SCC File No.: 37985

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

BETWEEN:

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

APPELLANT
(Appellant)

- and -

WEYERHAEUSER COMPANY LIMITED

RESPONDENT
(Respondent)

- and -

RESOLUTE FP CANADA INC.

RESPONDENT
(Respondent)

AND BETWEEN:

RESOLUTE FP CANADA INC.

APPELLANT
(Respondent)

- and -

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

RESPONDENT
(Appellant)

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WEYERHAEUSER COMPANY LIMITED

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- and -

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

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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

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PART I – OVERVIEW AND FACTS

A. Overview

1. This appeal concerns the public interest in environmental regulation and the interpretation of an indemnity ("1985 Indemnity") given by Ontario to Great Lakes Forest Products Limited and Reed Ltd. The 1985 Indemnity was provided as part of the settlement of pollution-based law suits commenced in the 1970s as a result of contaminants discharged into the English and Wabigoon Rivers ("Rivers") from a chemical plant and a pulp and paper mill located near Dryden, Ontario ("Dryden Property").

2. Following years of mediation, the settlement addressed the health and welfare claims of the Grassy Narrows and Islington First Nations[1] (collectively, "First Nations"). In addition to resolving a lawsuit brought by the First Nations ("First Nations Litigation") and two incidental actions, the settlement created the Mercury Disability Board, the Mercury Disability Fund and included the enactment of related federal and provincial legislation ("Settlement").[2]

3. At issue is whether the 1985 Indemnity is so broad as to require the Ontario public purse to absorb the cost of complying with an environmental regulatory order made by the province in 2011 based on legislation enacted five years after the 1985 Indemnity was signed.[3] Ontario's position is that the 1985 Indemnity is only intended to address third party claims, whether statutory or at common law, in the nature of those settled in 1985.

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[1] Grassy Narrows First Nation is also known as Asubpeeschoseewagong Netum Anishinabek. Islington First Nation is now known as Wabaseemoong Independent Nations.

[2] *Weyerhaeuser Co v Ontario (AG)*, 2017 ONCA 1007 at para 219, [2017] OJ No 6654 [COA Decision], Laskin JA, dissenting, Joint Appeal Record [AR], Vol I, Tab 5, p 105. The two other actions for damages arising from pollution were commenced in 1970 by Ontario Central Airlines Limited and Barney's Ball Lake Lodge Company Limited against the same defendants named in the First Nations Litigation. Final Release Agreement between Barney Lamm, *et al* and Reed Inc. dated July 29, 1986.

[3] This order is discussed below as the "Director's Order".

4. The majority of the Ontario Court of Appeal failed to correct the motions judge's erroneous application of this Court's decision in *Sattva Capital Corp. v Creston Moly Corp*.[4] As a result, important aspects of the factual matrix were not considered properly, or at all. An example is the error made in failing to appreciate the interpretative impact of the Spills Bill which created a new statutory cause of action only seventeen days before the 1985 Indemnity was signed ("Spills Bill").[5]

5. The enactment of the Spills Bill provides a compelling explanation for why the words "statutory or otherwise" were added to Clause 1 of the 1985 Indemnity. The intention of the parties was to address possible statutory claims based on *existing* legislation. The 1985 Indemnity contains no language under which the province undertakes to pay damages as a result of a breach of contract resulting from future legislation.

6. The majority also failed to correct the motions judge's error in reading Clause 1 without regard to the other provisions in the contract which address carriage of and cooperation in the defence of claims; provisions typical of third party indemnities.

7. In dissent, Justice Laskin correctly dealt with the factual matrix and the language of the 1985 Indemnity as a whole. He concluded that it was limited to third party claims and would have allowed Ontario's appeal.

8. A second issue in this appeal is whether the decision of the motions judge and Court of Appeal countenances an indirect fettering of legislative power contrary to this Court's decision in *Pacific National Investments Ltd. v Victoria (City)*.[6]

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[4] 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].
[5] *Environmental Protection Act*, RSO 1980, c C141, Part IX – Spills, ss 79-112, proclaimed in force on November 29, 1985. See Proclamation, (1985) O Gaz, Vol 118-33, 3539, (*Environmental Protection Act*), Appellant's Book of Authorities [BOA], Tab 6.
[6] 2000 SCC 64, [2000] 2 SCR 919 [*Pacific National (1)*].

9. The Court of Appeal should have recognized that the motions judge had, in effect, implied a term into the 1985 Indemnity regarding obligations which might arise from future legislation and had failed to appreciate that such an implication resulted in an indirect fetter.

10. The Court of Appeal also erred in concluding that *Pacific National (1)* was not applicable, finding that it is limited to the legislative actions of municipalities. There is no policy basis for narrowly limiting the application of *Pacific National (1)* to the legislative acts of municipal councils given the broad expanse of provincial contracts and their correspondingly greater impact on public funds.

11. Further, the Court of Appeal ought to have corrected the motions judge's conclusion that the 1985 Indemnity was a "business agreement". The Settlement was not commercial in nature. It reflected a policy objective to address concerns arising from the mercury contamination.

12. In any event, what constitutes a business agreement in a government context warrants further examination. Provincial governments enter into a wide array of agreements with the overall objective of providing public services and, to a lesser extent, goods. These are different than private sector contracts. Absent express language courts should not imply an obligation to compensate for breach of contract resulting from future legislation.

13. Finally, four years after *Pacific National (1),* in *Pacific National Investments Ltd. v Victoria (City),*[7] the plaintiff made partial recovery based on unjust enrichment. On its face this may present as another form of indirect fetter. However, the two *Pacific National* decisions are reconcilable. Paying compensation based on restitutionary principles, as distinct from expectation damages for breach of contract, is different both in quality and typically in quantum.

B. Facts

(i) The Director's Order Underlying this Appeal

14. In August 2011, the Ontario Ministry of the Environment ("MOE") issued an order ("Director's Order") against Resolute and Weyerhaeuser as former owners and/or persons in

[7] 2004 SCC 75 at para 1, [2004] 3 SCR 575 [*Pacific National (2)*].

management or control of a mercury waste disposal site[8] ("WDS").[9] The Director's Order was made pursuant to sections 18(1) and 44 of the 1990 *Environmental Protection Act*.[10]

15. The *EPA* was amended significantly in 1990, specifically to enable the regulator to reach back to *former* owners or those who previously had management or control of an undertaking or property to prevent, reduce or ameliorate the discharge of a contaminant into the natural environment.[11] The Director's Order could not have been made under the *EPA* as it existed at the time of the Settlement.

16. The Director's Order is preventative in nature. It requires ongoing monitoring, maintenance, testing and reporting requirements in relation to the WDS.[12] The regulatory obligations under the Director's Order are substantially the same as those that Great Lakes had been carrying out at the time the 1985 Indemnity was given and that its successors continued to carry out thereafter.[13]

17. Resolute and Weyerhaeuser appealed the Director's Order to the Environmental Review Tribunal.[14] The appeals remain in abeyance. Weyerhaeuser then commenced this action in May 2013.[15] Resolute was added, on consent, as an interested party.

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[8] The WDS was severed from the larger Dryden Property in 2000 and later transferred to a federal corporation in receivership during subsequent *CCAA* proceedings. This is discussed below under "Ownership of the WDS and Surrounding Land: 1979 – present".

[9] Affidavit of Trina Rawn, sworn October 14, 2014 [Rawn Affidavit], Exhibit A, AR, Vol IV, Tab 27A.

[10] RSO 1990, c E-19 [*EPA*]; Loi sur la protection de l'environnement, LRO 1990, c E-19 [*LPE*].

[11] This statutory amendment is discussed further below under "Part III – Argument".

[12] COA Decision, *supra* note 2 at paras 205, 261, Laskin JA, AR, Vol I, Tab 5, pp 100, 123; Rawn Affidavit, *supra* note 9 at Exhibit A, AR, Vol IV, Tab 27A.

[13] COA Decision, *supra* note 2 at para 235, Laskin JA, AR, Vol I, Tab 5, p 112; Rawn Affidavit, *supra* note 9 at para 37, AR, Vol IV, Tab 27, p 12 and Exhibit Z, AR, Vol V, Tab 27Z.

[14] COA Decision, *supra* note 2 at paras 52-53, Brown JA, AR, Vol I, Tab 5, p 44; Notice of Appeal of Resolute FP Canada Inc. Environmental Review Tribunal, dated September 9, 2011, AR, Vol III, Tab 24; Affidavit of Charles K. Douthwaite, sworn November 24, 2014 [Douthwaite Affidavit], Exhibit C, AR, Vol VI, Tab 28C.

18. Weyerhaeuser and Resolute each claimed the benefit of the 1985 Indemnity. They contended that Ontario was obligated to indemnify them for any costs incurred to comply with the Director's Order.[16] Ontario denied that the 1985 Indemnity covered first party claims.[17]

(ii) The Reed Era Pollution at Dryden

19. In the 1960s and 1970s, Dryden Paper Company Ltd. and Dryden Chemicals Limited owned and operated a chemical plant and a pulp and paper mill on the Dryden Property.[18] They amalgamated in 1976 to form Reed Ltd.[19] The operations produced various pollutants which were released into the Rivers, including untreated mercury waste water ("Reed Era Pollution").[20]

20. In response, Ontario required that the companies cease dumping the mercury waste water, contain mercury contaminated waste in the WDS, and modernize operations. The modernization requirements were set out in a control order made against Reed in September, 1979 ("1979 Control Order") under the 1971 version of the *EPA*.[21]

21. The WDS was established in 1971 and its owner or operator has since been subject to regular monitoring, maintenance, testing and reporting requirements as prescribed by MOE certificates of approval ("COA").[22] This work will be required for its remaining lifespan.[23]

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[15] COA Decision, *supra* note 2 at para 53, Brown JA, AR, Vol I, Tab 5, p 44; Statement of Claim of Weyerhaeuser Company Limited, dated May 10, 2013, AR, Vol II, Tab 8.
[16] COA Decision, *supra* note 2 at para 2, Brown JA, AR, Vol I, Tab 5, p 28.
[17] *Ibid* at para 3, Brown JA, AR, Vol I, Tab 5, p 28; Amended Statement of Defence of Her Majesty the Queen in right of Ontario, dated November 26, 2015, AR Vol II, Tab 10.
[18] COA Decision, *supra* note 2 at para 9, Brown JA, AR, Vol I, Tab 5, p 30; Rawn Affidavit, *supra* note 9 at para 9, AR, Vol IV, Tab 27, p 3.
[19] COA Decision, *supra* note 2 at para 13, Brown JA, AR, Vol I, Tab 5, p 31; Rawn Affidavit, *supra* note 9 at para 11, AR, Vol IV, Tab 27, p 4.
[20] COA Decision, *supra* note 2 at paras 9-10, Brown JA, AR, Vol I, Tab 5, p 30; Rawn Affidavit, *supra* note 9 at para 9, AR, Vol IV, Tab 27, p 3.
[21] COA Decision, *supra* note 2 at para 11, Brown JA and para 215, Laskin JA, AR, Vol I, Tab 5, pp 30-31, 103; Ministry of the Environment, Control Order, issued against Reed Ltd. dated September 5, 1979 [1979 Control Order], AR, Vol III, Tab 16.
[22] COA Decision, *supra* note 2 at paras 11-12, 14, 16, 21, 23, Brown JA, AR, Vol I, Tab 5, pp 30-31, 34; Rawn Affidavit, *supra* note 9 at paras 33, 35, 36, AR, Vol IV, Tab 27, pp 10-11 and Exhibits S-Y, AR, Vol V, Tabs 27S-Y.
[23] COA Decision, *supra* note 2 at para 48, Brown JA, AR, Vol I, Tab 5, p 43; Rawn Affidavit, *supra* note 9 at para 35, AR, Vol IV, Tab 27, p 10.

