or proceeding, which may be asserted thereafter by a government,

---

[15] Appeal Decision at para. 53 - JAR, Vol. 1, p. 44.

[16] Motion Decision at para. 28 - JAR, Vol. 1, p. 36.

> including any province or statutory agency with respect to the discharge or presence of any pollutant on the Dryden property.[17]

31. Accordingly, the motion judge concluded that the Indemnity covered the costs of complying with the Director's Order.[18]

32. The motion judge found the language used in the enurement clause to be similarly broad and unqualified. His Honour held that the term "successor", read in the context of the agreement as a whole and with a view to the factual matrix, included successors in title to the property, including Weyerhaeuser.

33. The motion judge also found that the Indemnity was assigned by Great Lakes' successor, Bowater, to Weyerhaeuser when Weyerhaeuser purchased the property in 1998. As a result, Weyerhaeuser could rely upon the Indemnity both as a successor, and as Great Lakes' assignee.[19]

34. Finally, the motion judge held that the Indemnity did not improperly fetter the province's discretion, because (i) the fettering doctrine only applies to agreements that restrict legislative functions and not to business agreements; (ii) the province's position amounted to a collateral attack on the judgment that approved the settlement; and (iii) the province, presumably having entered into the agreement in good faith and with the expectation that it would be enforceable, was subject to the private law of contracts.[20]

35. Accordingly, the motions judge held that Weyerhaeuser and Resolute were entitled to be indemnified under the Indemnity for their costs of complying with the Director's Order.

B. The Decision of the Court of Appeal for Ontario (Laskin, Lauwers and Brown JJ.A.)

36. The province appealed the decision of the motion judge to the Court of Appeal for Ontario.

---

[17] Motion Decision at para. 42 - JAR, Vol. 1, p. 41.

[18] Motion Decision at paras. 44-47 - JAR, Vol. 1, p. 42.

[19] Motion Decision at para. 61-64 - JAR, Vol. 1, pp. 46-48.

[20] Motion Decision at para. 51 - JAR, Vol. 1, p. 44.

37. The majority upheld the motion judge's findings on the three issues that were before the Court in the first instance, and from which the province had appealed, namely that: (i) the Indemnity applied to costs arising out of compliance with the Director's Order; (ii) Weyerhaeuser fell within the scope of the enurement clause (as an assignee, but not as a successor) and acquired the right to rely upon the Indemnity when it purchased the property; and (iii) the Indemnity was not unenforceable under the fettering doctrine.

38. However, the majority then went on to consider whether a party, having acquired the right to rely upon the Indemnity by falling within the scope of the enurement clause, could subsequently lose that right when it sold the property.

39. Specifically, the majority held that:

(a) Resolute was a corporate successor to Great Lakes and would have had the right to rely upon the Indemnity, had the property not been sold to Weyerhaeuser;

(b) when Great Lakes' corporate successor, Bowater, sold the property to Weyerhaeuser, it assigned the full benefit of the Indemnity to Weyerhaeuser;

(c) as a result, Weyerhaeuser acquired the benefit of the Indemnity;

(d) at the same time, Great Lakes and its corporate successors "lost" the benefit of the Indemnity; and

(e) as a consequence, Resolute could not rely upon the Indemnity, even though Resolute was indisputably a "successor" to Great Lakes.[21]

40. The majority went on to overturn the motion judge's determination that Weyerhaeuser could rely on the Indemnity, on the basis that it was unable to determine on the evidence before it whether or not Weyerhaeuser "lost" the benefit of the Indemnity when it sold the property to Domtar.[22] Specifically, the majority found it was unable to make this determination without reviewing the Asset Purchase Agreement that governed the sale of the property from Weyerhaeuser to Domtar, which was not in the record.

---

[21] Appeal Decision at paras. 193 and 195 - JAR, Vol. 1, pp. 95-96.

[22] Appeal Decision at paras. 162 to 166 - JAR, Vol. 1, pp. 81-84.

41. As a result, the majority ordered that the adjudication of what rights Weyerhaeuser possessed at the time the Director's Order was made in 2011 be remitted to the court below.

42. The majority also disagreed with the motion judge's finding that Weyerhaeuser could rely on the Indemnity as a successor in title to the property. In doing so, the majority effectively applied a legal presumption (which it referred to as a "general principle") that the term "successor" in reference to a corporation applies only to corporate successors.[23]

43. Having presumed that "successor" refers only to corporate successors, the majority imposed upon Weyerhaeuser the onus to justify a departure from that principle.

