SCC File No. 37985

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

B E T W E E N:

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

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

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT, RESOLUTE FP CANADA INC.

(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal, brought by Ontario, raises two questions. First, when a court interprets contractual language to have its plain and ordinary meaning, consistent with the factual matrix, can an appellate court intervene because it disagrees with the lower court's findings about the surrounding circumstances? Second, should the rule against legislative fettering be expanded to allow the Crown to escape its contractual commitments without consequence?

2. As the Court of Appeal concluded, the answer to both questions is "no." This is the only possible answer that is consistent with this Court's jurisprudence. There is no reason for this Court to interfere with the decision of the motion judge.

3. In 1979, and again in 1985, the province of Ontario gave Resolute's predecessor (Great Lakes) broad indemnities covering environmental liabilities related to a pulp and paper mill in Dryden, Ontario. The 1985 indemnity is the subject of this appeal.

4. Ontario gave this 1985 indemnity to Great Lakes in order to achieve a series of objectives. First, an environmental indemnity was the only way to induce Great Lakes to purchase the mill in 1979 and rescue the town of Dryden from economic collapse. In 1985, the parties agreed to release the 1979 indemnity and replace it with the 1985 indemnity at issue. Second, Ontario needed Great Lakes to negotiate and spend millions of dollars on a settlement with the First Nations for contamination that occurred before Great Lakes' purchase of the mill. The settlement concluded in 1985. Finally, Great Lakes expended hundreds of millions of dollars upgrading and improving the mill itself, thus sustaining the economic viability of Dryden.

5. In return, the indemnity protected Great Lakes and its successors from the pre-existing environmental contamination on the Dryden site, including mercury waste that the former owner had buried in a landfill. The indemnity expressly covers any obligations, liabilities, costs or expenses arising from existing or future claims or proceedings, whether "statutory or otherwise", brought by governments, including "any province" and any "agency, body or authority" thereof.

6. Ontario now seeks to renege on its indemnity. It takes the far-fetched position that "statutory" obligations and liabilities owing to "any province" or its agencies does not include

orders made under Ontario's *Environmental Protection Act* ("*EPA*"). It constructs this argument by cherry-picking certain facts, omitting others, and, most importantly, ignoring the text of the indemnity.

7. The motion judge rejected Ontario's interpretation. He held that "any province" included Ontario, and that "statutory" obligations included obligations arising from orders made by the Ministry of the Environment under the *EPA*. As a result, he concluded that the plain and ordinary meaning of the indemnity, read consistently with the factual matrix, covered the costs of those obligations. Indeed, he held that Ontario's interpretation was commercially absurd. The majority of the Court of Appeal affirmed the decision, appropriately deferring to the motion judge on this question of contractual interpretation.

8. Ultimately, Ontario asks this Court to re-interpret the indemnity by ignoring the text and re-considering the context. The motion judge committed no palpable or overriding error. There is no basis to overturn his interpretation.

9. Finally, Ontario argues that the motion judge's interpretation would be unlawful because it indirectly fetters the Ontario Legislature's right to change the law. This is also wrong. The indemnity does not fetter the Legislature's powers in any way; it is free to change the law in any way it likes. But that does not mean it is not bound by its promises. If it promises to indemnify against statutory claims and liabilities, it must do so. As this Court has emphasized, the Crown is obliged to uphold the rule of law. Rules against fettering do not permit the Crown escape its contractual obligations without consequence.

10. Resolute therefore asks that Ontario's appeal be dismissed.

The Dryden Mill and the landfill

11. In the 1960s and 1970s, Dryden was a one-company town. That company was the Dryden Paper Company, later Reed Ltd., which operated a pulp and paper mill (the "Dryden Mill"). Any threat to the mill was a threat to the town's economic viability.