22. In 1977, the First Nations commenced the First Nations Litigation against Dryden Chemicals, Dryden Paper and Reed. The action sought damages for personal injury, loss of jobs and loss of way of life due to the contamination of the Rivers.[24] Related actions were brought by Barney's Ball Lake Lodge Company Limited and Ontario Central Airlines Limited.[25]

(iii) Ownership of the WDS and Surrounding Land: 1979 - Present

23. In 1979, against the background of the 1979 Control Order and the ongoing First Nations Litigation, Reed sought to sell its Dryden operations to Great Lakes.[26]

24. Ontario was concerned about the viability of the Dryden community. When negotiations with Reed stalled due to Great Lakes' worry about future Reed Era Pollution claims, Ontario offered to cap Great Lakes' exposure for damages at $15M. Great Lakes correspondingly committed to spending approximately $200M to modernize and expand the Dryden operations.[27]

25. Ontario's commitment to Great Lakes was commemorated in a letter from the Treasurer of Ontario dated November 6, 1979 ("1979 Indemnity").[28]

26. An asset purchase agreement, to which Ontario was not a party, was then finalized ("Dryden Agreement"). The sale of the Dryden assets was completed in December, 1979.[29]

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[24] COA Decision, *supra* note 2 at para 15, Brown JA, AR, Vol I, Tab 5, p 31; Rawn Affidavit, *supra* note 9 at para 11, AR, Vol IV, Tab 27, p 4 and Exhibits D, E, AR, Vol IV, Tabs 27D-E.

[25] Rawn Affidavit, *supra* note 9 at para 12, AR, Vol IV, Tab 27, p 4 and Exhibits F, G, AR, Vol IV, Tabs 27F-G.

[26] COA Decision, *supra* note 2 at para 17, Brown JA, AR, Vol I, Tab 5, p 32; Rawn Affidavit, *supra* note 9 at para 14, AR, Vol IV, Tab 27, p 5.

[27] COA Decision, *supra* note 2 at paras 17-18, Brown JA, AR, Vol I, Tab 5, p 32; Rawn Affidavit, *supra* note 9 at paras 15-16, AR, Vol IV, Tabs 27, p 5.

[28] COA Decision, *supra* note 2 at para 19, Brown JA, AR, Vol I, Tab 5, pp 32-33; Rawn Affidavit, *supra* note 9 at Exhibit I, AR, Vol IV, Tab 27I. The important provisions are discussed further below in "Part III – Argument".

[29] COA Decision, *supra* note 2 at para 22, Brown JA, AR, Vol I, Tab 5, p 34; Memorandum of Agreement between Great Lakes Forest Products Limited and Reed Ltd. dated December 7, 1979 [Dryden Agreement], AR, Vol III, Tab 17.

27. In the Dryden Agreement, Reed and Great Lakes addressed the various environmental responsibilities consistent with the *EPA* of the day. Under the legislative scheme, the COA obligations for the WDS would become Great Lakes' responsibility as the new owner and operator. The 1979 Control Order made against Reed while it was an owner of the Dryden Property would continue to bind it.[30]

28. The Dryden Agreement included Clauses 5.3 and 11.4 to accommodate, respectively, the litigation arising from Reed Era Pollution and regulatory obligations.[31] These Clauses were important considerations in Justice Laskin's dissenting judgment.[32]

29. Under Clause 5.3 Reed and Great Lakes undertook to split the first $15M in "Pollution Claims", after which Great Lakes would indemnify Reed for any such future claims.[33] This arrangement was consistent with the promise made by Ontario in the 1979 Indemnity to cover Great Lakes for damages or settlement amounts after the first $15M was shared by the companies. The indemnity provision of Clause 5.3 was substantially brought forward into the Settlement documents and underscores that the 1985 Indemnity was intended to address third party claims only.[34]

30. The companies addressed Reed's sole remaining *EPA* responsibility, the 1979 Control Order, in Clause 11.4 which required Great Lakes to assume full financial responsibility for it and recognized that it was not a Pollution Claim like those referenced in Clause 5.3.[35]

31. Following the purchase, Great Lakes continued the modernization of the Dryden operations and substantially completed them by 1982.[36] Great Lakes and its corporate successors

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[30] 1979 Control Order, *supra* note 21, AR, Vol III, Tab 16.
[31] See "Part III – Argument" below.

[32] COA Decision, *supra* note 2 at paras 253-56, Laskin JA, AR, Vol I, Tab 5, pp 120-21.
[33] *Ibid* at para 218, Laskin JA, AR, Vol I, Tab 5, p 104.
[34] Relevant portion of Clause 5.3 are set out below under "The Dryden Agreement".

[35] Dryden Agreement, *supra* note 29 at Clause 11.4, AR, Vol III, Tab 17, pp 46-47. See COA Decision, *supra* note 2 at paras 253-55, Laskin JA, AR, Vol I, Tab 5, pp 120-21.

also continued to fulfill all regulatory requirements pertaining to the WDS after completion of the purchase.[37]

32. By 1998, Great Lakes had become Bowater Pulp and Paper Canada Inc.[38] and had entered into an asset purchase agreement with Weyerhaeuser for the sale of the Dryden assets ("1998 APA"). Weyerhaeuser sought to exclude the WDS from the assets to be purchased and a severance was contemplated before closing.[39] When the severance became impossible to obtain before closing, Weyerhaeuser agreed to take title to the WDS on the condition that it would be leased back to Bowater and re-conveyed to Bowater following the severance. The sale to Weyerhaeuser was completed on September 30, 1998.[40]

33. The severance of the WDS was obtained approximately two years later and the WDS was re-conveyed to Bowater on August 25, 2000.[41]

34. Weyerhaeuser sold the Dryden operations to Domtar Inc. in 2007.[42] Whether the 1985 Indemnity was transferred to Domtar as part of that sale remains a live issue.[43]

35. In 2009 Bowater filed for protection under the *Companies' Creditors Arrangement Act*.[44] Before emerging from *CCAA* protection, by order of Gascon J (as he then was), Bowater

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[36] COA Decision, *supra* note 2 at paras 217, 228, Laskin JA, AR, Vol I, Tab 5, pp 78, 109-10; Great Lakes Forest Products Limited, Annual Report for 1982 [1982 GL Annual Report] at pp 4-11, AR, Vol III, Tab 19D, pp 111-14.

[37] COA Decision, *supra* note 2 at para 235, Laskin JA, AR, Vol I, Tab 5, p 112; See Rawn Affidavit, *supra* note 9 at paras 33, 35-36, AR, Vol IV, Tab 27, pp 10-11, and Exhibits S-Y, AR, Vol V, Tabs 27S-Y, pp 144-57.

[38] In 2010 Bowater became Abitibi-Consolidated Inc. and finally Resolute in 2012.

[39] COA Decision, *supra* note 2 at paras 40-41, 138, Brown JA, AR, Vol I, Tab 5, pp 41, 74; Douthwaite Affidavit, *supra* note 14 at para 22, AR, Vol VI, Tab 28, p 8.

[40] COA Decision, *supra* note 2 at paras 39-41, 139, 141-42, Brown JA, AR, Vol I, Tab 5, pp 41, 74-75; Rawn Affidavit, *supra* note 9 at Exhibits O-Q, AR, Vol V, Tabs 27O-Q, pp 117-37.

[41] COA Decision, *supra* note 2 at paras 41, 143, Brown JA, AR, Vol I, Tab 5, pp 41, 76; Rawn Affidavit, *supra* note 9 at para 28, AR, Vol IV, Tab 27, p 8, and Exhibit R, AR, Vol V, Tab 27R.

[42] COA Decision, *supra* note 2 at para 42, Brown JA, AR, Vol I, Tab 5, p 41.

[43] *Ibid* at paras 166, 185, Brown JA, AR, Vol I, Tab 5, pp 83, 92-93.

transferred the WDS to a related numbered company (4513541 Canada Inc. ("451")) already in receivership. In April 2011 the Receiver of 451 was permitted to abandon the WDS and was subsequently discharged.[45] The WDS was effectively orphaned. As a result, the Director's Order was issued to the previous owners including Resolute and Weyerhaeuser to ensure that the necessary monitoring, maintenance, testing and reporting would continue.[46]

(iv) Resolution of the First Nations and Related Litigation

36. In the early 1980s Canada, Ontario, Great Lakes, Reed and the First Nations engaged in mediation to address the First Nations' concerns relating to the mercury discharge.[47]

37. In January 1982, when negotiations stalled, the Provincial Secretary for Resources Development, Russell Ramsay, wrote to Great Lakes and reaffirmed Ontario's commitment under the 1979 Indemnity ("Ramsay Letter"). The Ramsay Letter reiterates the intention to compensate for court awarded damages or the settlement of litigation.[48]

38. The First Nations Litigation was finally settled on terms set out in a November 22, 1985 Memorandum of Agreement ("MOA") entered into by Canada, Ontario, the First Nations, Reed and Great Lakes.[49] In addition to the First Nations receiving settlement funds, the MOA created a legislative program in response to the health and social issues claimed by the two First Nations

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[44] RSC 1985, c C-36 [*CCAA*]; Loi sur les arrangements avec les créanciers des compagnies, LRC 1985, c C-36.