44. The dissenting Justice (Laskin J.A.) would have found that the Indemnity did not apply to the Director's Order at all. As a result, Laskin J.A. did not have to consider whether Weyerhaeuser came within the terms of the enurement clause.[24]

PART II – THE QUESTIONS IN ISSUE

45. This appeal raises the following questions:

(a) What is the applicable standard of review?

(b) Did the majority err in applying a "general principle" that a party who assigns the benefit of an indemnity presumptively loses that benefit for itself, rather than interpreting the Indemnity according to ordinary principles of contractual interpretation?

(c) Did the majority err in applying a "general principle" that the term "successors" when used in respect of a corporation refers only to corporate successors, rather than interpreting the Indemnity according to ordinary principles of contractual interpretation?

---

[23] Appeal Decision at paras. 170, 171, 178 and 184 - JAR, Vol. 1, pp. 85, 86, 89-90 and 92.

[24] Appeal Decision at paras. 264 and 270 - JAR, Vol. 1, pp. 124 and 127.

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

46. An Indemnity is a contract. It should be interpreted according to ordinary principles of contractual interpretation. That is what the motion judge did. He committed no palpable and overriding error.

47. The Court of Appeal should have deferred to the motion judge's finding that Weyerhaeuser could rely upon the Indemnity as both an assignee and a successor. Instead, the majority ignored contractual interpretation principles and applied legal presumptions that have no basis in law. This was a reversible error.

48. This Court has held that the interpretation of a contract is a question of mixed-fact-and-law. As a result, the motion judge's decision could only be overturned if it was the result of a palpable and overriding error.[25] While the Court of Appeal correctly stated the standard of review applicable in this case, Weyerhaeuser respectfully submits that it failed to apply that standard properly.

49. The palpable and overriding error standard requires the error to be "clearly wrong" or plainly seen, and to be one that would have altered the result or that may well have altered the result. The standard emphasizes the need to "put one's finger on the crucial flaw, fallacy or mistake" before appellate intervention is warranted.[26]

50. This Court has adopted with approval the following statement of the applicable principle:

> Palpable and overriding error is a highly deferential standard of review … "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding

---

[25] *Creston Moly Corp v. Sattva Capital Corp.*, 2014 SCC 53 ("*Sattva*") at paras. 50 and 55, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 ("*Ledcor*") at paras. 35-36.

[26] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5, 36 and 37, *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55, 56, 69 and 70, *Benhaim v. St-Germain*, 2016 SCC 48, paras. 37-40.

> error it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[27]

51. In this case, the Court of Appeal showed no deference to the motion judge's interpretation of the Indemnity. Instead, the majority applied presumptions that have no basis in law in order to disregard entirely the contextual interpretive exercise that the motion judge undertook.

52. The majority's application of legal presumptions was not only an error, but it was also an attempt to transform a question of mixed fact and law concerning the interpretation of the contract into an extricable error of law. This Court has cautioned courts not to find extricable questions simply as a shortcut around the deferential palpable and overriding error standard of review.[28]

B. The Majority Erred in Applying a Presumption that the Assignment of an Indemnity Extinguishes the Assignor's Rights

i. The Majority Failed to Apply the Standard Principles of Contractual Interpretation

53. In determining whether an assignor retains any benefit in an Indemnity upon assignment, the majority ought to have applied the standard principles of contractual interpretation as stipulated recently by this Court in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*[29] That approach would have led the majority to conclude (as did the motion judge) that Weyerhaeuser was entitled to rely upon the Indemnity as an assignee.

54. In *Ledcor*, this Court held that when interpreting an insurance contract, "The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole."[32] This was the approach that the motion judge applied in this case.

---

[27] *Benham v. St. Germain*, *supra*, at para. 38, quoting from *South Yukon Forest Corp. v. R.*, 2012 FCA 165, at para. 46.

[28] *Sattva*, *supra*, at paras. 50, 55 and 64; *Ledcor*, *supra*, at paras. 35-36.

[29] 2016 SCC 37.

55. The fact that the Indemnity used the terms “successors and assigns” in the plural form, and already applied to multiple parties - Great Lakes, and the predecessor in title, Reed and its parent company - reflected a contractual intention that the Indemnity cover the entire potential environmental liability in respect of the property, regardless of who might hold the property at the time a Director’s Order might be made. The clear language of the enurement clause expressly contemplates multiple and successive holders of the indemnity.

56. The necessary implication of the wording of the enurement clause is that Weyerhaeuser and Resolute can each rely upon the Indemnity in respect of liabilities arising out of their ownership of the property for different periods of time.