12. The Dryden Mill's bleaching process produced a mercury-contaminated waste byproduct.[1] The waste was discharged into the neighbouring river systems.[2]

13. In 1971, Reed constructed a waste disposal site for the mercury-contaminated waste (referred to as the "landfill" or the "WDS").[3] Beginning in 1977, the Ministry of the Environment ("MOE") imposed compliance requirements on Reed with respect to the landfill.[4]

14. In 1979, Ontario also issued a control order (the "Control Order") against Reed in relation to the Dryden Mill under the 1971 *EPA*. It required Reed to, among other things, limit and eventually cease dumping waste into the river.[5]

Great Lakes invests in the Dryden Mill in exchange for an indemnity from Ontario

15. In 1979, Reed was considering shutting down its operations in Dryden. Great Lakes Forest Products Limited ("Great Lakes") entered into negotiations to buy the Dryden Mill. However, Great Lakes was reluctant to purchase the property without protection from potential environmental liabilities related to the landfill. It therefore hesitated to complete the purchase.[6]

16. The Government of Ontario recognized that environmental liabilities were "a major impediment to the sale."[7] It was concerned that if the sale did not occur, the Dryden Mill would close. This would have had serious and adverse economic effects on Dryden and the region.[8]

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[1] Reasons of the Superior Court of Justice, Commercial List, dated July 16, 2016 ("Motion Judge Reasons"), para. 7, Joint Appeal Record ("JAR"), Vol. I, Tab 1, p. 2.
[2] Reasons of the Ontario Court of Appeal, dated December 20, 2017 ("Court of Appeal Reasons"), para. 10, JAR, Vol. I, Tab 5, p. 30.
[3] Court of Appeal Reasons, para. 11, JAR, Vol. I, Tab 5, pp. 30-31.
[4] Court of Appeal Reasons, paras. 14, 16, JAR, Vol. I, Tab 5, p. 31; Affidavit of Trina Rawn sworn October 14, 2014, para. 36 ("Rawn Affidavit"), JAR, Vol. IV, Tab 27, pp. 10-11; Ministry of the Environment Certificates of Approval, Exhibits "S", "T", "U", "V", Rawn Affidavit, JAR, Vol. V, Tabs 27S, 27T, 27U, 27V, pp. 144, 146, 148, 150.
[5] Ministry of the Environment Control Order, issued against Reed Ltd. dated September 5, 1979, JAR, Vol III, Tab 16, pp. 1-7.
[6] Motion Judge Reasons, para. 8, JAR, Vol. I, Tab 1, p. 2.
[7] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 31st Parl., 3rd Sess., (6 November 1979), Statement of the Honourable Frank S. Miller, Exhibit "A", Affidavit of Ryan Roberts, sworn December 1, 2014, JAR, Vol. VI, Tab 29A, pp. 70-71.
[8] Motion Judge Reasons, para. 9, JAR, Vol. I, Tab 1, p. 2.

17. To facilitate the sale, Ontario provided assurances that it would indemnify Great Lakes for any amounts over $15 million arising from environmental contamination caused by Reed ("1979 Indemnity").[9] The 1979 Indemnity was conditional on Great Lakes committing to spend $200 million for the modernization and expansion of the Dryden Mill.[10]

18. In providing the 1979 Indemnity, Ontario made a decision to take on the environmental risks associated with the landfill. The Treasurer of Ontario determined that the continued operation and modernization of the Dryden Mill was "of considerable importance to the people of this Province" and would result in "substantial and beneficial employment and economic effects" that were critical to Dryden.[11] Thus, the Treasurer told the Legislature that: "this government decided it had to share in the risk to ensure a future for that community" to "maintain the employment of almost 1,700 people in a community that has no other employer of note."[12]

19. Based on Ontario providing the 1979 Indemnity, Great Lakes purchased the Dryden Mill from Reed for around $90 million.[13] The sale closed on December 7, 1979 under an asset purchase agreement between Reed and Great Lakes (the "Dryden Agreement"). As part of the Dryden Agreement, Great Lakes agreed to indemnify Reed for any environmental liabilities arising from the Dryden Mill, including the "presence of any pollutant, including mercury."[14]

20. Reed agreed to share in the cost of any environmental liability with Great Lakes up to a maximum of $7.5 million payment by Reed. However, Section 11.4 of the Dryden Agreement carved out from this cost sharing (and made Great Lakes wholly liable for) the costs of compliance with the existing Control Order, as described above, and any substitute order to the

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[9] The 1979 Indemnity indemnified Great Lakes, but not Reed.