[45] COA Decision, *supra* note 2 at paras 43-45, Brown JA, AR, Vol I, Tab 5, p 41-42; Rawn Affidavit, *supra* note 9 at paras 39-40, AR, Vol IV, Tab 27, p 12 and Exhibits BB-CC, AR, Vol V, Tabs 27BB-CC.

[46] By 1993, Reed no longer existed. See COA Decision, *supra* note 2 at para 37, Brown JA, AR, Vol I, Tab 5, p 40.

[47] COA Decision, *supra* note 2 at para 24, Brown JA, AR, Vol I, Tab 5, p 34.

[48] See the discussion below in "Part III – Argument".

[49] COA Decision, *supra* note 2 at para 25, Brown JA, AR, Vol I, Tab 5, p 36. Ontario was joined as a party on consent. Rawn Affidavit, *supra* note 9 at para 11, AR, Vol IV, Tab 27, p 4.

communities. The program included the creation of a Mercury Disability Fund and Mercury Disability Board, both of which still exist.[50]

(a) Indemnities given as part of the Settlement

39. Section 2.4(a) of the MOA states that "Ontario shall provide to Great Lakes and Reed indemnities in respect of the issues."[51]

40. The issues were defined in section 1 of the MOA as:

> 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").[52]

41. The definition of the issues, together with section 2.4(a) of the MOA, illustrates that the 1985 Indemnity was intended to respond to claims arising from the effects of Reed Era Pollution such as the First Nations Litigation.[53]

42. In order to facilitate the Settlement, the parties entered into an escrow agreement on December 16, 1985 ("Escrow Agreement"). Great Lakes granted Reed a new indemnity bringing forward the Clause 5.3 indemnification commitments it had made to Reed ("Schedule D Indemnity").[54] Ontario provided the 1985 Indemnity (Schedule F).

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[50] COA Decision, *supra* note 2 at para 28, Brown JA, and para 219, Laskin JA, AR, Vol I, Tab 5, pp 36-37, 105.
[51] *Ibid* at para 28, Brown JA, AR, Vol I, Tab 5, pp 36-37; Rawn Affidavit, *supra* note 9 at Exhibit J, Clause 2.4, AR, Vol IV, Tab 27J, p 145.
[52] COA Decision, *supra* note 2 at para 26, Brown JA, AR, Vol I, Tab 5, p 36; Rawn Affidavit, *supra* note 9 at Exhibit J, Clause 1, AR, Vol IV, Tab 27J, p 140.
[53] COA Decision, *supra* note 2 at paras 221-223, 238-239, Laskin JA, AR, Vol I, Tab 5, pp 106-07, 113-14.
[54] Rawn Affidavit, *supra* note 9 at Exhibit J, Schedule D, AR, Vol IV, Tab 27J, pp 180-85. This is discussed further below under "(d) The MOA, Escrow Agreement and Schedules".

43. Clause 1 of both the 1985 Indemnity and the Schedule D Indemnity mirrors the language of Clause 5.3 of the Dryden Agreement. The only significant change is "statutory or otherwise":

> [The indemnitor] hereby covenants and agrees to indemnify [the indemnitee/indemnitee(s)]… harmless from and against any obligations, liability, damages, 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 … 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) … 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] to [Great Lakes] under the Dryden Agreement (hereinafter referred to as "Pollution Claims").…[55] [Emphasis added]

44. The Spills Bill was proclaimed in force seventeen days before the Schedule D Indemnity and the 1985 Indemnity were signed.[56] It contained a provision creating a broad new statutory cause of action against polluters and remains in force today as section 99 of the *EPA*.[57]

45. Clause 2 of both the 1985 Indemnity and the Schedule D Indemnity requires the indemnitee(s) to notify the indemnitor if they receive a Pollution Claim and entitles Ontario to take control of the defence of any action.[58] Clause 3 requires the indemnitee(s) to cooperate in

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[55] Dryden Agreement, *supra* note 29 at Clause 5.3, AR, Vol III, Tab 17, p 19; Rawn Affidavit, *supra* note 9 at Exhibit J, Schedules D and F, AR, Vol IV, Tab 27J, pp 180-85, 188-92.

[56] The MOA was signed on November 22, 1985. The Spills Bill was proclaimed in force on November 29, 1985. The Escrow Agreement and 1985 Indemnity were executed on December 16, 1985.

[57] COA Decision, *supra* note 2 at para 247, Laskin JA, AR, Vol I, Tab 5, p 118; *EPA*, *supra* note 10, s 99; *LPE*, *supra* note 10, art 99.

[58] COA Decision, *supra* note 2 at para 266, Laskin JA, AR, Vol I, Tab 5, p 125; Rawn Affidavit, *supra* note 9 at Exhibit J, Schedules D and F, Clause 2, AR, Vol IV, Tab 27J, pp 181-82, 190.

the investigation, defence and settlement of any Pollution Claim.[59] The provisions in Clauses 2 and 3 are typical of those in third party indemnities.[60]

C. The Proceedings Below

(i) The Summary Judgment Motions

46. In 2016 all parties brought motions for summary judgment.

47. Weyerhaeuser claimed that the 1985 Indemnity covered the costs of complying with the Director's Order, that there had been no violation of the fettering doctrine and that it was entitled to the benefits of the 1985 Indemnity as a successor or assign under its enurement clause in accordance with the Ontario Court of Appeal's decision in *Brown v Belleville (City)*.[61]

48. Resolute also took the position that the 1985 Indemnity protected it from costs associated with the Director's Order under the enurement clause and that, as a corporate successor to Great Lakes, it could rely on this protection even if the 1985 Indemnity had been an asset sold to Weyerhaeuser as part of the 1998 APA.[62] It supported Weyerhaeuser's submission that there had been no breach of the fettering doctrine as well.

49. Ontario's position was that the 1985 Indemnity only covered third party Pollution Claims and did not create an obligation to compensate either Resolute or Weyerhaeuser for costs incurred to comply with the Director's Order.[63] It further submitted that the benefits of the 1985 Indemnity had not been transferred to Weyerhaeuser under the 1998 APA but that, if they had

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[59] COA Decision, *supra* note 2 at para 267, Laskin JA, AR, Vol I, Tab 5, pp 125-26; Rawn Affidavit, *supra* note 9 at Exhibit J, Schedules D and F, Clause 3, AR, Vol IV, Tab 27J, pp 182, 190-91.

[60] COA Decision, *supra* note 2 at para 268, Laskin JA, AR, Vol I, Tab 5, p 126; This is addressed below under "Error of Law – The Failure to Read the 1985 Indemnity as a Whole".

[61] 2013 ONCA 148, 114 OR (3d) 561[*Brown*]; *Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2016 ONSC 4652 [SCJ Decision] at para 29, AR, Vol I, Tab 1, p 7.

[62] SCJ Decision, s*upra* note 61 at para 30, AR, Vol I, Tab 1, p 7; Factum of the Respondent, Resolute FP Canada Inc. dated February 28, 2017, at para 27, AR, Vol VIII, Tab 42, p 80.

[63] SCJ Decision, s*upra* note 61 at para 31, AR, Vol I, Tab 1, p 7.

been, Resolute was no longer entitled to them.[64] Ontario also argued that Weyerhaeuser was not entitled to benefit as a successor under the principles set out in *Brown*.[65]

50. A further submission made by Ontario was that providing indemnification under the 1985 Indemnity in respect of an order which could not even have been made under existing legislation amounted to an indirect fetter of legislative power contrary to *Pacific National (1)*.[66]

51. The motions judge dismissed Ontario's motion and granted the motions for summary judgment brought by Weyerhaeuser and Resolute.[67]

52. His Honour rejected Ontario's argument that a consideration of the factual matrix, in accordance with this Court's decision in *Sattva*, demonstrated that the 1985 Indemnity was intended to only cover third party claims.[68]

53. The motions judge found that Resolute was entitled to the benefits of the 1985 Indemnity as a corporate successor to Great Lakes and that Weyerhaeuser was entitled both as an assignee pursuant to the 1998 APA and as a successor in title to the WDS per the decision in *Brown*.[69]

54. The motions judge also rejected Ontario's argument that the interpretation of the 1985 Indemnity urged by Resolute and Weyerhaeuser amounted to an indirect fettering of provincial legislative powers because the statutory provision foundational to the Director's Order was not enacted until five years after the 1985 Indemnity was signed. His Honour found that the 1985

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[64] *Ibid* at para 33, AR, Vol I, Tab 1, p 7; COA Decision, *supra* note 2 at para 132, Brown JA, AR, Vol I, Tab 5, p 72; Factum of Her Majesty the Queen as represented by the Ministry of the Attorney General dated June 12, 2015 at para 4, AR, Vol VII, Tab 36, p 4.
[65] *Brown*, *supra* note 61; SCJ Decision, *supra* note 61 at para 57, AR, Vol I, Tab 1, p 14.
[66] SCJ Decision, *supra* note 61 at paras 32, 50, AR, Vol I, Tab 1, pp 7, 12.
[67] *Ibid* at para 65, AR, Vol I, Tab 1, p 15.
[68] *Ibid* at para 48, AR, Vol I, Tab 1, pp 10-11; COA Decision, *supra* note 2 at para 61, Brown JA, AR, Vol I, Tab 5, pp 46-47.
[69] SCJ Decision, *supra* note 61 at paras 55, 63-64, AR, Vol I, Tab 1, pp 13, 15; COA Decision, *supra* note 2 at para 131, Brown JA, AR, Vol I, Tab 5, p 72.