57. Given the undisputed evidence that Weyerhaeuser never exercised any control over the waste disposal site, and did not cause or contribute in any way to the property’s contamination, Weyerhaeuser’s temporary legal title to the waste disposal site is the only basis on which the Director could have made the Order. In other words, as against Weyerhaeuser, the Order relates to the period of time when Weyerhaeuser owned the property. As a result, Weyerhaeuser can rely on the Indemnity.

58. The majority of the Court of Appeal simply ignored the wording of the enurement clause. This is most obvious in their analysis of whether Resolute could rely upon the Indemnity. The majority held that Resolute could not rely upon the Indemnity, despite the fact that Resolute was indisputably a corporate successor to Great Lakes, because Great Lakes’ successor, Bowater, had assigned the Indemnity to Weyerhaeuser. To reach that conclusion, the majority had to treat the clause as though it could apply only to either “successors or assigns”. But the clause does not refer to “successors or assigns”. It refers to “successors and assigns.”

59. The factual matrix within which the Indemnity was granted also supports the interpretation that the province agreed to assume liability for all environmental issues relating to the property, regardless of who might own it from time to time.

60. The Indemnity replaced a previous indemnity that the province had given to both Reed and Great Lakes, in order to induce Great Lakes to purchase the property and make

improvements to the pulp and paper mill. The province understood that no company would purchase the property without an indemnity in respect of its well-known environmental issues.

61. By the same token, the Indemnity would have been of little value to Great Lakes, unless it extended to all successive owners of the property. If it had been understood that the Indemnity would not apply to successive owners of the property, it would have been difficult for Great Lakes ever to have sold it. No purchaser would want to buy the property (and to acquire the associated environmental liabilities) without receiving from Great Lakes an assignment of the Indemnity.

62. At the same time, Great Lakes would not have wanted to grant such an assignment, had it understood that, in assigning the Indemnity, Great Lakes would itself lose the benefit of it. As held by the motion judge "it would be commercially absurd to conclude that the parties contemplated that the province could at any time withdraw its commitment to protect Great Lakes and its successors from environmental liability arising from the disposal site and issue an order requiring Great Lakes or its successors to incur substantial costs to remediate the site."[30]

63. Similarly, Weyerhaeuser would not have wanted to either buy or sell the property, had Weyerhaeuser not believed that it would be able to rely upon the Indemnity if, at some point in time, an environmental claim or order were made against Weyerhaeuser. This is especially true, given that, when Weyerhaeuser bought the property in 1998 and when it sold the property in 2007, the Director had the ability to make a wide range of orders against both former and current land owners, regardless of whether they caused or contributed to environmental contamination. The Director retains that power today.

64. The majority's interpretation of the enurement clause would condemn the holder of the Indemnity to retain the property forever, or risk incurring substantial environmental liabilities. It would also interfere with the ability of provincial governments to make the sort of policy decision that the Province of Ontario made in 1979, when it decided to grant an indemnity to Great Lakes, in order to induce the company to invest in the pulp and paper mill in Dryden. In doing so, the province chose to accept responsibility for environmental liability associated with

---

[30] Motion Decision, *supra,* note 17, para. 48 - JAR, Vol. 1, p. 43.

the property, in order to promote the economic well-being of the people of Dryden by keeping the area's most important employer in operation. It is unlikely that Great Lakes would have purchased the property if it thought that it would have to hold it in perpetuity in order to benefit from the Indemnity. If Great Lakes had not bought the property, the result would have been the closure of the area's principal employer – the very result the province was trying to prevent by granting an indemnity.

65. In failing to consider the consequences of its interpretation of the Indemnity, the majority violated the well-established principle enunciated by this Court in *Consolidated-Bathurst v. Mutual Boiler*[31]:

> Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. **Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result**.[32] [emphasis added]

66. In other words: "If 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."[33]

67. While the majority acknowledged that the principles of contractual interpretation require a court to read the contract "in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result",[34] the majority applied no such analysis when it interpreted Weyerhaeuser and Resolute's entitlement to the benefit of the Indemnity.

---

[31] [1980] 1. S.C.R. 888.

[32] *Ibid*, at p. 901.

[33] *Guarantee Co. of North America v. Gordon Capital Corp*, [1999] 3 S.C.R. 423 at para. 61.

[34] Appeal Decision at para. 65 - JAR, Vol. 1, p. 48.

68. This is apparent from the commercially absurd results that obtain under the majority's interpretation of the Indemnity:

(a) Resolute could have relied upon the Indemnity if Resolute's predecessor had sold the property to Weyerhaeuser the day after the Director's Order was made, but could not rely upon it if the sale occurred the day before the Order. The fact that Great Lakes (and its successors) held the Indemnity for thirty years, and that its environmental liability related exclusively to the time period when it held the Indemnity, would all be irrelevant.