[10] Motion Judge Reasons, para. 9, JAR, Vol. I, Tab 1, p. 2.
[11] 1979 Indemnity, Exhibit "I", Rawn Affidavit, JAR, Vol. IV, Tab 27I, pp. 135-136.
[12] Ontario, Legislative Assembly, Official Report of Debates (Hansard) 31st Parl., 3rd Sess., (8 November 1979), Statement of the Honourable Frank S. Miller, Exhibit "A", Affidavit of Trina Rawn, sworn December 9, 2014, JAR, Vol. VI, Tab 30A, p. 83.
[13] Great Lakes Forest Products, 1979 Annual Report, JAR, Vol. III, Tab 19A, p. 64.
[14] Memorandum of Agreement made as of the 7th day of December, 1979 between Great Lakes Forest Products Limited, Reed Ltd. and Reed International ("Dryden Agreement"), ss. 5.3, 11.4, JAR, Vol. III, Tab 17, pp. 19, 46-47.

extent that it required "substantially the same action to be taken or performed."[15] No other environmental or regulatory costs were excluded.

Great Lakes settles the First Nations litigation and gets the Ontario Indemnity

21. In 1977, two First Nations bands commenced an action against Reed alleging that it had contaminated the river with mercury, causing significant health problems for local residents.[16]

22. In 1982, Ontario was encouraging Great Lakes and Reed to settle this litigation with the First Nations. On January 28, 1982, the Minister for Resources Development, R.H. Ramsay, wrote to Great Lakes about the "impasse in negotiations" and urged it to resume the negotiations with the First Nations (the "1982 Letter").[17] Great Lakes had already spent considerable sums to modernize the Dryden Mill, as required by the 1979 Indemnity. It continued to do so in 1983, 1984, and 1985.[18] For example, in 1985 alone, Great Lakes spent $8.6 million upgrading the Dryden Mill.[19]

23. A settlement was achieved in 1985 between the First Nations, Ontario, the Federal Government, Reed and Great Lakes. The settlement was documented in a 1985 Memorandum of Agreement (the "MOA").[20]

24. Under the MOA, the parties agreed "to settle all claims and causes of action, past, present and future" arising out of the relevant issues.[21] Reed and Great Lakes contributed $11.75 million to the settlement, while Ontario contributed only $2.167 million.[22] In exchange, the First Nations

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[15] Dryden Agreement, s. 11.4, JAR, Vol. III, Tab 17, pp. 19, 46-47.
[16] Motion Judge Reasons, para. 1, JAR, Vol. I, Tab 1, p. 1.
[17] Letter from R. H. Ramsay to C. J. Carter dated January 28, 1982, JAR, Vol. III, Tab 21, pp. 175-176.
[18] Court of Appeal Reasons, para. 86, JAR, Vol. I, Tab 5, pp 55-56; Great Lakes Forest Products, 1983 Annual Report, JAR, Vol III, Tab 19E, p. 125 ($7.5 million); Great Lakes Forest Products, 1984 Annual Report, JAR, Vol III, Tab 19F, p. 139 ($5.5 million and $13.8 million for new machine); Great Lakes Forest Products, 1985 Annual Report, JAR, Vol III, Tab 19G, p. 156 ($8.6 million).
[19] Great Lakes Forest Products, 1985 Annual Report, JAR, Vol III, Tab 19G, p. 156.
[20] Motion Judge Reasons, para. 11, JAR, Vol. I, Tab 1, p. 2.
[21] Motion Judge Reasons, para. 13, JAR, Vol. I, Tab 1, p. 3.
[22] Memorandum of Agreement, executed November 22, 1985 ("MOA"), Exhibit "J", ss. 1.2, 1.3, 1.4, Rawn Affidavit, JAR, Vol. IV, Tab 27J, p. 141.

agreed to the dismissal of their litigation with full releases.[23] The First Nations agreed that the settlement would "preclude any further claims" in respect of the contamination.[24]

25. As part of the settlement, Ontario issued the Ontario Indemnity. Specifically, Great Lakes and Reed agreed to release Ontario from the 1979 Indemnity, and Ontario agreed to grant both parties a new indemnity. This Ontario Indemnity is the subject of this litigation.

