SCC File No. 37985

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

BETWEEN:

RESOLUTE FP CANADA INC.

Appellant
(Respondent)

– and –

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE MINISTRY OF THE ATTORNEY GENERAL and
WEYERHAEUSER COMPANY LIMITED

Respondents
(Appellants)

AND BETWEEN:

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

Appellant
(Appellant)

– and –

WEYERHAEUSER COMPANY LIMITED and
RESOLUTE FP CANADA INC.

Respondents
(Respondents)

AND BETWEEN:

WEYERHAEUSER COMPANY LIMITED

Appellant
(Respondent)

– and –

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

Respondent
(Appellant)

FACTUM OF THE RESPONDENT, WEYERHAEUSER COMPANY LIMITED TO THE APPEAL BY HER MAJESTY THE QUEEN

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

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PART I – STATEMENT OF FACTS

I. OVERVIEW

1. The Province of Ontario seeks to avoid the clear words of an Indemnity or, in the alternative, to extend the fettering doctrine to a business contract in order to render the Indemnity unenforceable. These attempts should fail in this Court as they did in both of the Courts below.

2. The province granted the Indemnity to address mercury contamination on a property near Dryden, Ontario. The Indemnity was part of the settlement of a lawsuit and replaced a previous indemnity that the province had granted in order to make possible the sale of the property and the continuation of a pulp and paper business that was essential to the local economy.

3. The province agreed to indemnify the property owner against any "obligation, liability, damages, loss, costs or expenses" resulting from **any** claim, action or proceeding with respect to the past contamination of the property.

4. The Indemnity, by its terms, contains no time limit, applies to "statutory" claims, and applies to claims, actions and proceedings brought by "governments…including any province… or any agency, body or authority ..." This language, read in light of the surrounding circumstances, cannot reasonably bear any meaning other than that it applies to cover the liability imposed by the Director's Order at issue in this appeal. The province's arguments seek not to interpret the indemnity but to rewrite it.

5. In the alternative, the province argues that the Indemnity does not apply because enforcing it would offend the fettering doctrine. That position is contrary to this Court's previous decisions, which have held consistently that the fettering doctrine does not apply to business agreements. Business agreements are contracts that, like the indemnity, relate to the exercise of the government's executive functions, but do not limit its legislative discretion. Accepting the province's position would effectively exempt it from the private law of contracts.

6. The province's appeal should be dismissed with costs.

II. BACKGROUND FACTS

7. The essential facts in this case are not in dispute. The parties disagree as to their relative importance. The province places considerable emphasis upon some of the circumstances in which it granted the Indemnity, while ignoring others. The respondent, Weyerhaeuser Company Limited, disagrees with how the province characterizes the surrounding circumstances. Weyerhaeuser sets out below what it considers to be the relevant facts surrounding the Indemnity.

A. The Property and the Site

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

9. The Dryden companies discharged untreated mercury waste into the nearby river system. In 1971, they constructed a waste disposal site on the property to serve as a burial site for the mercury waste. The province has been aware of the contamination of the waste disposal site since the 1970s and began imposing environmental compliance conditions upon its owners in 1977.[1]

B. The Grassy Narrows and Islington Band's Litigation

10. In 1977, members of two First Nations Bands affected by the property's contamination commenced a lawsuit against Dryden Paper and its successor, Reed Limited.[2]

11. Reed entered into negotiations to sell the property to Great Lakes in 1979. Great Lakes was reluctant to purchase the property without protection from environmental liability. The

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[1] Motion Decision, para. 7, Joint Appeal Record [JAR], Vol. 1, Tab 1, p. 2; Appeal Decision, paras. 9-11 and 14, JAR, Vol. 1, Tab 5, pp. 30-31.

[2] Motion Decision, para. 1, JAR, Vol. 1, Tab 1, p. 1; Appeal Decision, para. 15, JAR, Vol. 1, Tab 5, p. 31.

province was concerned that if Great Lakes did not purchase the property, the Dryden pulp and paper mill might close, damaging the local economy.[3]

12. In order to induce Great Lakes to purchase the property, and invest in the modernization of the pulp and paper mill's operations, the province granted an indemnity by entering into a letter agreement with Great Lakes (sometimes referred to as the "1979 Indemnity").[4]

13. The First Nations settled the lawsuit with the province, Her Majesty the Queen (as represented by the Minister of Indian Affairs and Northern Development), Reed and Great Lakes in 1985. The settlement documents included a Memorandum of Agreement and an Escrow Agreement. In its recitals, the Memorandum of Agreement defines the "issues" it addresses as follows:

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

14. The Memorandum of Agreement also includes provisions requiring the province to provide Great Lakes with an indemnity, pursuant to which:

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

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

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[3] Motion Decision, paras. 8-9, JAR, Vol. 1, Tab 1, p. 2; Appeal Decision, para. 17, JAR, Vol. 1, Tab 5, p. 32.

[4] Motion Decision, para. 9, JAR, Vol. 1, Tab 1, p. 2; Appeal Decision, paras. 19-20, JAR, Vol. 1, Tab 5, pp. 32-33.

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

15. On June 26, 1986, the Supreme Court of Ontario approved the settlement of the Lawsuit in accordance with the terms of the Memorandum of Agreement and granted a judgment that included the following paragraph:

> 1. THIS COURT ORDERS AND DECLARES that the Settlement of the within action in accordance with the terms of the Memorandum of Agreement is hereby approved.[6]

16. The province's affiant admitted that the "settlement package" included the Indemnity.[7] In other words, the Indemnity formed part of the settlement approved by the Supreme Court of Ontario in its 1986 judgment.[8] There is no evidence that the province opposed the 1986 Judgment or ever appealed from it.

17. The Legislature of the Province and the Parliament of Canada each enacted a statute to abolish all rights of claim raised by the plaintiffs in the lawsuit and give effect to the settlement. The statutes passed by the Legislature and by Parliament constituted legislative validation of the settlement package, including the Indemnity.[9]

C. The Indemnity

18. In accordance with the terms of the settlement, the province granted Great Lakes and Reed a new Indemnity (the "Indemnity").

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[5] Motion Decision, paras. 11-14, JAR, Vol. 1, Tab 1, pp. 2-3; Appeal Decision, paras. 25-26, JAR, Vol. 1, Tab 5, p. 36.

[6] Affidavit of Charles K. Douthwaite, sworn November 24, 2014 [Douthwaite Affidavit], para. 16, and Exhibit "B", JAR, Vol. 6, Tab 28, p. 6 and Tab 28B, pp. 21-23.

[7] Affidavit of Trina Rawn, sworn October 14, 2014 [Rawn Affidavit], para. 21, JAR, Vol. 4, Tab 27, p. 77.

[8] Factum of Her Majesty the Queen as Represented by the Ministry of the Attorney General [Province's Factum], para. 1.

[9] Motion Decision, paras. 14-15, JAR, Vol. 1, Tab 1, p. 3; Appeal Decision, para. 36, JAR, Vol. 1, Tab 5, p. 40. Rawn Affidavit, para 18, JAR, Vol. 4, Tab 27, p. 6. Douthwaite Affidavit, para. 17, JAR, Vol. 6, Tab 28, p. 6. Province's Factum, para. 2.

19. By its express terms, the Indemnity: (i) applied to all claims, actions and proceedings, "whether statutory or otherwise"; (ii) applied to any province or any agency, body or authority created by statutory or other authority; and (iii) was of unlimited duration.