(b) Weyerhaeuser could have relied upon the Indemnity if the Director had made the Order before 2007. The province will have succeeded in avoiding its contractual obligations simply by delaying making its Order by four years. By the time the Director made the Order, the waste disposal site had been in existence for forty years.

(c) Weyerhaeuser's exposure with respect to the property is higher now than it was when it actually owned the property and (on the majority's theory) could rely upon the Indemnity.

(d) As there is no time limit on the province's ability to make orders in respect of past pollution (whose effects can be of very long duration), no holder of any indemnity can ever be assured of its protection. Instead, the province can simply "wait out" the current holder until it sells the property to a new owner and then make an order against the seller. A party could hold a property for a hundred years, only to be ordered to remediate it one day after it sold the property to a new owner (who would insist upon an assignment of the Indemnity).

(e) The intentions of parties who entered into environmental indemnity agreements prior to the decision of the Court of Appeal for Ontario in this case, with the intention that they apply to all successive owners of a contaminated property, will be frustrated.

69. Neither the majority nor the province provided any rational justification for the commercially absurd results that arise from the majority's application of the presumption that an assignor loses all benefit to an Indemnity upon assignment, even where that assignment does not change the scope of the obligations of the obligor.

70. Weyerhaeuser submits that the motion judge committed no error (let alone a palpable and overriding one) in concluding, on the basis of the wording of the Indemnity, the factual matrix and the principle that commercially unreasonable results should be avoided, that Weyerhaeuser was entitled in 2011 to rely upon the Indemnity as an assignee.

ii. The Majority Erred in Applying a Presumption that the Assignment of an Indemnity Necessarily Extinguishes an Assignor's Ability to Benefit from an Indemnity

71. Instead of reviewing the motion judge's contractual interpretation for a palpable and overriding error, the majority began its analysis by applying a "general principle" (in effect, a legal presumption) that the assignment of an Indemnity necessarily extinguishes the assignor's ability to benefit from the Indemnity.

72. The majority did not point to any palpable and over-riding error in the motion judge's interpretation of the enurement clause according to ordinary principles of contractual interpretation. Instead, the majority treated the ability to assign the benefit of the Indemnity as being subject to a different legal principle. Rather than employ the standard principles of contractual interpretation to determine which parties could benefit from the Indemnity, the majority applied a "general principle" that: (i) does not apply to other contracts; and (ii) is unsupported by any legal authority.

73. The majority took the position that when a party assigns the benefit of an indemnity to another party, it necessarily loses entirely the benefit of the indemnity. The majority's reasoning was as follows:

> As a general principle, an absolute assignment of a chose in action, which leaves no interest in the assignor, extinguishes the assignor's right to later call on the obligor to perform the contract as the assignee has acquired the right to such performance: *Milo Candy Co. v. Browns Ltd*. (1915), 8 O.W.N. 99 (Ont. C.A.), at para. 10; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53(1); *Restatement (Second) of Contracts*, §317 (1981); *Aaron Ferer & Sons Ltd. v.*

> *Chase Manhattan Bank, Nat. Ass'n*, 731 F.2d 112, 125 (2d Cir. 1984). The assignee steps into the shoes of the assignor and has standing to enforce the contract as against the obligor as if it was the original covenantee: *Brown*, at para. 84.[35]

74. Applying this presumption, the majority concluded that Resolute's predecessor, Bowater, had lost the right to rely upon the indemnity when it sold the property to Weyerhaeuser. The majority also held that it could not determine whether Weyerhaeuser retained the right to rely upon the Indemnity, after it sold the property to Domtar.

75. With respect, the majority's presumption is inconsistent with the general principles that govern the assignment of contracts. At common law, a party may generally assign to another party the benefits it is entitled to receive under a contract, even absent an express enurement clause.

76. The primary limit on the ability to assign benefits under a contract is that doing so may not increase the obligations of the obligor. As the Court of Appeal for Ontario stated in *Rodaro v. Royal Bank*[36]:

> Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties…[37]

77. The motion judge's interpretation of the enurement clause was consistent with the law's focus on whether or not an assignment would increase the obligations of the counter-party. In this case, the assignment of the Indemnity from Great Lakes' successor to Weyerhaeuser did not increase the burden on the province. The Indemnity is not based on any special skills or characteristics that would limit the agreement to its original parties.

---

[35] Appeal Decision, paras. 193 to 198 - JAR, Vol. 1, pp. 95- 97.

[36] (2002), 59 OR (3d) 74.

[37] *Ibid*, at para. 33 (citations omitted).