The Ontario Indemnity is broad and covers statutory claims by any province

26. The Ontario Indemnity was an expansion of the 1979 Indemnity. The recitals of the Ontario Indemnity recognized that Ontario had entered into the 1979 Indemnity "for the purpose of facilitating the purchase and sale of a pulp and paper plant in Dryden and thereby enabling the modernization and upgrading of the plant" which was "deemed to be in the public interest."[25]

27. The substance of the protection in the Ontario Indemnity is found in section 1:

> Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date [December 17, 1979] a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by any 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").[26] [Emphasis of Court of Appeal]

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[23] Court of Appeal Reasons, para. 27, JAR, Vol. I, Tab 5, p. 36.
[24] MOA, Exhibit "J", ss. 2.2, 2.5, Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 144-145.
[25] Motion Judge Reasons, para. 17, JAR, Vol. I, Tab 1, pp. 3-4.
[26] Court of Appeal Reasons, para. 31, JAR, Vol. I, Tab 5, pp. 37-39.

28. Unlike the 1979 Indemnity, which expired in 2010, the Ontario Indemnity was expressly "valid without limitation as to time."[27]

The Director's Order

29. Through various transactions and changes in corporate status, Resolute became the successor of Great Lakes. Resolute no longer owns or controls the landfill.

30. On August 25, 2011, the MOE issued a Director's Order requiring Weyerhaeuser and Resolute, as Great Lakes' successor, to conduct environmental monitoring and reporting and to make a substantial payment to Ontario as financial assurance in respect of the landfill.[28]

31. In response to the Director's Order, Weyerhaeuser initiated this action in 2014. Both Weyerhaeuser and Ontario brought motions for summary judgment to determine whether the Ontario Indemnity applies to the Director's Order. Both parties consented to Resolute intervening as a party in the proceeding. Resolute also brought a motion for summary judgment.

The Ontario Superior Court grants summary judgment to Resolute

32. The motion judge granted summary judgment in favour of Resolute and Weyerhaeuser against Ontario. He held that:

(1) To protect Dryden's economy and "save the pulp and paper industry in Dryden,"[29] Ontario offered Great Lakes and its successors future protection from environmental liability to encourage it to acquire the Dryden Mill.[30]

(2) The Ontario Indemnity applies to the Director's Order on the clear language of the indemnity, which is consistent with the surrounding circumstances. In so holding, the motions judge rejected Ontario's position that the Ontario Indemnity only applied to claims or proceedings commenced by third parties and not to those commenced by Ontario or its agencies.[31]

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[27] Motion Judge Reasons, para. 18, JAR, Vol. I, Tab 1, p. 4.
[28] Motion Judge Reasons, para. 26, JAR, Vol. I, Tab 1, p. 6.
[29] Motion Judge Reasons, para. 53, JAR, Vol. I, Tab 1, p. 13.
[30] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[31] Motion Judge Reasons, paras. 46, 48, JAR, Vol. I, Tab 1, pp. 10-11.

(3) Ontario's interpretation that the Ontario Indemnity did not apply to claims by Ontario or its agencies would be "commercially absurd". It would have allowed Ontario to resile from its commitment to protect Great Lakes or its successors from environmental liability and, instead, impose substantial environmental remediation costs on those same parties at any time.[32]

(4) The Ontario Indemnity did not improperly fetter, directly or indirectly, Ontario's discretion. Ontario cannot breach its past agreement with impunity; rather, it must be held to the bargain it made.[33]

Court of Appeal agrees that the Ontario Indemnity covers the Director's Order

33. Justice Brown, writing for the majority of the Court of Appeal, found no error in the motion judge's analysis and held that the Ontario Indemnity applied to the Director's Order.[34] Justice Laskin dissented.