Indemnity was a business agreement in accordance with this Court's decision in *Pacific National (1)* and thus followed this Court's earlier decision in *Wells v Newfoundland*.[70]

(ii) The Court of Appeal

55. The Court of Appeal allowed Ontario's appeal against Resolute and partially allowed it against Weyerhaeuser.[71]

56. On the issue of scope, the majority upheld the motions judge's finding that the 1985 Indemnity covers the costs of complying with the Director's Order. They found no legal or material factual errors in the motions judge's interpretive approach.[72]

57. While the majority acknowledged that the motions judge had erred in concluding that the object of the Director's Order, the WDS, was the source of mercury discharge into the Rivers, unlike Justice Laskin they did not believe this was a palpable and overriding error.[73]

58. The majority found no palpable and overriding error in the motions judge's conclusion that the 1998 APA operated to assign the full benefit of the 1985 Indemnity to Weyerhaeuser.[74] However, they further concluded that while Resolute was a corporate successor to Great Lakes, whatever benefits Great Lakes had under the 1985 Indemnity were lost when Bowater sold it to Weyerhaeuser in 1998.[75]

59. The majority also held that the question of whether Weyerhaeuser subsequently sold the 1985 Indemnity to Domtar must be determined by the lower court following a further hearing.[76]

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[70] [1999] 3 SCR 199, 177 DLR (4th) 73 (SCC) [*Wells*]; SCJ Decision, *supra* note 61 at paras 51-53, AR, Vol I, Tab 1, pp 12-13; COA Decision, *supra* note 2 at para 119, Brown JA, AR, Vol I, Tab 5, p 68.
[71] COA Decision, *supra* note 2 at paras 203-04, Brown JA, AR, Vol I, Tab 5, p 99.
[72] *Ibid* at para 128, Brown JA, AR, Vol I, Tab 5, p 71.
[73] *Ibid* at para 82, Brown JA, AR, Vol I, Tab 5, p 54.
[74] *Ibid* at para 161, Brown JA, AR, Vol I, Tab 5, p 81.
[75] *Ibid* at paras 193, 198, Brown JA, AR, Vol I, Tab 5, pp 95, 97.
[76] *Ibid* at paras 166, 204, Brown JA, AR, Vol I, Tab 5, p 84, 99.

They rejected Weyerhaeuser's argument that it was entitled to the benefits as a successor owner of the WDS concluding that the motions judge had misapplied *Brown*.[77]

60. On the issue of legislative fettering, the majority upheld the motions judge's decision that the 1985 Indemnity was a business agreement and as such did not restrict the province's legislative functions.[78] They also rejected Ontario's submission that the motions judge had unnecessarily implied a term into the 1985 Indemnity so as to make it applicable to legislation that would not be enacted until 1990.[79] The majority concluded, as well, that Ontario could have passed legislation to avoid liability had it so desired.[80]

(iii) The Dissenting Judgment of Justice Laskin

61. The focus of the dissenting judgment was on the scope of the 1985 Indemnity. Justice Laskin concluded that the motions judge had made several errors of both a legally and factually impactful nature. He found that the 1985 Indemnity was not intended to respond to first party claims such as the Director's Order.[81] He also concluded that the Director's Order did not, in any case, create a Pollution Claim for damages caused by the discharge of mercury and other pollutants into the Rivers. His Honour would have allowed Ontario's appeal and dismissed the motions for judgment brought by Resolute and Weyerhaeuser.[82]

62. Justice Laskin concluded that the motions judge had erred in law by reading the words of the 1985 Indemnity without properly considering the context in which it was given; a context which included the 1979 Indemnity, the Dryden Agreement, the Ramsay Letter, the Spills Bill and the MOA, including the Escrow Agreement and Schedules.[83]

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[77] *Ibid* at para 184, Brown JA, AR, Vol I, Tab 5, p 92.
[78] *Ibid* at paras 119-21, Brown JA, AR, Vol I, Tab 5, p 68.
[79] *Ibid* at para 122, Brown JA, AR, Vol I, Tab 5, pp 68-69.
[80] *Ibid* at para 127, Brown JA, AR, Vol I, Tab 5, p 70.
[81] *Ibid* at para 212, Laskin JA, AR, Vol I, Tab 5, p 102.
[82] *Ibid* at para 270, Laskin JA, AR, Vol I, Tab 5, p 127.
[83] *Ibid* at para 211(2), Laskin JA, AR, Vol I, Tab 5, p 102.

63. His Honour further held that the motions judge erred in law in failing to consider the 1985 Indemnity as a whole, instead focusing only on Clause 1, while Clauses 2 and 3 contained, respectively, control of defence and cooperation clauses typical of third party indemnities.[84]

64. Justice Laskin also found that the motions judge made two significant errors of fact regarding the circumstances surrounding the granting of the 1985 Indemnity.[85] The first was the finding that Great Lakes had agreed to pay significant amounts of money to continue to modernize its operation in Dryden.[86] The second error was that the impetus for the 1985 Indemnity was mercury discharge from the WDS.[87]

PART II – QUESTIONS IN ISSUE

65. This appeal raises the following issues:

a. did the majority of the Court of Appeal err in failing to correct the motions judge's approach to this Court's decision in *Sattva* and in upholding his conclusion that the 1985 Indemnity covers first party claims and that the Director's Order gives rise to a Pollution Claim as contemplated in the MOA?

b. did the majority of the Court of Appeal err in not correcting the motions judge's failure to consider the 1985 Indemnity as a whole, thereby ignoring its control of defence and cooperation clauses?

c. did the majority of the Court of Appeal err in failing to recognize that two errors of fact made by the motions judge were of a palpable and overriding nature?

d. did the Court of Appeal err in failing to correct the motions judge's decision that the 1985 Indemnity was a business agreement to which the indirect fettering rule did not apply and otherwise in the manner in which they applied *Pacific National (1)*?

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[84] *Ibid* at para 211(3), Laskin JA, AR, Vol I, Tab 5, p 102.
[85] *Ibid* at paras 228-31, Laskin JA, AR, Vol I, Tab 5, pp 109-10.
[86] *Ibid* at para 228, Laskin JA, AR, Vol I, Tab 5, pp 109-10.
[87] *Ibid* at para 230, Laskin JA, AR, Vol I, Tab 5, p 110.

PART III – ARGUMENT

A. The Standard of Review

66. Decisions concerning the interpretation of negotiated contracts are generally taken to involve questions of mixed fact and law and may be overturned where the court below has made a palpable and overriding error.[88] The appellate process will engage a consideration of the circumstances in which the contract was made.[89] Extricable errors of law, such as the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor are reviewable on a correctness standard.[90]

67. A lower court's findings of fact may be reversed where it is established that they amount to a palpable and overriding error.[91] The motions judge made two significant errors concerning the factual matrix.

B. Errors of Mixed Fact and Law - The Motions Judge's Misapplication of *Sattva*

68. *Sattva* instructs lower courts to read the words of a contract within the context of the document as a whole with regard to the surrounding circumstances.[92] The meaning of the words used in any contract is derived from the "factual matrix", those contextual factors including the purpose of the agreement and the nature of the relationship created by the agreement, and which consist of objective evidence of the background facts that were or reasonably ought to have been within the knowledge of the parties at or before the date of contracting.[93]

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[88] *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para 21, [2016] 2 SCR 23 [*Ledcor*].
[89] *Sattva*, *supra* note 4 at para 50; *Ledcor*, *supra* note 88 at para 21.
[90] *Sattva*, *supra* note 4 at para 53; *Ledcor*, *supra* note 88 at paras 21, 36.
[91] *Hryniak v Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87; *Housen v Nikolaisen*, 2002 SCC 33 at paras 5-6, 10, 23, 36, [2002] 2 SCR 235; *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 4, 53-57, 70, 110, [2005] 1 SCR 401; *Peart v Peel (Regional Municipality) Police Services Board*, 217 OAC 269 at para 158, [2006] OJ No 4457.
[92] *Sattva*, *supra* note 4 at paras 46-47; *Dumbrell v Regional Group of Companies Inc.*, 2007 ONCA 59 at paras 53-55, 85 OR (3d) 616; See also COA Decision, *supra* note 2 at para 236, Laskin JA, AR, Vol I, Tab 5, p 112.
[93] *Sattva*, *supra* note 4 at paras 48, 58; *Plan Group v Bell Canada*, 2009 ONCA 548 at para 37, 96 OR (3d) 81.

69. The motions judge stated that interpreting the 1985 Indemnity with reference to the factual matrix of the MOA was not the appropriate starting point.[94] This was an extricable error of law.[95] The majority of the Court of Appeal upheld this approach.[96]

70. As noted by Justice Laskin "context controls meaning". "The words of an agreement, and the context in which those words are used, cannot be separated and approached at different stages of the interpretative process."[97]

71. The motions judge should not have considered the words of the 1985 Indemnity and the context in which it was made at different stages.[98] In doing so he misapplied the direction given in *Sattva* which rejected this approach expressly.[99] The motions judge failed to appreciate that events going back to 1979 significantly informed the meaning of the 1985 Indemnity.[100] He should have considered its interrelationship with the 1979 Indemnity, the Dryden Agreement, the Ramsay Letter, the Spills Bill and the MOA, Escrow Agreement and Schedules.[101]

(i) The Context of the 1985 Indemnity

(a) Ontario's Commitments: The 1979 Indemnity and the Ramsay Letter

72. Ontario's intention to indemnify only for third party claims has always been clear. The intention was to compensate for "damages" resulting from court decisions or settlements.

73. The 1979 Indemnity provided as follows:

> I am aware … of [Great Lakes'] concern over potential liabilities for environmental *damages* caused by Reed ... in the Dryden area ... I further understand that … Reed … and Great Lakes are willing to assume, on an equal

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[94] SCJ Decision, *supra* note 61 at para 40, AR, Vol I, Tab 1, p 8; *Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 SCR 129, 161 DLR (4th) 1 (SCC).
[95] COA Decision, *supra* note 2 at para 237, Laskin JA, AR, Vol I, Tab 5, p 112-13.
[96] *Ibid* at paras 70-71, Brown JA, AR, Vol I, Tab 5, p 51.
[97] COA Decision, *supra* note 2 at para 237, Laskin JA, AR, Vol I, Tab 5, pp 112-13, citing *Starrcoll Inc. v 2281927 Ontario Ltd*, 2016 ONCA 275 at para 17, 68 RPR (5th) 173.
[98] COA Decision, *supra* note 2 at para 237, Laskin JA, AR, Vol I, Tab 5, pp 112-13.
[99] *Sattva, supra* note 4 at paras 47-48, 57-58.
[100] COA Decision, *supra* note 2 at paras 260, 263, Laskin JA, AR, Vol 1, Tab 5, pp 121-22, 124.
[101] *Ibid* at paras 263-264, Laskin JA, AR, Vol 1, Tab 5, p 124.