78. At the time it granted the Indemnity, the province should and would have been agnostic to which parties could rely on the Indemnity. When it was granted, the province could not have known how many times, if at all, the ownership of the property and the waste disposal site would change. The province should not now be allowed to evade, opportunistically, its obligations under the terms of the Indemnity simply because one party did not hold title to the property and the waste disposal site in perpetuity. This is particularly so, given that the transfer of the property from one owner to another advanced the province's policy goal of keeping the pulp and paper mill in operation.

79. The majority's presumption that the assignment of an indemnity extinguishes the assignor's rights ignores ordinary principles of contractual interpretation, the wording of the enurement clause at issue in this case and general principles applicable to assignments. It is also without basis in law.

80. The authorities cited by the majority in support of this presumption were not presented to the Court by any party, and no party was afforded the opportunity to make submissions on the effect of these authorities on the interpretation of the Indemnity. With respect, Weyerhaeuser submits that, not having sought or had the benefit of written submissions or oral arguments made by the parties, the majority fell into error in its approach to this issue.

81. In support of its conclusion that the assignment of a chose in action necessarily extinguishes the assignor's rights, the majority relied upon one Canadian case, *Milo Candy Co. v. Browns Ltd.*[38] *Milo Candy* did not involve the interpretation of an indemnity nor the interpretation of an enurement clause. The case arose when one company sold a factory to another company. The vendor assigned to the purchaser a pending contract pursuant to which a supplier was to sell sugar to the factory. The Court found that, having assigned to the factory purchaser the right to receive the sugar, the factory vendor had no right to receive the shipment itself. The Court's interpretation of the vendor's entitlement to benefit from the sugar contract was logical and consistent with the factual matrix. If the Court had held otherwise, the sugar supplier would have been obligated to make double the shipments that it had contracted to supply. In other words, the assignment would have increased the obligations of the counter-party.

[38] (1915), 8 O.W.N. 99 (Ont. C. A.).

82. The concern over increasing the obligations of the counter-party does not arise where what is assigned is an indemnity in respect of a defined risk, as in the present case. As found by both the motion judge and the majority of the Court of Appeal, the province agreed to assume responsibility for all environmental liabilities in respect of the property. The province's exposure and obligations remain unaltered, regardless of how many parties could benefit from the Indemnity.

83. Apart from *Milo Candy*, the majority relied on:

(a) Section 53(1) of the *Conveyancing and Law of Property Act*,[39] which provides that absolute assignments may pass and transfer legal rights to a *chose in action* and all related legal and other rights, but does not provide that the assignor's rights are extinguished upon assignment.

(b) Section 317 of the American *Restatement (Second) of Contracts*,[40] which expressly describes that an assignment may extinguish the assignor's right to performance "in whole **or in part.**" This authority supports the position accepted by the motion judge, namely, that various successive owners of the property could benefit from the Indemnity in respect of the different time periods during which they owned the property – in other words, the Indemnity could be assigned in part to successive owners.

(c) *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*,[41] an American decision dealing with the assignment of accounts receivable. As in *Milo Candy*, the assignment in *Aaron Ferer* would have increased the counter-party's obligations, if the contractual right could have been held by both the assignor and the assignee.

84. Finally, the majority referred to paragraph 84 of *Brown v. Belleville (City)*,[42] an earlier decision of the Court of Appeal relied upon by the motion judge. *Brown* did not involve the assignment of an indemnity, and the decision does not stand for the proposition that the assignor of an indemnity loses its benefit. To the contrary, in the paragraph of *Brown* cited by the

---

[39] R.S.O. 1990, c. C.34.

[40] Restatement (Second) of Contracts §317 (1981).

[41] 731 F. 2d 112, 125 (2d Cir. 1984) ("*Aaron Ferer*").

[42] 2013 ONCA 148 ("*Brown*").

majority, the Court specifically states that the reference to "successors and assigns" in the indemnity that was before the Court in that case "would extend to an **aggregation or class of persons** that includes successor landowners …"[43]. The majority's assumption that only one person can benefit from an indemnity, rather than "an aggregation or class of persons" therefore directly contradicts the Court's reasoning in *Brown*.

85. The majority erred in starting with its presumption regarding the effect of the assignment of the Indemnity, leading it to find that there was insufficient evidence in the record for it to determine whether Weyerhaeuser "lost" the benefit of the Indemnity.

86. The majority did not need to find any evidence to rebut this presumption – rather, it needed to start with the application of the ordinary principles of contractual interpretation, giving consideration to the broad and unqualified nature of the assignment, the factual matrix regarding the granting of the Indemnity, and the commercial reasonableness of its interpretation. Had it done so, it would have found no palpable and over-riding error in the motion judge's conclusion that Weyerhaeuser could rely upon the Indemnity, regardless of whether or not Weyerhaeuser assigned the benefit of the Indemnity to Domtar when it sold the property in 2007.