34. Guided by this Court's decision in *Sattva*, Justice Brown reviewed the motion judge's decision on a deferential standard, giving due respect to the analysis and findings below. Justice Brown rejected all of Ontario's arguments and concluded that:

(1) The motion judge did not err in starting with the text of the Ontario Indemnity as this was the "logical place to start the contractual interpretation exercise."[35]

(2) The motion judge did not err in interpreting the Ontario Indemnity as covering statutory claims arising after the date that the indemnity was executed.[36]

(3) The motion judge was correct not to draw an inference about the parties' 1985 negotiations[37] or the parties' post-execution conduct.[38]

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[32] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[33] Motion Judge Reasons, para. 53, JAR, Vol. I, Tab 1, p. 13.
[34] Court of Appeal Reasons, paras. 78, 98, JAR, Vol. I, Tab 5, pp. 53, 61.
[35] Court of Appeal Reasons, para. 76, JAR, Vol. I, Tab 5, p. 52.
[36] Court of Appeal Reasons, paras. 108-110, JAR, Vol. I, Tab 5, pp. 64-65.
[37] Court of Appeal Reasons, paras. 111-112, JAR, Vol. I, Tab 5, pp. 65-66.
[38] Court of Appeal Reasons, para. 117, JAR, Vol. I, Tab 5, p. 67.

(4) The Ontario Indemnity did not offend the principle against fettering of legislative powers and that "Ontario remains bound by the terms of the deal it struck."[39]

35. Justice Laskin dissented. He held that the motion judge did not "fully and accurately consider [the Ontario Indemnity's] relevant context."[40] Justice Laskin therefore embarked on his own interpretation of the indemnity. Based on his view that "context controls meaning,"[41] he reconsidered and re-weighed the factual matrix, ultimately determining that the Ontario Indemnity covered only third-party claims, not the Director's Order.[42] Justice Laskin did not address the issue of fettering.

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

36. Ontario's appeal raises two questions:

(1) Did the motion judge commit a palpable and overriding error in interpreting the Ontario Indemnity as covering the Director's Order?

(2) Did the motion judge err in concluding that the Ontario Indemnity did not fetter Ontario's legislative or ministerial discretion?

37. Resolute submits that the answer to these questions is "no." The appeal should therefore be dismissed.

PART III – STATEMENT OF ARGUMENT

Standard of review

38. The interpretation of the Ontario Indemnity raises no pure issues of law. As this Court has said, extricable questions of law in the contractual context "will be rare."[43] It is therefore insufficient for Ontario to provide a preferable or reasonable alternate interpretation of the

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[39] Court of Appeal Reasons, para. 127, JAR, Vol. I, Tab 5, p. 70.
[40] Court of Appeal Reasons, para. 240, JAR, Vol. I, Tab 5, p. 114.
[41] Court of Appeal Reasons, para. 237, JAR, Vol. I, Tab 5, pp. 112-113.
[42] Court of Appeal Reasons, para. 212, JAR, Vol. I, Tab 5, p. 102.
[43] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 55.

contract. It must show that the motion judge made an obvious error that "goes to the very core of the outcome of the case."[44]

39. The fettering issue raises questions of law to be reviewed on a correctness standard, but the motion judge's characterization of the Ontario Indemnity as a business agreement is a holding of mixed fact and law and is thus entitled to deference.

Contractual interpretation

40. The first issue is whether the motion judge erred in concluding that the Ontario Indemnity applies to claims or proceedings commenced by Ontario or its agencies and whether, as Ontario contests, it is limited to so-called third-party claims, thereby excluding Ontario. He made no error.

41. This question turns on the meaning of "any province" in the Ontario Indemnity. Section 1 provides that Great Lakes and its successors are indemnified from any claim brought by "governments (including… any province … or any agency, body or authority created by any statutory or other authority)." Resolute interprets "any province" to mean any of Canada's provinces, including Ontario.

42. Ontario disagrees that it is included in the phrase "any province." Instead, Ontario asserts that, in the "context" of the surrounding circumstances, "any province" does not mean *any* province because "province does not mean Ontario."[45]

43. Ontario's position is flawed twice over:

(1) Ontario's use of the factual matrix is an erroneous interpretation of *Sattva*. The law requires a robust analysis of the text of a contract, particularly in complex commercial agreements. Context can assist but the text retains its primacy.