> basis, responsibility, up to a maximum of $15 million, for any environmental *damages* attributable to the operations of Reed … in the Dryden area prior to this acquisition by Great Lakes.
>
> 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 [*sic*] negotiations with … Reed … 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 [or] Reed … in respect of pollution caused by Reed … in … Dryden ... or in the event that any settlement with any claimant is made the amount of which settlement has been approved by [Ontario],* I have been authorized … to advise you … that … Ontario [will] ensure that Great Lakes … will not be required to pay any monies in excess of the maximum amount of $15 million … 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.[102] [Emphasis added]

74. As noted above, this commitment made by Ontario was restated in the Ramsay Letter:

> … [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 [Great Lakes and Reed] in connection with … 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." [103] [Emphasis added]

75. Like the 1979 Indemnity, the Ramsay Letter limits the promise of indemnification to obligations arising from *court orders or settlements* consequent on *damages* caused by Reed Era Pollution. Both documents contemplate compensation only for third party claims.

76. The motions judge did not refer to the Ramsay Letter at all. With respect to the 1979 Indemnity His Honour found that, as it was a separate agreement from the 1985 Indemnity, only

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[102] *Ibid* at para 241, Laskin JA, AR, Vol I, Tab 5, pp 114-15; Rawn Affidavit, *supra* note 9 at Exhibit I, AR, Vol IV, Tab 27I.

[103] COA Decision, *supra* note 2 at para 243, Laskin JA, AR, Vol I, Tab 5, p 116; Letter from R. H. Ramsay to C. J. Carter dated January 28, 1982, AR, Vol III, Tab 21.

the words of the latter should be considered.[104] The majority of the Court of Appeal found no reversible error in this analysis.[105]

77. The 1979 Indemnity and the Ramsay Letter are important elements of the factual matrix. Had the courts below considered them properly, or at all, they would have concluded that the 1985 Indemnity was only intended to respond to third party claims.[106]

(b) The Dryden Agreement

78. After Ontario provided the 1979 Indemnity, Reed and Great Lakes signed the Dryden Agreement which addressed both the ongoing and potential Pollution Claims, including the First Nations Litigation, and the various environmental responsibilities consistent with the statutory structure of the *EPA* as it then was. The WDS' COA obligations would become Great Lakes' responsibility as the new owner and operator. Reed would continue to be bound by the 1979 Control Order made against it while it was the owner.[107]

79. The companies addressed the 1979 Control Order in Clause 11.4. It required Great Lakes to assume full financial responsibility for it following completion of its purchase from Reed. It also recognized that the 1979 Control Order was not a Pollution Claim.

80. Clause 11.4 provides as follows:

> [Reed] and [Great Lakes] acknowledge and agree that notwithstanding anything herein contained [Reed] shall have no obligation under the indemnity provided for in clause 5.3 hereof to the extent of any action taken or performed by [Great Lakes] after the Closing Date in compliance with the existing Control Order … or in compliance with any Control Order which may be issued in substitution therefor … It is further acknowledged and agreed that obligations of [Reed] under such Control Order constitute commitments of [Reed] which are to be assumed by [Great Lakes] hereunder without adjustment to the purchase price.[108]

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[104] SCJ Decision, *supra* note 61 at para 48, AR, Vol I, Tab 1, pp 10-11; COA Decision, *supra* note 2 at para 93, Brown JA, AR, Vol I, Tab 5, pp 58-59.
[105] COA Decision, *supra* note 2 at para 94, Brown JA, AR, Vol I, Tab 5, p 59.
[106] *Ibid* at paras 263-64, Laskin JA, AR, Vol I, Tab 5, p 124.
[107] 1979 Control Order, *supra* note 21, AR, Vol III, Tab 16.
[108] Dryden Agreement, *supra* note 29 at Clause 11.4, AR, Vol III, Tab 17, pp 46-47.

81. The motions judge incorrectly concluded that the "1979 Indemnity" excluded the cost of regulatory compliance. His Honour stated:

> The Province's comparison of the language of the 1979 Indemnity and the [1985] Indemnity does not persuade me that Weyerhaeuser's and Resolute's interpretation of the [1985] Indemnity is incorrect. The [1985] Indemnity is a separate agreement and must be interpreted by considering the words used by the parties in it, not a previous agreement. Further, the fact that the *1979 Indemnity* contained a specific provision that excluded the cost of regulatory compliance supports the conclusion that the [1985] Indemnity includes these costs because it does not contain a similar provision.[109] [Emphasis added]

82. The 1979 Indemnity, in fact, contains no regulatory carve out. In no way is it inconsistent with the 1985 Indemnity. Both reflect an intention to cover only third party claims.

83. Assuming that the motions judge's reference to the 1979 Indemnity was actually a reference to Clause 11.4 of the Dryden Agreement, it is important to note that the Dryden Agreement was a private contractual arrangement made between Reed and Great Lakes. The absence of a provision such as Clause 11.4 in the 1985 Indemnity was, accordingly, not evidence that Ontario intended it to cover regulatory costs.[110] The majority of the Court of Appeal failed to address this error.

84. Further, by 1985 there was no need for similar regulatory carve out language. Reed had no obligations for the Dryden operations. The 1979 Control Order issued against it was rescinded on June 5, 1980 and replaced with one naming Great Lakes on the same terms ("1980 Control Order").[111] The 1980 Control Order had been substantially complied with by 1982 and, in any event, expired on December 31, 1983.[112] Great Lakes continued to have the COA responsibilities as the operator and owner of the WDS.

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[109] SCJ Decision, *supra* note 61 at para 48, AR, Vol I, Tab 1, p 11.
[110] COA Decision, *supra* note 2 at paras 255-56, Laskin JA, AR, Vol I, Tab 5, p 121.
[111] 1979 Control Order, *supra* note 21, AR, Vol III, Tab 16; Ministry of the Environment, Control Order, issued against Great Lakes Forest Products Limited dated June 5, 1980 [1980 Control Order], AR, Vol III, Tab 20.
[112] 1980 Control Order, *supra* note 111, AR, Vol III, Tab 20; 1982 GL Annual Report, *supra* note 36 at pp 4-11, AR, Vol III, Tab 18D, pp 111-14.

85. The motions judge misunderstood the reason for Clause 11.4. As noted above and by Justice Laskin, the only environmental matter that would bind Reed after the sale was the 1979 Control Order.[113] Clause 11.4 put the financial responsibility for post-closing costs related to that regulatory obligation on Great Lakes. It further exempted the 1979 Control Order from the cost sharing obligations agreed to by the companies in Clause 5.3.

86. In Clause 5.3 Great Lakes and Reed agreed to share the risk of any Pollution Claims to a maximum of $15M, beyond which Great Lakes would fully indemnify Reed. It is in Clause 5.3 where the companies defined Pollution Claims for the first time:

> [Great Lakes] hereby covenants and agrees to indemnify [Reed] … harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the Closing Date as a result of any claim, action or proceeding existing at the Closing Date or which may arise or be asserted thereafter, 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, 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] to [Great Lakes] (hereinafter referred to as "Pollution Claims")…[114]

87. Clause 5.3 fits with the promise Ontario made in the 1979 Indemnity.[115] It is an important clause because, with the addition of the words "statutory or otherwise", it was substantially brought forward into the 1985 Indemnity and the Schedule D Indemnity.

(c) The Spills Bill

88. The factual matrix should have included the law of the day. The enactment of the Spills Bill provides a strong explanation as to why the words "statutory or otherwise" were added to Clause 1 of the 1985 Indemnity. This addition addressed a significant new statutory cause of

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[113] COA Decision, *supra* note 2 at para 255, Laskin JA, AR, Vol I, Tab 5, p 121.
[114] Dryden Agreement, *supra* note 29 at Clause 5.3, AR, Vol III, Tab 17, p 19.
[115] Rawn Affidavit, *supra* note 9 at Exhibit I, AR, Vol IV, Tab 27I.

action created by the Spills Bill, along with other third party statutory claims which could have been brought at that time.[116]

89. The motions judge did not address the Spills Bill at all. The majority of the Court of Appeal incorrectly concluded that it was inadmissible as evidence of the parties' specific negotiations or intentions.[117]

90. Consistent with this Court's decision in *Sattva*, Justice Laskin found that the Spills Bill and the statutory right of action it created is an objective fact that would have or reasonably ought to have been known to the parties. He noted:

> Evidence of such a fact is admissible to help determine the parties' meaning in using specific words – in this case the phrase "statutory or otherwise". As the Supreme Court explained at para. 60 of *Sattva* … [citation omitted]:
>
> > The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objective of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.[118]

91. Nothing in the language of the 1985 Indemnity indicates that the parties intended the term "statutory" to refer to claims arising from future legislation. Courts have, correctly, been reluctant to impose obligations arising from future legislation absent express words to that effect.[119] This approach promotes certainty in contract law.

92. Even though Clause 1 refers to "claims existing at December 17, 1979 or which may arise or be asserted thereafter", it does not follow that the parties intended the 1985 Indemnity to

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[116] See *Fisheries Act*, RS, c F-14, ss 34-41, BOA, Tab 4; *Midwest Properties Ltd. v Thordarson*, 2015 ONCA 819 at paras 44-45, 128 OR (3d) 81, leave to appeal to SCC refused, May 26, 2016.
[117] COA Decision, *supra* note 2 at paras 111-12, Brown JA, AR, Vol I, Tab 5, pp 65-66.
[118] *Ibid* at para 248, Laskin JA, AR, Vol I, Tab 5, p 118 citing *Sattva, supra* note 4 at para 60.
[119] *Spooner Oils Ltd. v Turner Valley Gas Conservation*, [1933] SCR 629 at 641-42, [1933] 4 DLR 545 (SCC) [*Spooner*].

apply to claims based on future legislation. The more reasonable interpretation of this language is that it is intended to refer to third party claims, referable to Reed Era Pollution, that could arise or be asserted in the future, based on the law as it existed as of the date of the 1985 Indemnity.

93. Further, while Clause 1 purports to capture every conceivable claim by a variety of claimants, it does not require *every* type of plaintiff to be able to assert *every* type of claim. In context, "province" does not mean Ontario. Nor does a "province" have to be capable of bringing a statutory claim to give meaning to Clause 1. In fact, in the 1970s the province of Manitoba asserted a claim for compensation against Dryden Chemicals based on the company's contamination of the Rivers. Manitoba's claim was grounded in both common law and the province's *Fisherman's Assistance and Polluter's Liability Act*.[120]

(d) The MOA, Escrow Agreement and Schedules

94. The 1985 Indemnity was one contract in a series executed as part of the Settlement. As noted by Winkler, CJO in *Salah v Timothy's Coffees of the World Inc.*:

> Where a transaction involves the execution of several documents that form parts of a larger composite whole – like a complex commercial transaction – *and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements*.[121] [Emphasis added]

95. While not commercial in nature, the Settlement was a complex arrangement. The full complement of Settlement contracts consisted of the MOA as well as the Escrow Agreement and its Schedules, including the 1985 Indemnity (Schedule F). The motions judge and the majority of the Court of Appeal erred in not appreciating that the MOA and Schedules A-E were an important part of the factual matrix.