20. The Indemnity includes the following provision:

> 1. **Ontario** hereby covenants and **agrees to indemnify** Great Lakes, Reed, International and any company which was at the Closing Date a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and **against any obligation, liability, 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 (**including those arising** or asserted **after the date of this agreement**), whether **by** individuals, firms, companies, **governments (including** the Federal Government of Canada and **any province** or municipality thereof **or any agency, body or authority created by statutory or other authority)** or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the Dryden Agreement (hereinafter referred to as "Pollution Claims"). It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International.[10]

21. The motion judge and the majority of the Court of Appeal for Ontario agreed that the Indemnity was sufficiently broad to apply to environmental enforcement orders made by the province itself.[11]

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[10] Indemnity, Exhibit "J" to the Rawn Affidavit, JAR, Vol. IV, Tab 27 J, p. 189 - 190, clause 1, [Emphasis added]. Motion Decision, paras. 17-18, JAR, Vol. 1, Tab 1, p. 3-4; Appeal Decision, paras. 31-33, JAR, Vol. 1, Tab 5, pp. 37-40.

[11] Appeal Decision, para. 128, JAR, Vol. 1, Tab 5, p. 71.

D. Weyerhaeuser's Purchase of the Dryden Property

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

23. The 1998 Agreement included a description of the assets that Weyerhaeuser was purchasing, including the contractual rights and indemnities relating to the Dryden operation. The motion judge and the majority of the Court of Appeal agreed that the 1998 Agreement assigned to Weyerhaeuser the full benefit of the Indemnity. That issue is addressed in the factum that Weyerhaeuser filed in its own appeal from the decision of the Court of Appeal for Ontario.

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

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

25. Due to a delay in obtaining the severance, Weyerhaeuser held legal title to the waste disposal site for approximately two years (until August 25, 2000). During this time, Weyerhaeuser leased the waste disposal site back to Bowater, so that Bowater remained in control and possession of the waste disposal site. Weyerhaeuser did not in any way cause or contribute to the waste disposal site's contamination.[12] At the end of the two year lease, Bowater obtained the severance and resumed legal title to the waste disposal site (of which it had retained possession throughout).[13] Weyerhaeuser sold the Dryden pulp and paper operation (not including the waste disposal site) to Domtar Inc. in 2007.[14]

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[12] Motion Decision, para. 22, JAR, Vol. 1, Tab 1, p. 6

[13] Motion Decision, para. 23, JAR, Vol. 1, Tab 1, p. 6.

[14] Motion Decision, para. 24, JAR, Vol. 1, Tab 1, p. 6; Appeal Decision, para. 42, JAR, Vol. 1, Tab 5, p. 41.

26. In 2011, more than ten years after Weyerhaeuser had ceased to hold legal title to the waste disposal site, the Director of the Ministry of the Environment and Climate Change issued a Director's Order, which requires Weyerhaeuser, Resolute and others, to provide mandatory environmental monitoring, reporting and financial assurance in respect of the waste disposal site. Weyerhaeuser appealed the Order to the Environmental Review Tribunal.[15]

27. Weyerhaeuser commenced an action against the province in May 2013 seeking an order requiring the province to indemnify Weyerhaeuser for all costs it incurred, and may be required to incur in the future, as a result of the Director's Order.[16]

III. PROCEDURAL HISTORY

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

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

29. The three issues before the motion judge were:

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

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

(c) Assuming the Indemnity would otherwise apply, is it unenforceable under the fettering doctrine?[17]

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[15] Motion Decision, paras. 26-27, JAR, Vol. 1, Tab 1, p. 6; Appeal Decision, paras. 50-52, JAR, Vol. 1, Tab 5, pp. 43-44.

[16] Appeal Decision, para. 53, JAR, Vol. 1, Tab 5, p. 44.

[17] Motion Decision, para. 28, JAR, Vol. 1, Tab 1, p. 6.

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

31. The motion judge found as a matter of mixed fact and law that the province in granting the Indemnity intended to assume liability for all aspects of the property's mercury contamination:

> The ordinary and grammatical meaning of these words makes it clear that the Province agreed to indemnify Great Lakes for any costs or expenses resulting from any claim or proceeding, which may be asserted thereafter by a government, including any province or statutory agency with respect to the discharge or presence of any pollutant on the Dryden property.[18]

32. The motion judge found that the broad wording of the Indemnity indicated that the parties intended it to apply to a statutory claim or proceeding brought by a provincial agency, such as the Director's Order issued by the Ministry of the Environment.[19] His Honour considered the factual matrix, which supported an interpretation that adheres to the ordinary and grammatical meaning of the words used in the Indemnity. Accordingly, the motion judge concluded that the Indemnity covered the costs of complying with the Director's Order.[20]

33. The issue of whether Weyerhaeuser could rely upon the Indemnity as a successor or assign is addressed in Weyerhaeuser's appeal from the Court of Appeal's decision.

34. Finally, the motion judge held that the Indemnity did not improperly fetter the province's discretion, because: (i) the fettering doctrine only applies to agreements that restrict legislative functions and not to business agreements; (ii) the province's position amounted to a collateral attack on the judgment that approved the settlement; and (iii) the province, presumably having entered into the agreement in good faith and with the expectation that it would be enforceable, was subject to the private law of contracts.[21]

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[18] Motion Decision, para. 42, JAR, Vol. 1, Tab 1, p. 9.

[19] Motion Decision, paras. 44-47, JAR, Vol. 1, Tab 1, pp. 9-10.

[20] Motion Decision, paras. 44-47, JAR, Vol. 1, Tab 1, pp. 9-10.

[21] Motion Decision, para. 51, JAR, Vol. 1, Tab 1, p. 12.

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

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

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

37. The majority upheld the motion judge's findings that: (i) the Indemnity applied to costs arising out of compliance with the Director's Order; and (ii) the Indemnity was not unenforceable under the fettering doctrine. The Court of Appeal's determination concerning Weyerhaeuser's right to rely upon the Indemnity as a successor or assign is addressed in Weyerhaeuser's appeal from the decision.

38. The majority dismissed each of the province's arguments as to why the motion judge erred in interpreting the scope of the Indemnity, including the following arguments that the province repeats before this Court:

(a) The province's claim that the motion judge erred by stating that the waste disposal site discharged mercury into the nearby river system: The majority held that while the motion judge was mistaken in suggesting that the site had caused contamination, this was not a palpable and overriding error. This minor misapprehension "did not undermine the motion judge's unimpeachable finding that in 1985 it was known the WDS [waste disposal site] posed a serious environmental liability".

(b) The province's claim that the motion judge erred by making an unsupported finding of fact that Great Lakes continued to spend significant amounts of money to modernize the pulp and paper operations in Dryden: The majority held that the motion judge did not err because the record disclosed that Great Lakes made such expenditures on facility modernization from 1980 until 1985 (not only until 1982, as the province suggests).

(c) The province's claim that the motion judge erred in law by failing to interpret s. 1 of the Indemnity in light of all of the terms of the Indemnity, including the provision that

required Weyerhaeuser to give notice to the province of any claims: The majority held that there was no reversible error in the motion judge's conclusion that the "notice of claim" provision and related terms in the Indemnity were not inconsistent with the province's obligation to indemnify Weyerhaeuser.

39. The majority also dismissed the province's submission that the motion judge erred in law by interpreting the Indemnity in a manner that indirectly fettered the province's legislative discretion. While the province argued that the motion judge implied into the Indemnity a term requiring the province to compensate the indemnitees for costs, the majority held that it was clear that the motion judge's decision was based on His Honour's reading of the express language of the Indemnity and did not require him to imply any terms. The majority also found that no language in the Indemnity purported to fetter, in any way, the province's legislative powers. Ultimately, the majority concluded that, absent legislation to relieve itself from the financial obligations it assumed under the Indemnity, the province remained bound by the terms of its bargain.[22]

40. The dissenting Justice (Laskin J.A.) would have found that the Indemnity did not apply to the Director's Order at all, based upon a reading of the Indemnity as a whole. Weyerhaeuser addresses this argument, which the province repeats on this appeal, below. Having found that the Indemnity did not apply to the Director's Order, Laskin J.A. did not have to consider whether it fettered the province's legislative powers impermissibly.[23]

PART II – THE QUESTIONS IN ISSUE

41. The Province's Factum sets out four issues:

(a) Did the majority err in failing to correct the motion judge's approach to this Court's decision in *Sattva* and in upholding the motion judge's judge conclusion that the

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[22] Appeal Decision, paras. 162 – 166, 170, 171, 178, 184, 193 and 195, JAR, Vol. 1, Tab 5, pp. 81-86, 89-90, 92, and 95-96.