87. Weyerhaeuser and Domtar could both rely upon the Indemnity in respect of the periods of time when they owned the property, because that assignment would not have increased the province's obligations.

C. The Majority Erred in Finding that the Term "Successors" as used in the Enurement Clause Refers only to Corporate Successors

88. The majority replicated the errors it made with respect to interpreting the effect of the assignment of the Indemnity when it considered the meaning of the term "successors" in the Indemnity's enurement clause.

89. The majority erred in overturning the motion judge's finding that Weyerhaeuser could rely on the Indemnity as a successor in title to the property because it: (i) failed to apply the ordinary principles of contractual interpretation and to defer to the findings of mixed-fact-and-

---

[43] *Brown* at para. 84 [emphasis added].

law of the motion judge; and (ii) instead applied a presumption that the word "successor", when used in respect of a corporation, refers only to corporate successors.

i. The Majority Failed to Apply the Ordinary Principles of Contractual Interpretation to the Term "Successors"

90. The majority erred when it failed to apply the standard principles of contractual interpretation to the term "successors" as used in the enurement clause. The proper approach to the interpretation of "successors" is that set out in the Court of Appeal's decision in *Brown*, and this Court's decision in *Heritage Capital Corp. v. Equitable Trust Co*,[44] and that applied by the motion judge in the instant case.

91. In *Heritage Capital*, this Court applied the basic principles of contractual interpretation to determine the meaning of the term "successors" as used in the enurement clause at issue in that case. The Court held that "successors" only applied to corporate successors because, elsewhere in the agreement, the parties had specified that certain other benefits extended specifically to "successors in title" and to "subsequent owners." Accordingly, the explicit exclusion of "successors in title" and "subsequent owners" from the enurement clause had to be of some significance.

92. The Court stated of the use of differing terms in the same contract that:

> The term "successor" should be read to mean a corporate successor, considering that clause 8.3 refers to "successors in title" and "subsequent owners", of which 604 clearly is one, while clause 8.8 refers to "successors". "Contracting parties are presumed to intend the legal consequences of their words" …
>
> Meaning 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, and in this case, of the same section of an agreement.[45]

93. As is evident from this passage, this Court in *Heritage Capital* was not applying a presumption that the term "successor" was limited to corporate successors. Otherwise, the Court would have stated that presumption and observed that the presumption was "supported by" the

---

[44] 2016 SCC 19.

[45] *Ibid*., at paras. 46 to 47.

wording of clause 8.3 (which referred to "successors in title"). Instead, the Court concluded that "successors", as used in the enurement clause meant "corporate successors", only after "considering" clause 8.3 In other words, the Court interpreted the meaning of "successor" not by applying a presumption, but by considering the term in the context of the agreement as a whole.

94. The Indemnity granted by the province in the present case does not draw the same distinction in terms between "successors," "successors in title" and "subsequent owners". Accordingly, this Court's rationale for finding that the enurement clause only extended to corporate successors in *Heritage Capital* is inapplicable to the interpretation of the Indemnity.

95. This Court in *Heritage Capital* did not apply a rebuttable presumption when interpreting the term "successors", as the majority did in this case. Instead, it applied the ordinary principles of contractual interpretation, which include consideration of the meaning of a term within the context of the agreement as a whole, and the factual matrix.

96. Likewise, in *Brown*, the Court of Appeal had to decide whether a municipality's obligation to maintain a drainage system of a property owner could be enforced by the property owner's successor. The obligation arose out of an indenture agreement, which contained an enurement clause with wording very similar to that at issue in the present case.

97. The enurement clause in *Brown* read:

> THIS INDENTURE Shall inure [sic] to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns.[46]

98. The Court looked to the language of the enurement clause in finding that the successors in title were "successors" within the meaning of the clause:

> The **broad and unqualified language of the enurement clause** constitutes an express stipulation by the contracting parties that they intended the benefit of the Agreement to be shared by future owners of Mr. Sills's lands, as his successors or assigns or by way of inheritance. **The language of the enurement clause unequivocally confirms that the contracting parties intended and agreed that**

---

[46] *Brown*, *supra*, at para. 80.

> **the benefit of the Agreement would extend to an aggregation or class of persons that includes successor landowners of Mr. Sills**.[47]

99. It is clear from the reference to "an aggregation or class of persons" that, contrary to the majority in the present case, the Court of Appeal in *Brown* was not of the view that the beneficiary of an indemnity loses its benefit when the indemnity is assigned or there is a successor. Instead, the Court in *Brown* clearly understood that any one of a number of parties (an "aggregation" or "class") could enforce an agreement, where the burden imposed on the counter-party (in *Brown*, the City's obligation to maintain a drainage ditch) would not be increased as a result of successors or assigns benefiting from it. That principle is directly applicable to the present case.