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[120] *Manitoba v Interprovincial Co-Operatives Ltd.*, (1972) 30 DLR (3d) 166 at 171, [1972] MJ No 128; *Interprovincial Co-Operatives Ltd. v Dryden Chemicals Ltd.*, [1976] 1 SCR 477 at 505, 53 DLR (3d) 321 (SCC); See also Rawn Affidavit, *supra* note 9 at para 13, AR, Vol IV, Tab 27, pp 4-5 and Exhibit H, AR, Vol IV, Tab 27H.

[121] 2010 ONCA 673 at para 16, [2010] OJ No 4336.

1. The MOA

96. As noted, section 2.4(a) and section 1 of the MOA make clear that "the issues" the 1985 Indemnity was intended to address were limited to matters relating to Reed's *discharge* of mercury and other pollutants prior to the sale to Great Lakes in December 1979.

97. The Director's Order is, as stated, a preventative measures order.[122] When the 1985 Indemnity is read alongside section 1 of the MOA, it is clear that the 1985 Indemnity does not respond to the Director's Order because the WDS was not a source of discharge.[123]

2. The Escrow Agreement and Schedules

98. As stated, Schedules A-E to the Escrow Agreement are important components of the factual matrix. They make three things apparent: (1) the parties understood the difference between a release and an indemnity, and the 1985 Indemnity was not intended to be a release; (2) the language from Clause 5.3 of the Dryden Agreement was brought forward to the Schedule D Indemnity and Schedule F (1985 Indemnity); and (3) the reasonable interpretation of these documents is that the language in Schedules D and F was intended to address the same kind of liability as it was intended to address in 1979.

99. In addition to requiring Ontario to give an indemnity, section 2.4(b) of the MOA required Great Lakes and Reed to provide releases to Ontario.[124] These are contained in Schedules B and E, respectively.[125] Each releases Ontario from its obligations to the companies arising from the 1979 Indemnity and the Ramsay Letter. Had the parties intended for Ontario to release the companies from any claims that Ontario could commence against them, the 1985 Indemnity would have included release language or a separate Release would have been provided.

100. In Schedules A and C, Reed and Great Lakes acknowledge that the other has performed certain of its respective obligations under the Dryden Agreement. Schedule C, given by Great

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[122] COA Decision, *supra* note 2 at para 82, Brown JA, AR, Vol I, Tab 5, p 54.
[123] *Ibid* at paras 260-62, Laskin JA, AR, Vol I, Tab 5, pp 122-24.
[124] Rawn Affidavit, *supra* note 9 at Exhibit J, Section 2.4 (b), AR, Vol IV, Tab 27J, p 145.
[125] *Ibid* at Exhibit J, Schedules B and E, AR, Vol IV, Tab 27J, pp 177-78, 186-87.

Lakes, acknowledges that Reed has completed its obligations under Clause 5.3 of the Dryden Agreement and releases and discharges Reed.[126] Schedule A, given to Reed by Great Lakes, acknowledges that Great Lakes has completed all of its obligations under the Dryden Agreement and releases and discharges Great Lakes "save and except all actions, causes of action, suits, debts, acts, bonds, covenants, contracts, claims and demands arising from or in any way connected with the Great Lakes Indemnity (Schedule "D" to the Escrow Agreement…)".[127]

101. In Clause 1 of the Schedule D Indemnity, Great Lakes agrees to indemnify Reed for Pollution Claims in the same language that is used in the 1985 Indemnity. This language is virtually identical to the indemnification it provided to Reed in Clause 5.3 of the Dryden Agreement. The only addition of significance in each is the phrase "statutory or otherwise". The enactment of the Spills Bill in 1985 provides a compelling explanation for this addition.[128]

C. Error of Law – The Failure to Read the 1985 Indemnity as a Whole

102. As noted by Justice Laskin, the motions judge also failed to consider the 1985 Indemnity as a whole. This was an error of law.

103. The 1985 Indemnity included the following provisions:

> Clause 2 -
>
> Upon the receipt of notice of any Pollution Claim directed to Great Lakes or Reed … Great Lakes or Reed … 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.
>
> Clause 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 …[129]

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[126] *Ibid* at Exhibit J, Schedule C, AR, Vol IV, Tab 27J, p 179.
[127] *Ibid* at Exhibit J, Schedule A, AR, Vol IV, Tab 27J, p 176.
[128] COA Decision, *supra* note 2 at paras 247-49, Laskin JA, AR, Vol I, Tab 5, pp 118-19.
[129] Rawn Affidavit, *supra* note 9 at Exhibit J, Schedule F, Clauses 2 and 3, AR, Vol IV, Tab 27J, pp 190-91.

These provisions are typical of third party indemnities and make it clear that the 1985 Indemnity was not meant to address first party claims.[130]

104. The 1985 Indemnity was not meant to capture proceedings commenced by Ontario. MOE could have made a regulatory order against Great Lakes at any time it remained owner of the Dryden Property. The 1985 Indemnity would have offered Great Lakes no protection in such a circumstance. In fact, the WDS has been subject to a number of COA requirements since its inception. Significantly, Great Lakes and its corporate successors have complied with these requirements but have never sought reimbursement under the 1985 Indemnity.[131]

D. Palpable and Overriding Errors of Fact

105. The motions judge also made two factual errors which were at the heart of his analysis of the scope and purpose of the 1985 Indemnity. He: (1) failed to appreciate that no fresh consideration had been given by Great Lakes as part of the Settlement and that its earlier commitment to modernize had been substantially completed by 1982;[132] and (2) concluded that the WDS was discharging mercury into the Rivers when there was no evidence that it was a source of discharge.[133] In light of these significant errors, the motions judge's interpretation of the 1985 Indemnity should receive little deference from this Court.

(i) No Fresh Consideration was given by Great Lakes

106. The motions judge's misunderstanding of the consideration given by Great Lakes to Ontario influenced his view of why the 1985 Indemnity was given. This factual error, relating to Great Lakes' end of the bargain, led him to conclude that Ontario should not be allowed to

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[130] *Mobil Oil Canada Ltd. v Beta Well Service Ltd.*, 1974 AltaSCAD 19 at paras 16-17, 43 DLR (3d) 745, aff'd (1974), 50 DLR (3d) 158 (SCC); *TransCanada Pipelines Ltd v Potter Station Power Limited Partnership*, 172 OAC 379 at paras 27-30, [2003] OJ No 1879 (Ont CA); *Stetson Oil & Gas Ltd. v Stifel Nicolaus Canada Inc.*, 2013 ONSC 1300 at para 138; [2013] OJ No 1058.
[131] COA Decision, *supra* note 2 at para 235, Laskin JA, AR, Vol I, Tab 5, p 112. *Montreal Trust Co. of Canada v Birmingham Lodge Ltd.*, 24 OR (3d) 97, 1995 CarswellOnt 541 at paras 23-24 (Ont CA).
[132] COA Decision, *supra* note 2 at para 228, Laskin JA, AR, Vol I, Tab 5, pp 109-10; SCJ Decision, *supra* note 61 at para 48, AR, Vol I, Tab 1, p 11.
[133] COA Decision, *supra* note 2 at para 82, Brown JA, and paras 230-31, Laskin JA, AR, Vol I, Tab 5, pp 54, 110-11; SCJ Decision, *supra* note 61 at paras 7, 42.

withdraw from what he understood to be the other end of the bargain; a commitment to provide "very broad protection to Great Lakes and its successors from future environmental liability."[134]

107. However, the record is clear that there was no further commitment by Great Lakes to expend any further funds towards the modernization of the operations beyond what it had already committed to in 1979. Great Lakes gave no fresh consideration at the time of the Settlement. The 1979 commitment that Great Lakes made to modernize had been substantially completed by 1982.[135] The promise to contribute a portion of the payment made to settle the First Nations Litigation had also been made in 1979.

108. As Justice Laskin noted regarding the modernization:

> The first error is the motion judge's finding that, as part of the 1985 settlement in which Ontario gave the Indemnity, Great Lakes agreed to pay significant amounts of money to continue to modernize its operations in Dryden. That finding is wrong. Great Lakes agreed to modernize its operation as consideration for the 1979 Indemnity. *Its modernization was completed in 1982, three years before the 1985 Indemnity was given. Great Lakes gave no new or additional commitment to modernize the Dryden operations in the 1985 MOA.*[136] [Emphasis added]

(ii) The WDS was not a Source of Discharge

109. There was no evidence before the motions judge, and no party submitted, that the WDS ever discharged a pollutant.

110. The conclusion that it was a source of pollution was a serious misapprehension of the evidence by the motions judge. It propelled him to the conclusion that Great Lakes had negotiated protection from the impact of regulatory orders in 1985. This conclusion and its impact on the interpretation of the 1985 Indemnity should have been overturned. Yet the majority found that the error did not rise to the level of palpable and overriding.[137]

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[134] SCJ Decision, *supra* note 61 at para 53, AR, Vol I, Tab 1, p 13; COA Decision, *supra* note 2 at para 229, Laskin JA, AR, Vol I, Tab 5, p 110.
[135] COA Decision, *supra* note 2 at para 228, Laskin JA, AR, Vol I, Tab 5, pp 109-10; 1982 GL Annual Report, *supra* note 36 at pp 4-11, AR, Vol III, Tab 18D, pp 111-14.
[136] COA Decision, *supra* note 2 at para 228, Laskin JA, AR, Vol I, Tab 5, pp 109-10.
[137] *Ibid* at paras 83-85, Brown JA, AR, Vol I, Tab 5, pp 54-55.

111. Once again, Justice Laskin observed:

> [233] … His conclusion is wrong.
>
> [234] The motion judge misconstrued the purpose and effect of the WDS. The WDS 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 WDS 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 WDS. Neither respondent submitted otherwise.
>
> [235] Moreover, the WDS could not in any sense pose a serious environmental liability. It has been subject to regular monitoring, maintenance, testing, and reporting prescribed by certificates of approval issued by the Ministry of the Environment. Great Lakes its successor, Bowater, and Bowater's successor, Resolute, have continually fulfilled their regulatory requirements.[138]

E. Fettering

112. The issue of legislative fettering arises because the legislation on which the Director's Order was based was not enacted until five years after the 1985 Indemnity was given.