[23] Appeal Decision, paras. 264 and 270, JAR, Vol. 1, Tab 5, pp. 124 and 127.

Indemnity covers first party claims and that the Director's Order gives rise to a Pollution Claim as contemplated in the Memorandum of Agreement?

(b) Did the majority err in not correcting the motion judge's failure to consider the Indemnity as a whole, thereby ignoring its control of defence and cooperation clauses?

(c) Did the majority err in failing to recognize that two errors of fact made by the motion judge were of a palpable and overriding nature?

(d) Did the majority err in failing to correct the motion judge's decision that the 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)*?

42. Weyerhaeuser's response to the Province's Factum is organized as follows:

(a) What standard of review applies to the motion judge's decision?

(b) Was there a palpable and over-riding error in the motion judge's interpretation of the Indemnity? Specifically, did the motion judge: (i) correctly apply this Court's decision in *Sattva*; (ii) consider the Indemnity as a whole; and (iii) appropriately consider the factual matrix surrounding the Indemnity?

(c) Did the motion judge err in finding that the fettering doctrine does not render the Indemnity unenforceable?

PART III – STATEMENT OF ARGUMENT

I. STANDARD OF REVIEW

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

44. This Court has held that the interpretation of a contract is a question of mixed-fact-and-law. As a result, the motion judge's decision could only be overturned if it was the result of a

palpable and overriding error.[24] The palpable and overriding error standard requires the error to be "clearly wrong" or plainly seen, and to be one that would have altered the result or that may well have altered the result. The standard emphasizes the need to "put one's finger on the crucial flaw, fallacy or mistake" before appellate intervention is warranted.[25]

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

> Palpable and overriding error is a highly deferential standard of review … "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[26]

46. Weyerhaeuser agrees that questions of law attract a standard of review of correctness. However, as set out in greater detail below, aside from the issues concerning the fettering doctrine, none of the errors alleged by the province are pure matters of law that would attract that standard.

II. THE INTERPRETATION OF THE INDEMNITY

47. The province submits that the motion judge erred in his application of this Court's decision in *Creston Moly Corp v. Sattva Capital Corp.* by failing to consider the Indemnity as a whole, and by failing to consider the factual matrix within which it was granted. Finally, the province points to a number of inconsequential factual errors in the motion judge's decision, that did not affect the outcome of the case.

48. In advancing these grounds of appeal, the province asks this Court to look at everything but the language of the Indemnity in order to construe its meaning. This is not the correct application of *Sattva*. It is an attempt to circumvent the clear and unequivocal terms in the Indemnity that refer to an obligation on the part of the province to indemnify Weyerhaeuser for

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

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

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

the costs of complying with a statutory claim. Weyerhaeuser submits that the motion judge and majority were correct in finding that the language of the Indemnity, viewed in the context of the circumstances surrounding its formation, supported this interpretation.

A. The Courts' Approach to *Sattva*

49. The province argues that the majority of the Court of Appeal, "failed to correct the motion judge's erroneous application of this Court's decision in *Sattva Capital Corp. v. Creston Moly Corp*."[27] Before considering the specific errors that the province attributes to the motion judge's analysis, it is important to review the approach to contractual interpretation set out in *Sattva*.

50. While the province's arguments focus on what they assert to be the insufficient weight that the motion judge gave to the factual matrix, in *Sattva* this Court emphasized the primacy of the text of a contract:

> While the **surrounding circumstances** will be considered in interpreting the terms of a contract, they **must never be allowed to overwhelm the words of that agreement** ... The goal of examining such evidence is to deepen a decisionmaker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract .. . While the surrounding circumstances are relied upon in the interpretative process, **courts cannot use them to deviate from the text such that the court effectively creates a new agreement**.[28]

51. In this case, the province attempts to use the factual matrix to create a new agreement between the parties. Specifically, it asks the Court to replace the actual terms of the Indemnity with a markedly different agreement that does not apply to "statutory" proceedings brought by "any province". This is not an attempt to interpret the Indemnity that the province granted in 1985. It is an attempt to replace the Indemnity with the contract that the province now wishes it had entered into in 1985.

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[27] Province's Factum, para. 4.

[28] *Sattva, supra*, para. 57 [Emphasis added]. *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, para. 37.

52. The province concedes (properly) that "Clause 1 [of the Indemnity] purports to capture every conceivable claim by a variety of claimants."[29] Both below and on this appeal, the province has failed to advance any interpretation of the 1985 Indemnity that would render it inapplicable to the Director's Order, while still giving a plausible meaning to the agreement's express reference to statutory proceedings brought by a province or agency. Instead, the province seeks to use the surrounding circumstances to override the clear language of the 1985 Indemnity. This is precisely what a court may not do, as held by this Court.

B. The Indemnity as a Whole Supports the Motion Judge's Interpretation

53. The province submits that the motion judge erred in law by failing to consider the Indemnity as a whole. Specifically, the province points to the notice and defence and settlement provisions of the Indemnity, which the province submits are typical of third party indemnities and "make it clear" that the Indemnity was not meant to address first party claims.

54. It is not correct to suggest, as the province does, that the motion judge erred in law by failing to consider the other provisions of the Indemnity. He considered them. He simply rejected the province's argument that the existence of those provisions could overwhelm the express reference to statutory claims brought by any province. The motion judge's decision on this point was therefore a matter of contractual interpretation. As a finding of mixed fact and law, the motion judge's interpretation of the Indemnity can only be overturned if it contains a palpable and overriding error.

55. As the motion judge found, and the majority upheld, there is no inconsistency between the notice, defence and settlement provisions and the province's obligation to indemnify Weyerhaeuser for the Director's Order. The Indemnity covers a wide range of claims. For some of them, the notice, defence and settlement provisions would be relevant. For others, like Weyerhaeuser's claim to be indemnified in respect of the Director's Order, they may not. The fact that some procedural provisions may be unnecessary or redundant in the case of certain types of claims does not mean that a Court should ignore clear language confirming that those

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[29] Province's Factum, para. 93.

claims are covered by the Indemnity. The fact that not every clause in an agreement applies in every circumstance does not negate other sections in the agreement.

56. Furthermore, as held by the Court of Appeal, a court interpreting a contract should read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result.[30]

57. If the province's interpretation were correct, and the 1985 Indemnity did not apply to the province's own regulatory orders, then it would have been open to the province to make an order against the property's owner the day after having induced the owner to pay millions of dollars to settle a lawsuit. No reasonable company would have agreed to a settlement that left it exposed to this type of liability.

58. Accordingly, the motion judge found, as a fact, that:

> Under the circumstances, it would be commercially absurd to conclude that the parties contemplated that the Province could at any time withdraw its commitment to protect Great Lakes and its successors from environmental liability arising from the disposal site and issue an order requiring Great Lakes or its successors to incur substantial costs to remediate the site.[31]

59. The Court of Appeal held, correctly, that there was an evidentiary basis to support this finding.[32]

60. Accordingly, Weyerhaeuser submits that the motion judge and the majority of the Court of Appeal did not err in finding that the notice, defence and settlement provisions cannot override or negate the otherwise express and unequivocal language in the Indemnity.

C. The Factual Matrix Supports the Motion Judge's Interpretation

61. The province argues that the motion judge failed to interpret the Indemnity within its factual matrix. Weyerhaeuser submits, to the contrary, that the motion judge not only considered

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[30] Appeal Decision, para. 65, JAR, Vol. 1, Tab 5, pp. 48-49, *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, para. 24.

[31] Motion Decision, para. 48, JAR, Vol. 1, Tab 1, pp. 10-11.

[32] Appeal Decision, para. 86, JAR, Vol. 1, Tab 5, p. 55.

the factual matrix, but concluded, correctly, that the surrounding circumstances supported Weyerhaeuser's interpretation, as the only one that was commercially reasonable.