100. The motion judge followed the approach set out in *Heritage Capital* and *Brown*. He interpreted the term "successor" by considering the wording of the Indemnity read in the context of the agreement as a whole, the factual matrix, and the commercial reasonableness of the resulting interpretation, which included the paramount importance that environmental law attaches to ownership of land. It is important to note that the motion judge's decision was a result of his contractual interpretation of the enurement clause. He did not treat the Indemnity as a covenant running with the land. The motion judge made no palpable and over-riding error, and the majority should have deferred to his interpretation of the Indemnity.

101. The principle that a contract should be interpreted in a way that avoids a commercially unreasonable result also played a role in the meaning the motion judge gave to the word "successors". As noted above, unless successive owners of the property were entitled to rely upon the Indemnity (whether as successors or assigns), the Indemnity would have been of little value to Great Lakes, because it would require Great Lakes to either retain the property in perpetuity or else lose the benefit of the Indemnity that the province had agreed to give.

---

[47] *Brown*, *supra*, at para. 84 [emphasis added].

ii. The Majority Erred in Relying on a "General Principle" that "Successors" Refers to "Corporate Successors"

102. In contrast to the motion judge, the majority began by applying a "general principle" that "successor" referred only to corporate successors, and then asked whether there were a reason for "departing from" that general principle. In effect, the majority applied a presumption over the actual language of the indemnity. It then placed upon Weyerhaeuser the onus of rebutting that presumption. The majority reasoned as follows:

> I start my analysis by recalling the general principle that the term "successor", when used in reference to a corporation, "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": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at 423; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 47.
>
> The enurement clause in the Ontario Indemnity uses the term "successor" in reference to a corporation: "The indemnity shall be binding upon and enure to the benefit of the respective successors … of … Great Lakes". Yet, in interpreting that clause, the motion judge departed from the general principle that "successor", when used in reference to a corporation, means a successor corporation. Instead, he concluded it includes Weyerhaeuser as a successor-in-title to a specific piece of property – the WDS. Since the motion judge applied the reasoning in *Brown* to depart from the general principle and reach that result, a careful review of that case is required.[48]

103. The majority distinguished the *Brown* case, and concluded that:

> The motion judge did not address any of these material differences. Nor did he explain **what language** in the Ontario Indemnity, or what circumstances in that contract's factual matrix, **would justify departing from the general principle that the term "successor", when used in reference to a corporation, generally denotes a successor corporation** that assumes the burdens and becomes vested with the rights of the prior corporation.
>
> …
>
> Weyerhaeuser cannot point to language in the Ontario Indemnity that would justify departing from the general principle.[49]

---

[48] Court of Appeal Decision, *supra*, note 1, paras. 170 to 171 - JAR, Vol. 1, pp. 85 - 86.

[49] *Ibid*., paras. 178 and 183 [emphasis added].

104. While there were factual differences between *Brown* and the present case, the majority's approach to interpreting the term "successors" reflected a different legal approach to the interpretive exercise. Much like their analysis of who was entitled to benefit from the Indemnity following an assignment, the majority began by applying a presumption to its interpretation of the term "successor".

105. In beginning with this "general principle", as opposed to the ordinary principles of contractual interpretation, the majority erred by applying its presumption over the actual language of the Indemnity. The majority chose to disregard the fact that the Indemnity used the terms "successors and assigns" in the plural form, and already applied to multiple parties (Great Lakes, Reed and Reed International PLC). That language reflected a contractual intention that the Indemnity cover the entire potential environmental liability in respect of the property, regardless of who might hold the property at the time a Director's Order might be made.

106. As noted above, the majority's decision, by holding that Resolute could not rely upon the Indemnity as a corporate successor to Great Lakes (because Great Lakes' successor, Bowater, had assigned the Indemnity to Weyerhaeuser) treated the clause as if it could apply only to either "successors or assigns" rather than to both "successors and assigns."

107. This application of what was, in effect, a rebuttable presumption, is fundamentally different from the approach taken by the Court of Appeal only a few years earlier in *Brown*. It is also fundamentally different from the approach that this Court applied in its recent decision in *Heritage Capital*, which, as explained above, was grounded in the standard principles of contractual interpretation.[50]

108. By the same token, in *National Trust Co. v. Mead*,[51] another authority relied on by the majority, this Court did not apply a presumption that "successors" meant only corporate

---

[50] *Heritage Capital, supra*, note 28.