113. "Ministers of State cannot, however, 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."[139] To do so would constitute a direct fetter of legislative power and be contrary to public policy.

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[138] *Ibid* at paras 233-235, Laskin JA, AR, Vol I, Tab 5, pp 111-12. See Rawn Affidavit, *supra* note 9 at para 3, AR, Vol IV, Tab 27, p 2.

[139] *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 1991 CarswellBC 168 at para 72 (SCC) [*Canada Assistance Plan*], citing *West Lakes Ltd. v South Australia* (1980), 25 SASR 389 at 390, BOA, Tab 3; AR Blackshield, "Constitutional Issues Affecting Public Private Partnerships" (2006) UNSW Law JI 53 at 302, quoting Alpheus Todd, *Parliamentary Government in the British Colonies*, 1st ed, (London: Longmans, Green, and Co, 1880) at 192 and AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 67-68, BOA, Tab 7.

114. A direct fetter of legislative power takes place when there is an express agreement to exercise or not exercise legislative powers in the future in a particular manner.[140]

115. This appeal addresses the issue of *indirect* fettering. An indirect fetter of legislative power occurs when there is an agreement to compensate if the legislation changes in the future and results in a breach of contract.[141] This type of fettering should only be permitted where there is an express intention to allocate commercial risk.

116. The 1985 Indemnity does not expressly address obligations that might arise from future legislation. The motions judge implied a term into it under which Ontario is required to compensate for costs incurred to comply with an order made under future legislation. This creates a disincentive to legislate and is an impermissible indirect fetter of legislative power.[142]

117. Interpreting the 1985 Indemnity as creating an obligation to pay compensation for the costs of environmental orders also acts as a disincentive to the exercise of ministerial discretion in the public interest.[143] It creates an absurdity and is contrary to the regulatory scheme.

(i) The Indirect Fettering of Legislative Power

118. In *Pacific National (1)* the City of Victoria enacted a down-zoning bylaw that negatively impacted a developer's ability to complete a harbour project, thereby reducing profitability. This Court dismissed the developer's claim for breach of contract on the basis that a contract which implied a term requiring the city to pay damages as a result of a subsequent zoning was beyond the municipality's capacity to make and contrary to public policy.[144]

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[140] *Pacific National (1), supra* note 6 at paras 55-56.
[141] *Ibid* at paras 63-64; *Attorney General of British Columbia v Esquimalt & Nanaimo Ry Co*, [1950] 1 DLR 305 at 312, 1949 CarswellBC 107 (PC).
[142] *Pacific National (1), supra note 6* at para 63.
[143] *R v Dominion of Canada Postage Stamp Vending Co. Ltd.*, [1930] SCR 500 at 505-06, 509-10, [1930] 4 DLR 241 (SCC) [*Dominion Postage*]; *Rederiaktiebolaget Amphitrite v The King*, [1921] 3 KB 500 at 503, [1921] All ER Rep 542 (Eng), BOA, Tab 2.
[144] *Pacific National (1), supra* note 6 at paras 71-74.

119. The Court saw no difference between direct and indirect fettering of legislative powers. It recognized that the rule against fettering applies with equal force to an agreement that seeks to impose an obligation to compensate for losses caused by the enactment of future legislation. It concluded that attaching financial consequences to a legislative decision may operate as a significant practical disincentive and therefore "is no more acceptable than an outright restriction on the legislative power."[145]

120. The Court distinguished its earlier decision in *Wells* explaining that it did not concern an issue of municipal legislative powers and involved a business contract.[146] In *Wells*, the provincial government had appointed Mr. Wells commissioner of the Newfoundland utilities board until age 70, subject to good behaviour.[147] The legislature subsequently abolished the board and Mr. Wells lost his job.[148] When he sued for breach of contract, Newfoundland defended arguing that even if it breached a term of the employment contract, it was entitled to do so as an exercise of unfettered sovereign power.[149]

121. This Court found that while Mr. Wells' employment contract could not be permitted to fetter the province's power to abolish the board, he was nonetheless entitled to damages for breach of contract.[150] In doing so the Court departed from the established legal principle that parliamentary sovereignty prohibits courts from implying contractual terms under which a government would be required to compensate a party following a legislative change.[151]

122. The Court held that a statute that causes a breach of contract should be construed as permitting an action in damages in the absence of clear evidence of a contrary legislative intent:

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[145] *Ibid* at para 63.
[146] *Ibid* at para 61.
[147] *Wells, supra* note 70 at paras 2-3.
[148] *Ibid* at para 7.
[149] *Ibid* at para 37.
[150] *Ibid* at paras 17-18, 41-43, 55.
[151] *Dominion Postage, supra* note 143 at 505-06; *Canada Assistance Plan, supra* note 139 at para 73; See also *Smith v London (City)* (1909), 20 OLR 133, 1909 CarswellOnt 300 at para 30 (Ont Div Ct).

> … *the use of legislation to strip a specific individual* of a legal right to compensation for breach of…[contract]…is a harsh and extraordinary use of governmental authority which, because it should not be done lightly, requires specific and unambiguous language.[152] [Emphasis added]

123. The rule of statutory interpretation established by *Wells* is not questioned in this appeal. It is acknowledged that legislation cancelling or avoiding Crown contracts should generally be construed as preserving the private law right of affected parties to claim damages for breach.[153] This finding is consistent with the well-established principle that legislation expropriating private property should be interpreted as intending the Crown to pay fair compensation unless the legislation clearly excludes such compensation.[154]

124. However, the facts in this case differ significantly from those in *Wells* where it was obvious that the elimination of Mr. Wells' employment was the objective of the legislation.[155] In contrast, the 1990 *EPA* amendments represented a decision taken in the public interest to broadly address legacy contamination.

125. In *Pacific National (1)* this Court recognized that different considerations apply in the case of a contract designed to hinder or impede the future exercise of legislative authority. This kind of contract is incompatible with the sovereignty of the legislature, inconsistent with the requirements of good public policy and beyond the legal authority of the executive branch of government. The Court was not faced with such a contract in *Wells*.

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[152] *Wells, supra* note 70 at para 49.
[153] *Ibid* at paras 17, 43, 55.
[154] *Toronto Area Transit Operating Authority v Dell Holdings Ltd.*, [1997] 1 SCR 32 at paras 20, 22, 142 DLR (4th) 206 (SCC).
[155] The Vice Chairman of the Resource Legislation Committee had even suggested the proposed legislation be named: "The Get Rid of Andy Wells Bill". See *Wells, supra* note 70 at para 42.

(ii) The Treatment of Indirect Fettering in the Courts below

(a) The Motions Judge

1. The Motions Judge Misunderstood Ontario's Fettering Argument and Implied Terms into the 1985 Indemnity

126. The motions judge misunderstood the basis of Ontario's argument, referring to it as one based on a direct fetter of legislation rather than an indirect fetter. He did this despite citing Ontario's factum which plainly referred to the type of fetter at issue as "indirect":

> *Issue #4 Does the Ontario Indemnity result in the fettering of the Province's discretion?*
>
> [50] The Province submits that it cannot enter into an agreement that *directly* fetters a Minister's discretion. It argues as follows at paras. 78-79 of its factum:
>
> > [78] … Agreements to pay compensation to those affected by the exercise of statutory discretion may act as an impermissible *indirect* fetter. While this *indirect* fettering rule does not apply to "business agreements", the 1985 Memorandum of Agreement does not fall into this category. [Emphasis added]
> >
> > [79] An obligation to pay compensation for the costs of environmental regulatory efforts would act as a significant disincentive to the exercising of those powers by government officials. It would amount to Ontario absorbing the cost of environmental regulation in response to its own orders. This creates an absurdity and is contrary to the regulatory scheme of the EPA which does not envision the MOE as a principal remediator as distinct from a regulator.[156]

127. The motions judge failed to appreciate that acceding to Weyerhaeuser and Resolute's position meant that he had to, in effect, imply terms into the 1985 Indemnity concerning obligations created by legislation not yet enacted.

128. As noted earlier, courts are reluctant to impose the consequences of future legislation on parties to a contract in the absence of express language. This principle serves to create certainty by making the obligations of the contract plainly visible.[157]

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[156] SCJ Decision, *supra* note 61 at para 50, AR, Vol I, Tab 1, p 12.
[157] *Spooner, supra* note 119 at 641-42.

129. In any event, the legally justifiable reasons for implying terms into a contract are well-known.[158] None are present in this case. The 1985 Indemnity requires no importation of terms to give it meaning and utility. It is a fully functional contract on its face.[159] If the intention had been to address future legislation, express language to that effect would have been expected.

130. The reasonable conclusion regarding the intentions of the parties in 1985 was that the coverage provided by the 1985 Indemnity extended into the future only to third party claims made after the closing date of the sale to Great Lakes, *provided they were related to Reed Era Pollution*. This is what is intended by the words "claims existing at December 17, 1979 or which may arise or be asserted thereafter".

131. Only by ignoring the impact of the Spills Bill and implying terms concerning future legislation into Clause 1 of the 1985 Indemnity could the motions judge have reached the conclusion that its scope extended to the costs of complying with the Director's Order. The majority of the Court of Appeal failed to appreciate that this is what the motions judge had done.

132. Further, as a matter of contractual interpretation there is a presumption of law in favour of a legal, enforceable interpretation of a contract. If a contract is reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.[160] Because the 1985 Indemnity is not a business contract as contemplated in *Pacific National (1)*, interpreting it to apply to statutory claims based on future legislation constitutes an indirect fetter and would be unenforceable.

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[158] *Rio Algom Ltd v Canada (AG)* 2012 ONSC 550 at paras 36-39, [2012] OJ No 100 [*Rio Algom*]; *MJB Enterprises Ltd v Defence Construction*, [1999] 1 SCR 619 at para 27, 170 DLR (4th) 577 (SCC) [*MJB Enterprises*]; *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 1992 CarswellOnt 892 at paras 45-46 (SCC); *Wallace v United Grain Growers Ltd*, [1997] 2 SCR 701 at para 137, 152 DLR (4th) 1 (SCC); *Attorney General of Belize & Ors v Belize Telecom Ltd v Amor*, [2009] UKPC 10, [2009] 2 All ER 1127 at para 21, BOA, Tab 1.