62. The province argues that the motion judge erred by failing to consider:

(a) The 1979 letter agreement between the province and Great Lakes (which the province refers to as the 1979 Indemnity), through which the province induced Great Lakes to purchase the property.

(b) A 1979 agreement between Great Lakes and the property's previous owner, to which the province was not a party (which the province refers to as the "Dryden Agreement").

(c) A 1982 letter from the province's treasurer to Great Lakes (which the province refers to as the "Ramsay Letter").

(d) The 1980 amendments to Ontario's *Environmental Protection Act* (commonly referred to the "Spills Bill"[33]).

(e) The Memorandum of Agreement that embodied the 1985 settlement of the First Nations' lawsuit.

63. The province made these same arguments before the Court of Appeal. The Court of Appeal rejected them, and so should this Court.

i. The 1979 Indemnity, the Dryden Agreement and the Ramsay Letter

64. The province asserts that the motion judge ought to have considered the wording of the 1979 letter agreement, and a 1982 letter from the province's treasurer, Minister Ramsay, when interpreting the scope of the Indemnity. In a related submission, the province also asserts that the motion judge ought to have considered the fact that the indemnity contained in the 1979 Dryden Agreement, an agreement to which the province was not a party, did not include costs caused by regulatory orders.

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[33] *Environmental Protection Act*, RSO 1980, c C 141, Part IX – Spills, ss 79-112.

65. The province argues that because these earlier agreements contained indemnities that did not purport to cover the province's own regulatory orders, the Indemnity should be interpreted as equally inapplicable to such orders. With respect, this argument ignores the fact that the Indemnity is a separate agreement that contains different language – including an express reference to statutory proceedings brought by any province – from the language used in those earlier agreements.

66. The province's argument would require this Court to ignore the actual language of the Indemnity, and instead read the Indemnity "as if" it contained the same language as those other arguments. This defies logic. Logic suggests that the parties used different language in the Indemnity than in the previous agreements because they intended a different result.

67. The majority of the Court of Appeal correctly dismissed these arguments on the basis that the province's reliance on the terms of these other contracts constituted improper use of factual matrix evidence, and that they were distinct agreements whose terms had no bearing on the interpretation of clear terms used in the Indemnity. Specifically, the majority wrote as follows:

> Ontario argues that since the indemnity contained in the 1979 Dryden Agreement (to which Ontario was not a party) did not include costs caused by regulatory orders, nor did the 1979 and 1982 Indemnities (which were unilateral promises made by Ontario, not jointly executed agreements), it follows the scope of the Ontario Indemnity must be the same.
>
> By its terms, the Ontario Indemnity did not purport to amend the 1979 Dryden Agreement or the 1979 and 1982 Indemnities. Nor did it incorporate by reference the scope of the earlier indemnities. The Ontario Indemnity was a distinct deal. As such, its interpretation required focusing on the language used in that contract. That is what the motion judge did. I see no error in his use of the factual matrix; he used the evidence of the surrounding circumstances for the limited purpose identified in *Sattva*.
>
> Ontario also casts its submission too high by arguing the language of s. 1 of the Ontario Indemnity was "virtually identical" to that in s. 5.3 of the 1979 Dryden Agreement, which did not include an indemnity for regulatory costs. It was not. **The language of the Ontario Indemnity differed in a critical respect, requiring indemnification of any costs incurred as a result of "any claim, action or proceeding, whether statutory or otherwise" (emphasis added). The**

> **presence of the phrase "statutory or otherwise" strongly influenced the motion judge's analysis** …[34]

68. In relying on the terms of the indemnities granted in 1979 and 1982, and the Dryden Agreement, the province attempts to argue that a contract that contains an express reference to "statutory claims … by any province" should be read in the same way as a contract that does not include those words. However, it is a well-established principle that "[c]ontracting parties are presumed to have intended the ordinary meaning of their words."[35] By using different language in the Indemnity, the parties must have intended a result different from that which would have applied under the 1979 and 1982 indemnities.

ii. The Spills Bill

69. The province submits that the motion judge ought to have considered the Spills Bill in interpreting the scope of the Indemnity. Specifically, the province submits that the statutory right of action created by that legislation explains the references to "statutory" claims in the Indemnity that was absent from the earlier indemnities.

70. This argument must fail for three reasons: (i) as the Court of Appeal majority held, the enactment of the Spills Bill is inadmissible as evidence of the parties' specific intentions; (ii) even if it were admissible, the enactment of the Spills Bill cannot be used to contradict the intentions of the parties as clearly expressed in the terms of the Indemnity; and (iii) the fact that the parties may have been aware of the Spills Bills does not mean that the parties did not intend the Indemnity to apply to other statutory claims as well.

71. The majority dismissed this ground of appeal on the basis that the enactment of the legislation was inadmissible as evidence of the parties' specific negotiations or intentions. The majority wrote:

> Canadian common law generally treats evidence of the parties' specific negotiations as inadmissible for purposes of interpreting a contract: *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2012 ONCA 862 … at

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[34] Appeal Decision, paras. 95-97, JAR, Vol. 1, Tab 5, pp. 59-61.

[35] Geoff R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at p. 91.

> para. 71. In light of that principle (and until that principle of contract interpretation is changed as a matter of policy), evidence of the factual matrix cannot operate as a kind of alternate means by which an adjudicator constructs a narrative about what the parties must have discussed or intended in their negotiations. In other words, evidence of the factual matrix cannot be used to do indirectly that which the principles of contract interpretation do not permit doing directly. Therefore, contrary to Ontario's submission, it was not open to the motion judge to consider evidence of the parties' specific intentions or negotiations, including whether they discussed the Spills Bill during the negotiations that culminated in the execution of the Ontario Indemnity.[36]

72. Weyerhaeuser submits that the motion judge and majority were correct in concluding that the Spills Bill was not admissible for the purposes of determining the scope of the Indemnity. However, even if this evidence were admissible, the province is still left to explain the reference in the Indemnity to statutory claims brought by "any province". In their factum, the only rationale the province provides is that "[i]n context, 'province' does not mean Ontario."

73. To the contrary, the Indemnity's reference to "any province" viewed in context supports a finding that it includes the province of Ontario. The Wabigoon and English Rivers only flow through two provinces: Ontario and Manitoba. Only those two provinces could conceivably have had environmental claims. If the Indemnity was not intended to apply to claims by Ontario, the parties would have drafted the Indemnity to refer to claims only "by the province of Manitoba" rather than "by any province".

74. The suggestion that the reference to "any province" was intended to apply only to claims by Manitoba is even less plausible when the Indemnity is viewed in its historical context. In 1975, ten years before the province granted the Indemnity, this Court had upheld the striking out of a statutory claim in respect of the mercury pollution, brought against the owner of the Dryden property by the province of Manitoba. The majority of this Court held the relevant legislation to be *ultra vires* the Manitoba Legislature's authority, to the extent that it purported to afford the Government of Manitoba statutory remedies in respect of acts done in Ontario.[37]

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[36] Appeal Decision, para. 112, JAR, Vol. 1, Tab 5, pp. 65-66.

[37] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477 at p. 516.

75. Even if the parties were thinking of the Spills Bill when they drafted the Indemnity (and there is no evidence that they were), this does not mean that it was the only source of statutory claims that they intended the Indemnity to capture.

76. Of course, the parties would not have known in 1985 what amendments might be made to the *Environmental Protection Act* in the future, and what new types of claim such amendments might create. But the wording of the Indemnity demonstrates their intention that the province would assume responsibility for any environmental liabilities associated with the property, regardless of whether they arose out of claims that existed at the time or would come to be only as a result of future statutory amendments.

77. The majority accordingly rejected the province's submission (which it repeats before this Court)[38] that nothing in the language of the Indemnity indicates that the parties intended the term "statutory" to refer to claims arising from future legislation. The majority found that the plain wording of the indemnity contradicted the province's interpretation. The Indemnity expressly states that it applies to all claims "existing at December 17, 1979, or which may arise or be asserted thereafter". It also includes a clause that stipulates that the indemnity will be "valid without limitation as to time".