[51] [1990] 2 SCR 410.

successors, but instead interpreted the term in light of the policy objectives of the statute in which the term was used and that the Court was interpreting.[52]

109. Weyerhaeuser submits that, had the majority applied ordinary principles of contractual interpretation, rather than a legal presumption, it would have found no palpable and overriding error in the motion judge's conclusion that Weyerhaeuser could rely upon the Indemnity as a "successor", in addition to being an assign.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT FOR COSTS

110. If this Honourable Court allows Weyerhaeuser's appeal and reinstates the decision of the motion judge, Weyerhaeuser submits that the motion judge's decision that Weyerhaeuser is entitled under the Indemnity to its full indemnity costs of this proceeding should also be reinstated, and should be extended to cover Weyerhaeuser's costs both in the Court of Appeal for Ontario and before this Court.

111. The Indemnity provides, in part:

> Ontario hereby covenants and agrees to indemnify [Weyerhaeuser]… harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by [Weyerhaeuser]… after the date hereof as a result of any claim, action or proceeding …[53]

112. The wording of the clause is extremely broad. If this Court reinstates the motion judge's finding that the Indemnity applies to the Director's Order, then the Indemnity clearly covers the legal fees that Weyerhaeuser has had to incur as a result of that Order. Those costs should include the costs of this proceeding. Had Weyerhaeuser been sued by a third party, the province would have had to reimburse its legal costs on a full indemnity basis. The province should not be better off because it was the province's own actions, rather than those of a third party, that forced Weyerhaeuser to incur legal costs.

---

[52] *Ibid*., at para. 21.

[53] Court of Appeal Decision, *supra*, note 1, para. 31 - JAR, Vol. 1, p. 38.

113. The costs of these motions are covered by the Indemnity and should be awarded on a full indemnity basis.

PART V – ORDER SOUGHT

114. Weyerhaeuser seeks an order restoring the decision of the motion judge and awarding Weyerhaeuser its costs on a full indemnity basis in the Court of Appeal for Ontario and before this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of January 2019.

For **Christopher D. Bredt**
Markus F. Kremer
Alannah Fotheringham

PART VI – TABLE OF AUTHORITIES

No.	Authority	Paragraph Reference
	Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank 731 F. 2d 112, 125 (2d Cir. 1984)	83(c)
	Benhaim v. St-Germain, [2016] 2 SCR 352, 2016 SCC 48	49, 50
	Brown v. Belleville, 2013 ONCA 148	84, 90, 96, 97, 98, 99, 100, 107
	Consolidated-Bathurst v. Mutual Boiler, [1980] 1. SCR 888	65
	Creston Moly Corp v. Sattva Capital Corp., 2014 SCC 53 *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53	48, 52
	Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 SCR 423	66
	H.L. v. Canada (Attorney General), [2005] 1 SCR 401, 2005SCC 25	49
	Heritage Capital Corp. v. Equitable Trust Co., [2016] 1 SCR 306, 2016 SCC 19	90, 91, 92, 93, 94, 95, 107
	Housen v. Nikolaisen, [2002] 2 SCR 235, 2002 SCC 33	49
	Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37	48, 52, 53
	Milo Candy Co. v. Browns Ltd. (1915), 8 O.W.N. 99 (Ont. C. A.).	81
	National Trust Co. v. Mead, [1990] 2 SCR 410	108
	Rodaro v. Royal Bank, (2002), 59 OR (3d) 74	76

PART VII – STATUTORY PROVISIONS

Statute, Rule, Legislation	Section / Rule, etc.
Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34	53(1)
Planning Act, R.S.O. 1990, c. P.13	
Restatement (Second) of Contracts (1981)	§317

***Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53(1)**	
Assignments of debts and choses in action **53** (1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.	**Cession de créances et d'autres droits d'action** **53** (1) Est valable, si elle ne vise pas à créer une charge seulement, la cession inconditionnelle d'une créance ou d'un autre droit d'action, faite à compter du 31 décembre 1897, par un écrit que signe le cédant, si le cédant en donne avis exprès et par écrit à la personne qui en est redevable à son endroit, notamment au débiteur ou au fiduciaire. La cession transporte, à compter de la date de l'avis, les droits du cédant reconnus par la common law, les recours qu'il possède, reconnus ou non par la common law, et le pouvoir de donner sans la participation du cédant une quittance libératoire, sous réserve des droits qui auraient eu en equity préférence sur ceux du cessionnaire, si le présent article n'avait pas été adopté. .

***Restatement (Second) of Contracts* §317 (1981)**
§ 317. Assignment of a Right (1) An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance. (2) A contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) assignment is validly precluded by contract.