[159] *MJB Enterprises*, *supra* note 158 at para 29; *Rio Algom*, *supra* note 158 at paras 42-43, 46; *Canadian Pacific Hotels Ltd. v Bank of Montreal*, [1987] 1 SCR 711 at paras 44, 51-53, 40 DLR (4th) 385 (SCC).

[160] *Maschinenfabrik Seydelmann K-G v Presswood Brothers Ltd.*, [1966] 1 OR 316, 1965 CarswellOnt 220 at paras 16-21 (Ont CA).

(b) The Court of Appeal

133. The majority rejected Ontario's submissions concerning the applicability of the indirect fettering doctrine.[161] Justice Laskin did not deal with the issue given his conclusion that the 1985 Indemnity did not cover costs related to the Director's Order.[162]

134. The majority of the Court of Appeal cited three principal factors in upholding the motions judge's decision: (a) the motions judge did not imply a term into the 1985 Indemnity; (b) there was no express language in the 1985 Indemnity which purported to fetter Ontario's legislative powers; and (c) *Pacific National (1)* was, in any event, limited to the exercise of contractual powers by a municipality.[163] They concluded that this case was more analogous to *Wells* and that Ontario should have passed legislation to relieve itself of any financial liability.[164]

135. The first of these conclusions is incorrect and is closely related to the second. The majority failed to appreciate that the motions judge could not have concluded that the 1985 Indemnity covered costs incurred under legislation enacted in 1990 without implying such a term. The third reflects an unduly narrow interpretation of *Pacific National (1)* and a failure to appreciate that the 1985 Indemnity is not a business contract.

(c) The 1985 Indemnity Contains no Commitment to Compensate for Future Legislative Change

136. Ontario repeats its earlier submission concerning the motions judge's implication of terms. The 1985 Indemnity does not contain an express commitment to pay compensation resulting from liability created under future statutes or statutory amendments and there is no basis in law for the motions judge to have implied such a term.

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[161] COA Decision, *supra* note 2 at paras 120-24, Brown JA, AR, Vol I, Tab 5, pp 68-69.
[162] *Ibid* at para 205, Laskin JA, AR, Vol I, Tab 5, p 100.
[163] *Ibid* at paras 120-24, Brown JA, AR, Vol I, Tab 5, pp 68-69.
[164] *Ibid* at para 127, Brown JA, AR, Vol I, Tab 5, p 70.

(d) Ontario Never Submitted that the 1985 Indemnity Contained an Express Commitment Regarding Future Legislation

137. The majority of the Court of Appeal concluded "… no language in the [1985] Indemnity purports to fetter, in any way, Ontario's legislative powers."[165]

138. Ontario never submitted that there was an *express* agreement to compensate for legislative obligations resulting from unknown future legislation. Like the motions judge, the majority failed to appreciate the distinction between legislation existing at the time the 1985 Indemnity was signed and legislation that did not yet exist. They failed to recognize that any obligation to compensate for costs arising out of future legislative action would engage the public policy concerns motivating this Court's decision in *Pacific National (1).*

(iii) The Municipal Legislative Powers Explanation of *Pacific National (1)* is Unduly Narrow

139. In *Pacific National (1)* this Court said that municipal councils should be free to govern "based on the best interests of their residents."[166] The Court of Appeal should not have interpreted *Pacific National (1)* as turning on only the improper exercise of municipal legislative powers. There are sound policy reasons why the indirect fettering doctrine should generally also apply in the case of provincial legislation. As noted, the doctrine of indirect fettering is a manifestation of the more general rule that promises by government officials concerning the future exercise of legislative authority are legally ineffective.

140. The provincial Crown may make any contract that an individual may unless it is prohibited from doing so by statute. It does so extensively in its delivery of services and goods to the public. This is in contrast to Crown corporations and municipal governments who may only enter into contracts when specifically empowered to do so by statute.[167]

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[165] *Ibid* at para 123, Brown JA, AR, Vol I, Tab 5, p 69.
[166] *Pacific National (1), supra* note 6 at para 71.
[167] *Pharmaceutical Manufacturers Assn of Canada v British Columbia (AG)* 1997, 149 DLR (4th) 613, 1997 CanLII 4597 at paras 27-28 (BC CA); *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, 1994 CarswellBC 115 at para 55 (SCC); Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters Canada, 2017) at §2.20.20(2)(a).

141. In comparative terms, the number of contracts potentially impacted by future legislation and their financial magnitude is greater in a provincial rather than a municipal context. Accordingly, the protection afforded the public purse by the indirect fettering doctrine is all the more important in a provincial setting.

(iv) The 1985 Indemnity is not a Business Contract

142. The motions judge's erroneous conclusion that the 1985 Indemnity was a business agreement was pivotal to his rejection of Ontario's fettering argument.[168] The majority upheld his conclusion but in doing so did not address the qualitative properties of a business contract and whether the 1985 Indemnity, as part of the Settlement, was correctly categorized by the motions judge as such an agreement.[169]

143. The failure by the majority to fully appreciate the circumstances of the Settlement and the true nature of the 1985 Indemnity was a significant error. Seen in proper context, the 1985 Indemnity is not a business contract. As Justice Laskin observed, the Settlement documents did "so much more" than just settle the First Nations Litigation.[170] The focus was on addressing the health and welfare related claims raised in that litigation and resulted in the establishment of the Mercury Disability Board and Fund as well as the related provincial and federal Acts.[171] The Court of Appeal should have corrected the motions judge's finding that the 1985 Indemnity was a business agreement.

(v) There was no Basis for the Court of Appeal to Conclude that Ontario should have Enacted Exculpatory Legislation

144. The enactment of ad hoc legislation to relieve from contractual liability is extraordinary. The majority of the Court of Appeal erred in expecting it in this case.

145. The 1990 amendments to the *EPA* reflect an environmental policy initiative to address legacy pollution. They were wide-ranging in scope and not confiscatory in nature. As stated, the amendments were not comparable to the legislation in *Wells* where it was immediately clear that

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[168] SCJ Decision, *supra* note 61 at paras 51-54, AR, Vol I, Tab 1, pp 12-13.
[169] COA Decision, *supra* note 2 at paras 119-27, Brown JA, AR, Vol I, Tab 5, pp 69-70.
[170] *Ibid* at para 219, Laskin JA, AR, Vol I, Tab 5, p 105.
[171] *Ibid* at para 28, Brown JA, AR, Vol I, Tab 5, pp 36-37.

it would have a profound and negative effect on Mr. Wells. In *Wells* it would have been reasonable to expect exculpatory legislation to have been enacted along with the legislation that abolished the board if the intention was to avoid paying contractual damages.

146. In any event, if Ontario is correct in its position that the 1985 Indemnity is limited to third party claims there is no liability from which to absolve itself legislatively.

(vi) The Business Contracts Exception to the Indirect Fettering Rule

147. Beyond the mischaracterization of the 1985 Indemnity in this case, there is larger difficulty with the business contracts exception. *Pacific National (1)* provides little guidance as to what constitutes a business contract for purposes of the exception. Subsequent case law from lower courts has also not clarified its scope.[172]

148. While Ontario enters numerous contracts of many kinds with the private sector, the province is not a profit driven entity nor a business as the term is commonly understood. Although many government agreements have commercial elements, it does not follow that they would necessarily constitute business agreements for the purposes of the exception.

149. Virtually all government contracts are made to facilitate a governmental or public interest purpose. Even agreements that appear on their face to be motivated by purely commercial objectives (*e.g.*, a loan or share purchase agreement), are intended to achieve public policy objectives rather than ordinary commercial ones.

150. For this reason, in considering whether an agreement constitutes a business contract, the inquiry should focus directly on the government's commitment to pay compensation in response to future legislative action, rather than the "business" character of the contract itself. Viewed in this way, the business contract exception represents an acknowledgement of the government's authority to make commitments involving a genuine allocation of commercial risks, even if those risks relate to the possibility of legislative developments. The government should, like any

[172] See *Rio Algom, supra* note 158 at paras 153-55; *Ontario First Nations (2008) Limited Partnership v Aboriginal Affairs (Ontario)*, 2013 ONSC 7141 at para 58, 118 OR (3d) 356.

contracting party, be free to assume the financial risk associated with future changes in the applicable law.

151. Different considerations apply in the case of a commitment that represents a veiled attempt to bind or impede the future decision-making of the legislature by attaching adverse financial consequences to such decisions. Such a commitment would constitute an unlawful attempt to do indirectly what the rule against fettering prevents government officials from doing directly. Unlike a promise reflecting a genuine allocation of commercial risk between contracting parties, a promise designed to indirectly interfere with legislative discretion could not reasonably be characterized as a feature of a normal business contract.

152. In any case, due to the important public policy dimension to these kinds of commitments, unequivocal evidence of contractual intent should be required before inferring any obligation on the part of the Crown to pay compensation in respect of future legislative action. This high evidentiary threshold is consistent with the view that the government does not make such commitments lightly. The Court appears to have accepted this point in *Pacific National (1)*.[173]

153. The requirement of unambiguous contractual language ensures that the scope of any promise related to the possibility of legislative action does not exceed the government's lawful authority. Implying this kind of commitment, as the motions judge did, as part of a generally worded indemnity provision creates the risk of vague and overbroad liabilities that could operate as a disincentive to legislate in a way that is inconsistent with the important public policy concerns underlying *Pacific National (1)*.

(vii) *Pacific National (1)* and *Pacific National (2)* are Reconcilable

154. In *Pacific National (2)*, a differently constituted Court upheld the trial judge's award of $1.08M to the developer based on unjust enrichment.[174]

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[173] *Pacific National (1), supra* note 6 at para 32.
[174] *Pacific National (2), supra* note 7 at paras 1, 59.

155. This approach is a fair balancing of interests. There is a significant difference between making an award of expectation damages for breach of contract and compensating a plaintiff based on principles of unjust enrichment. The measure of compensation in each of these instances is very different and the disincentive to legislate, accordingly, is not substantially impacted in the latter case.

PARTS IV AND V – ORDER REQUESTED

156. Ontario asks that this appeal be allowed with costs here and below.

Dated at the City of Toronto, in the Province of Ontario, this 4th day of January, 2019.

Leonard F. Marsello

Tamara D. Barclay

Nansy Ghobrial

PART VI – TABLE OF AUTHORITIES

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