78. In addition, the majority rejected this submission of the province on the basis that there was legislation in existence at the time the Indemnity was signed that authorized preventative measures orders similar to the Director's Order. Specifically, the majority wrote:

> [A]t the time the parties executed the Ontario Indemnity, the EPA authorized the issuance of regulatory certificates and orders that could impose costs upon the owners of a site. For example, the certificates of approval issued in respect of the WDS prior to 1985 contained conditions requiring the site owner to install monitoring equipment and periodically sample ground and surface water. As well, amendments to the EPA that came into force in 1984 authorized the issuance of preventative measures orders compelling site owners to take certain actions: *Environmental Protection Amendment Act*, 1983, S.O. 1983, c. 52, s. 6. These 1984 amendments were the genesis of the Director's powers, now found in s. 18(1) of the EPA, to issue preventative measures orders. The 2011 Director's Order was made, in part, pursuant to s. 18(1). Accordingly, preventative measures

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[38] Province's Factum, para. 91.

> orders were a feature of the environmental legislative scheme at the time the parties entered into the Ontario Indemnity.

79. The province does not address these findings of the majority in their factum on this appeal.

iii. The Memorandum of Agreement

80. The province submits that the motion judge failed to consider the Indemnity in the context of the settlement as a whole, and that the motion judge and majority erred in failing to give effect to the Memorandum of Agreement that the parties entered into at the time of the settlement of the First Nations' lawsuit.

81. The province argues that the "issues" delineated in the Memorandum of Agreement were limited to matters relating to the discharge of mercury and other pollutants, and submits that because the waste disposal site was not a source of discharge, the Indemnity does not respond to the Director's Order.

82. Once again, the province ignores the language of the relevant contract. The Memorandum of Agreement includes express reference to: "the continuing presence of any such pollutants … and governmental actions taken in consequence thereof". Given the breadth of these "issues" described in the Memorandum of Agreement, Weyerhaeuser submits that the motion judge and majority did give effect to its terms, just not in the manner that the province would have preferred.

83. By the same token, the Indemnity itself applies to liabilities in relation to, "the discharge or escape or presence of any pollutant … from or in the plant or plants or lands or premises…" With respect, the dissenting judge in the Court of Appeal (upon whose decision the province relies) erred by overlooking this language when interpreting the Indemnity. Laskin JA found that the waste disposal site could not give rise to a pollution claim within the meaning of the Indemnity, because it was "created and used as solution to the mercury pollution problem" and "was not a source of ongoing mercury contamination". This finding ignores the fact that the Indemnity expressly applies not only to the discharge of pollutants, but also to their continued presence, anywhere on the property (including the waste disposal site). As a result, the Indemnity

applies to the Director's Order regardless of whether or not the waste disposal site is a source of "ongoing mercury pollution."

D. Previous Owners' Conduct Does Not Bind Weyerhaeuser

84. The province also relies on the fact that Great Lakes and its successors have agreed to take certain steps under previous orders from the Ministry of the Environment. However, Weyerhaeuser cannot be bound by or estopped as a result of what another party, over which Weyerhaeuser had no control, chose to do in response to these previous orders. Moreover, given the negligible costs associated with complying with those previous orders, Great Lakes and its successors had good reason to comply with the orders and not insist on indemnification.[39]

E. The Motion Judge's Minor Factual Errors Did Not Affect the Outcome

85. The province takes issue with two findings of fact that the motion judge made. The majority in the Court of Appeal held that these did not amount to palpable and overriding errors.

86. Specifically, the province submits that the motion judge made errors of fact when he found that:

(a) The waste disposal site itself (rather than operations on the property) discharged mercury into the nearby river system.

(b) Great Lakes continued to expend capital on modernizing the pulp and paper industry following the settlement of the First Nations' lawsuit.

87. In parsing the motion judge's reasons in order to identify these minor errors, the province fails entirely to demonstrate how they affected the outcome of the motions in any way. In particular, the province fails to draw any concrete connections between these alleged errors of fact and the motion judge's conclusion that the director's order is covered by the Indemnity. Without that connection, these errors of fact are not palpable or overriding, and the majority was

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[39] Transcript of the Cross-Examination of Trina Rawn, held December 17, 2014, pp. 33-41, JAR, Vol. 6, Tab 31, pp. 108-116.

correct to find no merit in these grounds of appeal. To paraphrase this Court's reasoning, the province's points to minor spots on some of the leaves, but leaves standing the "tree" of the motion judge's decision.

88. The majority held that the motion judge's finding that the waste disposal site discharged mercury itself was not a palpable and overriding error because it was otherwise clear on the record that in 1985 the site posed significant environmental liability. Specifically, the majority found as follows:

> I accept the motion judge was mistaken when he stated the WDS discharged mercury into the river. The evidence indicates it was the chloralkali plant that discharged mercury into the river. However, that mistake did not undermine the motion judge's unimpeachable finding that in 1985 it was known the WDS posed a serious environmental liability. The evidence disclosed all actors treated the WDS as such, both before and after the 1985 contract. I see no merit in this ground of appeal.[40]

89. The province argues that the motion judge erred, because he "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."[41] As noted above, Great Lakes provided fresh consideration in return for the Indemnity. Specifically, Great Lakes (together with Reed) agreed to pay $11.75 million collectively for the benefit of the First Nations Bands and agreed to replace the 1979 Indemnity.

90. Furthermore, the majority held that that the motion judge's finding that Great Lakes continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden after 1982 was not a palpable and overriding error. The evidence on the whole demonstrated that Great Lakes continued to make capital expenditures until 1985.

91. After noting this ground of appeal amounted to a "fine parsing by [the province] of the motion judge's language while ignoring the 'big picture' disclosed by the record, which

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[40] Appeal Decision, para. 82, JAR, Vol. 1, Tab 5, p. 54.

[41] Province's Factum, para. 104.

supported the motion judge's reasoning", the majority considered the evidence disclosed on the broader record, and held as follows:

> Great Lakes made capital expenditures on facility modernization from 1980 until 1985; the expenditures did not stop in 1982, as Ontario suggests. The 1982 letter from Minister Ramsay sought to bring Great Lakes back to the negotiating table with the First Nations after talks had reached "an impasse". It worked; Great Lakes came back. After rejoining the negotiations, Great Lakes continued to spend money on modernizing the Dryden plant, as disclosed in its 1983, 1984, and 1985 annual reports.[42]

92. Weyerhaeuser submits that the majority's review of the alleged errors of fact made by the motion judge is correct, and should be upheld.

III. THE FETTERING DOCTRINE DOES NOT APPLY

A. Introduction

93. The province argues, in the alternative, that the fettering doctrine prevents Weyerhaeuser from relying upon the Indemnity on the facts of this case. This issue is only relevant if the Indemnity would otherwise apply to the Director's Order. In effect, the province argues that it should not be held to the bargain it made or have to honour obligations that it took on willingly. The province cannot have considered the Indemnity to violate the fettering doctrine at the time it settled the First Nations' lawsuit. The province must be presumed to have acted in good faith when it granted the Indemnity and, accordingly, to have believed it to be fully enforceable.

94. Weyerhaeuser submits that the fettering doctrine does not apply in this case for five reasons:

(a) The doctrine applies only to agreements that restrict legislative functions and not to business agreements.

(b) The Indemnity is a business agreement that does not fetter a legislative discretion.

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[42] Appeal Decision, para. 86, JAR, Vol. 1, Tab 5, pp. 55 -56.

(c) Even if the Indemnity fettered legislative discretion, the province would still have to compensate Weyerhaeuser, unless the province has passed legislation that expressly deprived Weyerhaeuser of the right to compensation. The province has passed no such legislation.

(d) The fettering doctrine is, in any event, superseded by the fact that Parliament and the Ontario Legislature have enacted legislation incorporating the Indemnity.

(e) The province's reliance on the fettering doctrine is a collateral attack on the judgment that approved the settlement of the First Nations' lawsuit.

B. The Fettering Doctrine Does Not Apply to Business Agreements

95. The general rule is that governments are bound by their contracts in the same way as individuals or private companies. As the province acknowledges, "The provincial Crown may make any contract that an individual may unless it is prohibited from doing so by statute."[43] The province enjoys no general immunity from civil liability. The fettering doctrine constitutes a limited exception to the general rule. It does not apply to this case.

96. This Court has held that, under the fettering doctrine, an agreement cannot prevent a government from enacting legislation, although it may require the government to pay compensation if it breaches its agreement.

97. In support of its fettering argument, the province relies principally upon this Court's decision in *Pacific National Investments Ltd. v. Victoria (City).*[44] In that case, a developer sued the City of Victoria, after it passed a by-law rezoning the waterfront in a way that prevented further residential development that was contemplated by an earlier agreement between the developer and the City.

98. In a split decision (4-3), the majority of this Court found that the contract was unenforceable to the extent that it purported to prevent the City of Victoria from rezoning the

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[43] Province's Factum, para. 140.

[44] 2000 SCC 64 [*Pacific National No.1*].

lands. The majority of the Court rejected the developer's argument that enforcing the contract would not directly fetter the City's by-law making authority (because it would not prevent the rezoning), but would at most represent an "indirect fetter" (because it would require the City to pay damages if it did so)

99. In the majority's opinion, the relevant distinction was not between direct and indirect fettering, but between legislative and non-legislative functions:

> The distinction between direct and indirect fettering, as [the developer] conceives it, is simply not a useful distinction. The distinction between legislative powers, adjudicative powers, and business or proprietary powers, accepted elsewhere in our Court's jurisprudence . . . is the sole distinction that should apply . . . Unless there is legislation expressing a public policy permitting it to do so, a **municipality may engage in business and proprietary contracts, but it cannot agree to terms that fetter its legislative power.**[45]

100. It is important to note that, even the majority in *Pacific National No. 1* would have limited the application of the fettering doctrine to legislative functions. In addition, the majority recognized an exception for "business contracts":

> Moreover, municipalities will be bound by their business contracts. They will not be free to break them on mere whim. They will have to pay compensation to the other party barring an express statutory provision denying any form of compensation or damages. On the other hand, contracts concerning the exercise of legislative powers involve other legal rules and policy considerations, as appears from the discussion above of the rules against direct and indirect fettering of municipal authority.[46]

101. As used by this Honourable Court in *Pacific National No. 1*, the term "business agreement" captures any agreement that a government enters into that does not purport to fetter its legislative discretion.

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[45] *Ibid*., para. 65 [emphasis added].

[46] *Ibid*., para. 69.

102. The majority's decision in *Pacific National No. 1*, has been criticized for extending the fettering doctrine to cases of so called "indirect fettering",[47] and as being inconsistent with this Court's earlier decision in *Wells v. Newfoundland*, discussed below.[48] The case also contains a strong three-judge dissent, which would have held that "indirect fettering" is permissible.

103. Ontario courts have interpreted *Pacific National No.1* narrowly.

104. *Rio Algom Ltd. v. Canada*,[49] upon which the province relies, is particularly instructive. The defendant in that case asked the Ontario Superior Court of Justice to imply into a uranium-supply contract a provision that would have required the federal government to compensate the company when it passed regulations that required the company to remediate radioactive tailings. The government argued that such a term would violate the fettering doctrine. The motion judge found no basis for implying such a term, but held that, if such a term existed it would not be unenforceable under the fettering doctrine.[50]

105. The Ontario Superior Court of Justice reached a similar conclusion in another case that the province relies upon, *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*.[51] There, the Court considered the enforceability of an agreement, reached as part of the settlement of litigation, in which the Province of Ontario agreed to appoint a representative of the First Nations of Ontario to the Board of Directors of the Ontario Lottery and Gaming Commission. When the province had failed to do so five years later, the partnership representing the First Nations sought arbitration, and the province sought to strike the claim. One of the arguments put forward by the province was that its discretion to make appointments to the Commission could not be fettered by being made subject to review by an arbitration panel.

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[47] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 324-31.

[48] [1999] 3 SCR 199.

[49] 2012 ONSC 550.

[50] *Ibid*., paras. 152 - 155.

[51] 2013 ONSC 7141.

106. Lederer J. discussed the *Wells*, *Pacific National No. 1* and *Rio Algom* decisions and concluded that:

> Moreover, I would not be so quick to accept the Revenue Sharing Agreement as something other than a business obligation similar to the agreement referred to in *Wells v. Newfoundland*. It was a contract entered into to settle litigation which considered who had the right to the profits of a large and successful casino. The Revenue Sharing Agreement is a business agreement and not a legislative act, such as the down-zoning in *Pacific National Investments Ltd. v. Victoria (City)*.
>
> To go back to where these reasons begin, it should not be a common or simple matter for the Crown to breach its agreements with impunity. We should be able to expect more than that ...[52]

107. While certain aspects of the fettering doctrine remain unsettled (in particular, as to the permissibility of so-called "indirect fettering", and the application of the doctrine outside of the municipal context), the Court does not have to resolve those aspects in this case. This Court's jurisprudence clearly establishes that it applies only to legislative action and does not apply to "business agreements" that only relate to executive action.[53] In none of the cases that follow *Pacific National No. 1* that the province relies upon did a Court apply the fettering doctrine to a non-legislative action.[54]

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[52] *Ibid*., paras. 58 -59.

[53] *Ocean Wise Conservation Authority v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58 at para. 48.

[54] The Supreme Court of Newfoundland and Labrador (Court of Appeal) did purport to apply the fettering doctrine to executive action in *Andrews v. Canada (Attorney General)* ("*Andrews 1*"), 2009 NLCA 70, leave denied, 2010 SCCA 61. Weyerhaeuser submits that *Andrews 1* was wrongly decided. The Court of Appeal, para. 39 of its decision that this Court had "left no doubt" in *Pacific National No. 1* that the fettering doctrine applied to the exercise of executive discretion. This is incorrect. *Pacific National No. 1* is authority for the fact that the doctrine applies to legislative functions, <u>not</u> executive ones. *Andrews 1* has been questioned by both the Newfoundland Court of Appeal itself (*Andrews v. Canada (Attorney General)*, 2014 NLCA 32, para. 42) and the Court of Appeal of British Columbia (*Levy v. British Columbia (Director of Crime Victim Assistance Program)*, 2018 BCCA 36, para. 31.

C. The Indemnity is a Business Agreement That Does Not Affect Legislative Discretion

108. The Indemnity is a business agreement, pursuant to which the province is required to pay compensation to Weyerhaeuser as a result of having taken a particular executive action: issuing a Director's Order.

109. Virtually every contract into which a government enters requires that the government pay compensation in the event of a breach of its obligations. Such agreements are not caught by the fettering doctrine. If they were, no contract with a government would be enforceable. In the present case, the Director's issuing of the Order did not involve a legislative function. The fettering doctrine does not apply.

110. In order to bring itself within the ambit of the fettering doctrine, the province has created a straw man. The province argues that Weyerhaeuser's interpretation of the Indemnity would indirectly fetter the ability of the Ontario Legislature to enact the 1990 amendments to the *Environmental Protection Act*. This argument was dismissed by both the motion judge and the majority of the Court of Appeal. It mischaracterizes Weyerhaeuser's position.

111. Contrary to the assertion of the province, Weyerhaeuser has never disputed the validity of the amendments to the *Environmental Protection Act*, or the ability of the Director to make the Director's Order. Indeed, Weyerhaeuser accepts that, subject to any constitutional limitations, the province could enact legislation that expressly removes entirely Weyerhaeuser's ability to sue on the Indemnity. But it would have to do so expressly.

112. Weyerhaeuser's entitlement to be indemnified by the province does not arise from the amendments to the *Environmental Protection Act*. It arises from the terms of the Indemnity that the province granted in 1985. Requiring the province to indemnify Weyerhaeuser with respect to the costs flowing from a particular statutory proceeding in no way fetters the province's legislative discretion. This was the conclusion reached by the motion judge and the majority of the Court of Appeal.

113. In making their case for the application of the fettering doctrine, the province relies heavily on its earlier submission that the Indemnity contains no express commitment to pay

compensation resulting from liability created under future statutes, and that the motion judge erred in "implying" such a term. This mischaracterizes what the motion judge did. The motion judge did not have to imply any terms into the Indemnity, nor did he purport to do so. He simply interpreted the language of the Indemnity. That language is broad enough to include potential future liabilities under statutes not yet enacted. As the majority of the Court of Appeal noted:

> [I]t is clear the motion judge did not imply any term into the Ontario Indemnity. His conclusion that the indemnity covers the costs of complying with regulatory directions was based on his reading of the express language of the contract.[55]

114. Furthermore, there is nothing in the terms of the Indemnity that purports to fetter the province's discretion. Weyerhaeuser agrees with the majority's conclusion that until the province passes legislation relieving itself from its obligations under the Indemnity, the province remains bound to its terms.

115. There are sound policy reasons for refusing to apply the fettering doctrine to indemnities granted by the province. There is the issue of fairness to parties who have relied upon indemnities given by the province, as Reed and Great Lakes did in this case when they agreed to spend hundreds of millions of dollars to modernize the Dryden facility and as Weyerhaeuser did when it purchased the Property. Just as important is the fact that it would become difficult for the province to settle litigation in appropriate cases in the future. If counter-parties knew that the province could renege on an indemnity any time the indemnity results in costs to the province that might be said to affect the province's decision-making, they would not accept such an indemnity.

116. The sole purpose of indemnities is to provide certainty. If the province cannot provide indemnities that are enforceable, its ability to settle litigation and enter into other business agreements would be seriously impaired.

117. This Court should reject the province's argument that the Indemnity is not a business agreement because it is "not commercial in nature" and "reflected a policy objective."[56] Everything a government does is ultimately in pursuit of a policy objective. If that were

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[55] Appeal Decision, para. 122, JAR, Vol. 1, Tab 5, pp. 68 - 69.
[56] Province's Factum, para. 11.

sufficient to render a contract void under the fettering doctrine, then no government contract would be enforceable. Weyerhaeuser agrees with the province's concession that:

> Virtually all government contacts 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.[57]

D. The Province Has Not Passed Legislation Depriving Weyerhaeuser of the Right to Compensation

118. As noted above, Weyerhaeuser accepts that the province could enact legislation that expressly removes entirely Weyerhaeuser's ability to sue on the Indemnity. It has not done so. Neither the *Environmental Protect Act* nor any other enactment purports to deprive Weyerhaeuser of its rights under the Indemnity.

119. As a result, even if Weyerhaeuser is incorrect and the Indemnity could be characterized as affecting a legislative function, the province would still be required to compensate Weyerhaeuser for the costs of complying with the Director's Order. Weyerhaeuser would be in the same position as the plaintiff in *Pacific National No. 1*, discussed above. While the plaintiff's contractual claim was dismissed in that decision, the developer subsequently brought a successful claim for unjust enrichment against the City, arising out of the same facts. The decision in that case was upheld by this Court in *Pacific National Investments Ltd. v. Victoria City*.[58]

120. *Pacific National No. 2* is consistent with this Court's earlier decision in *Wells v. Newfoundland*. In that case, the plaintiff sued to enforce a contract pursuant to which the government of Newfoundland had agreed to appoint him Commissioner of the province's public utilities board until age 70. The province had passed legislation abolishing the board, as a result of which the plaintiff lost his office. This Court held that, while the contract with the plaintiff could not fetter the provincial Legislature's legislative power (in the sense of preventing it from

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[57] Province's Factum, para. 149.

[58] 2004 SCC 75 [*Pacific National No. 2*].

enacting legislation to abolish the board), it did afford the plaintiff a remedy for breach of contract. The Court further commented that:

> [T]here is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. **There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party.**
>
> …
>
> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.[59]

121. The province itself rightly acknowledges "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."[60] The province has passed no legislation taking away Weyerhaeuser's rights under the Indemnity, let alone to deprive it of compensation for doing so.

122. As a result, even if the fettering doctrine applied in the present case, the province would still have to compensate Weyerhaeuser for any costs it has to incur as a result of the province's breach of the Indemnity. While the province argues that compensation based on restitutionary principles is different in quality and quantum from expectation damages for breach of contract,[61] that difference is not relevant to this case. Weyerhaeuser is entitled to be compensated for the costs it has incurred, and will incur, as a result of the Director's Order, whether as damages for a breach of the Indemnity, or because it has suffered a deprivation (incurring the costs) and the

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[59] *Ibid*., paras. 41 and 46 [emphasis added].

[60] Province's Factum, para. 123.

[61] Provinces' Factum, paras. 13 and 155.

province has enjoyed a corresponding enrichment (not having to incur costs it agreed to pay), for which there is no juristic reason.

E. Parliament and the Ontario Legislature Confirmed the Validity of the Indemnity

123. As the province concedes, the Indemnity was provided "as part of the settlement" of the Grassy Narrows litigation, which "included the enactment of related federal and provincial legislation".[62] The province's fettering argument fails to take into account the legislative enactment of the Indemnity. An agreement that has itself been approved by Parliament and the Legislature of Ontario cannot fetter legislative discretion. A finding that the 1985 Indemnity is invalid would be a challenge to the validity of the federal and provincial legislation that approved it.

124. At the time the Lawsuit was settled, the Parliament of Canada passed the *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*,[63] which expressly declared the Escrow Agreement (which includes the Indemnity) to be valid. That legislation includes the following provisions:

> 3. (1) The Agreement is hereby approved, given effect and declared valid.
>
> …
>
> "Agreement" means the Memorandum of Agreement between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc., Great Lakes Forest Products Ltd., the Islington Indian Band and the Grassy Narrows Indian Band, signed by each party thereto in the month of November, 1985, tabled in the House of Commons by the Minister of Indian Affairs and Northern Development on May 21, 1986 and recorded as document number 331-7/43, as amended by the Escrow Agreement;
>
> …
>
> "Escrow Agreement" means the Escrow Agreement between Great Lakes Forest Products Limited, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc. and National Trust Company, the terms of which were approved of and consented to by the Grassy Narrows Indian Band and Islington Indian Band and by Her Majesty the Queen in Right of Canada as represented by the Minister of

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[62] Province's Factum, para. 1 and 2.

[63] SC 1986, c. 2, ss. 2(1) and 3(1).

> Indian Affairs and Northern Development, dated as of the 16th day of December, 1985, tabled in the House of Commons by the Minister of Indian Affairs and Northern Development on May 21, 1986 and recorded as document number 331-7/43.[64]

125. At the same time, the Ontario Legislature enacted *An Act to implement the Terms of a Settlement of all Claims arising out of the Contamination by Mercury and other Pollutants of the English and Wabigoon and Related Rivers Systems*,[65] which implemented the terms of the Memorandum of Agreement pursuant to which the province granted the Indemnity. That legislation included the following provision:

> 2. The purpose of this Act is to implement, to the extent that the legislative authority of the Legislature extends thereto, the terms of a settlement, subject to certain exceptions contained therein, of all claims, whether past, present or future, arising out of the contamination by mercury and other pollutants of the English and Wabigoon and related river systems, the terms of which settlement are embodied in a Memorandum of Agreement signed by the parties thereto in the month of November, 1985, made between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc., Great Lakes Forest Products Ltd., The Islington Indian Band and The Grassy Narrows Indian Band.[66]

126. The province has never challenged the validity of either of these enactments. Where the province itself, through valid legislation, has chosen to implement an agreement, it cannot plausibly argue that the agreement fetters the province's discretion. If the Indemnity fetters the province's discretion, then so does the Ontario legislation that approved the settlement. There can be no argument, however, that the province lacks the ability to fetter its own discretion, by passing legislation.

F. The Province's Position is a Collateral Attack on the 1986 Judgment

127. The province's argument that the Indemnity is unenforceable is a collateral attack on the judgment that approved the settlement. The province's fettering argument ignores the fact that

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[64] *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 2, ss. 2(1) and 3(1).

[65] S.O. 1986, c. 23, s. 2.

[66] S.O. 1986, c. 23, s. 2.

the 1985 settlement (including the Indemnity) was approved by the Supreme Court of Ontario, with the province's consent.

128. It is a fundamental rule of our legal system that a valid court order may only be challenged in proceedings whose specific object is the reversal, variation, or nullification of the order or judgment. A party is not permitted to attack collaterally settlements and court orders in which it has participated previously. [67]

129. The 1986 judgment approved the terms of the Memorandum of Agreement, which required the province to provide the Indemnity. If the province had concerns about the validity of the Indemnity, it was incumbent upon the province to raise them at the time of that judgment.

130. For all of the reasons set out above, Weyerhaeuser submits that the province cannot rely upon the fettering doctrine to avoid its obligations under the Indemnity.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT FOR COSTS

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

132. The Indemnity provides, in part:

> Ontario hereby covenants and agrees to indemnify [Weyerhaeuser]… harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by [Weyerhaeuser]… after the date hereof as a result of any claim, action or proceeding …[68]

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[67] *Cunningham v. Moran*, 2010 ONSC 4310, paras. 35 to 40. *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, paras. 60-61.

[68] Appeal Decision, para. 31, JAR, Vol. 1, Tab 5, p. 38.

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

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

PART V – ORDER SOUGHT

135. Weyerhaeuser seeks an order dismissing the province's appeal and awarding Weyerhaeuser its costs on a full indemnity basis in the Court of Appeal for Ontario and before this Court.

PART VI – SUBMISSIONS ON SEALING OR CONFIDENTIALITY ORDER

136. There is not a sealing, confidentiality Order or publication ban in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 25th day of February 2019.

FOR Christopher D. Bredt
Markus F. Kremer
Alannah Fotheringham

PART VII – TABLE OF AUTHORITIES

No.	Authority	Paragraph Reference
Case Law		
1.	*Andrews v. Canada (Attorney General)*, 2009 NLCA 70, leave denied, 2010 SCCA 61.	107
2.	*Andrews v. Canada (Attorney General)*, 2014 NLCA 32.	107
3.	*Benhaim v. St-Germain*, 2016 SCC 48.	44, 45
4.	*Canada (Attorney General) v. Fontaine*, 2017 SCC 47.	50
5.	*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.	127
6.	*Creston Moly Corp v. Sattva Capital Corp.*, 2014 SCC 53.	44, 47, 48, 49, 50
7.	*Cunningham v. Moran*, 2010 ONSC 4310.	127
8.	*H.L. v. Canada (Attorney General)*, 2005 SCC 25.	44
9.	*Housen v. Nikolaisen*, 2002 SCC 33.	44
10.	*Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477.	74
11.	*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37.	44
12.	*Levy v. British Columbia (Director of Crime Victim Assistance Program)*, 2018 BCCA 36.	107
13.	*Ocean Wise Conservation Authority v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58.	107
14.	*Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)* 2013 ONSC 7141.	105, 106

No.	Authority	Paragraph Reference
15.	*Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64.	96 - 102, 104 - 108
16.	*Pacific National Investments Ltd. v. Victoria City*, 2004 SCC 75.	100
17.	*Rio Algom Ltd. v. Canada*, 2012 ONSC 550.	104
18.	*South Yukon Forest Corp. v. R.*, 2012 FCA 165.	45
19.	*Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205.	60
20.	*Wells v. Newfoundland*, [1999] 3 SCR 199.	102, 103, 106
Other Sources		
21.	Geoff R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012).	68
22.	Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 324-331.	102

PART VII – STATUTORY PROVISIONS

Statute, Rule, Legislation	**Section / Rule, etc.**
An Act to implement the Terms of a Settlement of all Claims arising out of the Contamination by Mercury and other Pollutants of the English and Wabigoon and Related Rivers Systems, SO 1986, c. 23.	2
Environmental Protection Act, RSO 1980, c C 141, Part IX – Spills	79-112
Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, SC 1986, c.2.	2(1) and 3(1).

An Act to implement the Terms of a Settlement of all Claims arising out of the Contamination by Mercury and other Pollutants of the English and Wabigoon and Related Rivers Systems, SO 1986, c. 23, s. 2.
2. The purpose of this Act is to implement, to the extent that the legislative authority of the Legislature extends thereto, the terms of a settlement, subject to certain exceptions contained therein, of all claims, whether past, present or future, arising out of the contamination by mercury and other pollutants of the English and Wabigoon and related river systems, the terms of which settlement are embodied in a Memorandum of Agreement signed by the parties thereto in the month of November, 1985, made between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc., Great Lakes Forest Products Ltd., The Islington Indian Band and The Grassy Narrows Indian Band.

Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, SC 1986, c 2, ss. 2(1) and 3(1) *Loi sur le règlement des revendications des bandes indiennes de Grassy Narrows et d'Islington (pollution par le mercure)*, L.C. 1986, ch. 23, ss. 2(1) et 3(1).	
3. (1) The Agreement is hereby approved, given effect and declared valid. … "Agreement" means the Memorandum of Agreement between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc.,	3 (1) La Convention est approuvée, mise en œuvre et déclarée valide. … **Convention** Le protocole d'entente conclu entre Sa Majesté la Reine du chef du Canada représentée par le ministre des Affaires indiennes et du Nord canadien, Sa Majesté la Reine du chef de la province d'Ontario, Reed Inc., Great Lakes Forest Products Ltd., la

Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, SC 1986, c 2, ss. 2(1) and 3(1) *Loi sur le règlement des revendications des bandes indiennes de Grassy Narrows et d'Islington (pollution par le mercure)*, L.C. 1986, ch. 23, ss. 2(1) et 3(1).	
Great Lakes Forest Products Ltd., the Islington Indian Band and the Grassy Narrows Indian Band, signed by each party thereto in the month of November, 1985, tabled in the House of Commons by the Minister of Indian Affairs and Northern Development on May 21, 1986 and recorded as document number 331-7/43, as amended by the Escrow Agreement; … "Escrow Agreement" means the Escrow Agreement between Great Lakes Forest Products Limited, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc. and National Trust Company, the terms of which were approved of and consented to by the Grassy Narrows Indian Band and Islington Indian Band and by Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, dated as of the 16th day of December, 1985, tabled in the House of Commons by the Minister of Indian Affairs and Northern Development on May 21, 1986 and recorded as document number 31-7/43.	bande indienne d'Islington et la bande indienne de Grassy Narrows, signé par chacune des parties au cours du mois de novembre 1985 et déposé devant la Chambre des communes par le ministre des Affaires indiennes et du Nord canadien le 21 mai 1986 sous le numéro d'enregistrement 331-7/43, compte tenu des modifications apportées par le contrat de mise en main tierce. (Agreement) ***contrat de mise en main tierce*** Le contrat de mise en main tierce daté du 16 décembre 1985, conclu entre Great Lakes Forest Products Limited, Sa Majesté la Reine du chef de la province d'Ontario, Reed Inc. et National Trust Company, lequel a fait l'objet de l'approbation et de l'assentiment de la bande indienne de Grassy Narrows, de la bande indienne d'Islington et de Sa Majesté la Reine du chef du Canada représentée par le ministre des Affaires indiennes et du Nord canadien, et déposé devant la Chambre des communes par le ministre des Affaires indiennes et du Nord canadien le 21 mai 1986 sous le numéro d'enregistrement 331-7/43. (Escrow Agreement)