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[44] *Benhaim v. St-Germain*, 2016 SCC 48, para. 38, citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165, para. 46.
[45] Factum of the Appellant, Her Majesty the Queen in Right of Ontario ("Ontario's Appellant Factum"), para. 93.

(2) The factual matrix does not support Ontario's interpretation. The motion judge considered the surrounding circumstances and found that they were not consistent with limiting the Ontario Indemnity to third-party claims. Indeed, in the face of the factual matrix, the motion judge found Ontario's position to be commercially absurd.

44. In this appeal, Ontario alleges that the motion judge erred because his reasons were overly textualist. It alleges, first, that he erred in law by looking at the text before the context, and second, that he made a palpable and overriding error by failing to appreciate the significance of the factual matrix. Ontario is wrong. The following section describes the motion judge's interpretation of the Ontario Indemnity and then addresses Ontario's alleged errors.

The Ontario Indemnity clearly applies to the Director's Order

45. The motion judge determined that the Director's Order falls within the clear language of the Ontario Indemnity. He considered the "ordinary and grammatical" meaning of the provision and concluded that each element of section 1 of the Ontario Indemnity was met:

- "The remediation order is a statutory claim or proceeding,
- that imposes obligations, liabilities or future costs on Great Lakes' successors,
- which arise or were asserted by a statutory agency of a province,
- because of or relating to events and circumstances,
- caused by the presence of mercury deposited in the disposal site by Reed."[46]

46. The motion judge concluded that the wording of the Ontario Indemnity was "clear and unambiguous" that the parties intended it to apply to claims and proceedings brought by Ontario and its agencies.[47]

47. He did not stop at the text. The motion judge went on to consider the context of the Ontario Indemnity, the context of other agreements between the parties, and the surrounding

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[46] Motion Judge Reasons, para. 46, JAR, Vol. I, Tab 1, p. 10.
[47] Motion Judge Reasons, para. 47, JAR, Vol. I, Tab 1, p. 10.

circumstances of the contract. He concluded that the "surrounding circumstances at the time [Ontario] granted the Ontario Indemnity does not support [Ontario's] position."[48]

48. The circumstances the motion judge considered included the purpose of the indemnities. He concluded that the surrounding circumstances evidenced a *quid pro quo*: Ontario induced Great Lakes to purchase the Dryden Mill (including the landfill) and to settle the First Nations litigation. In exchange, Ontario gave Great Lakes certainty by offering Great Lakes and its successors future protection from environmental liability.

49. The bargain took initial form in the 1979 Indemnity when Ontario "wanted to protect Dryden's economy and encouraged Great Lakes to continue the pulp and paper operation in Dryden and to invest a great deal of money in upgrading the operation." Thus, Ontario "offered Great Lakes and its successors future protection from environmental liability to encourage it to acquire the Dryden pulp and paper operation under the 1979 Indemnity."[49]

50. The context of the bargain continued when Ontario replaced the 1979 Indemnity with the Ontario Indemnity in 1985. While the underlying *quid pro quo* remained, the Ontario Indemnity also reflected the contributions that Great Lakes and Reed continued to make. Ontario not only wanted Great Lakes to continue operating and modernizing the Dryden Mill, it also wanted a settlement of the First Nations litigation. In 1985, Great Lakes and Reed helped facilitate this settlement by agreeing to "contribute substantial sums of money."[50] As "part of the settlement," the "Ontario Indemnity replaced the 1979 Indemnity," giving Great Lakes and Reed indemnification on broader and clearer terms.[51]

51. Ontario's position in this litigation seeks to undo that bargain. It conceded that the implication of its position is that Great Lakes agreed to make substantial investments in the

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[48] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[49] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[50] Ontario Indemnity, preamble, MOA, Schedule "F", Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, p. 189.
[51] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.

Dryden Mill but secured no protection from Ontario imposing substantial remediation costs immediately after:

> Q: And I take it the implication of the Crown's position in this matter is that Ontario could have ordered Great Lakes to remediate the mercury contamination in the river and on the site it acquired one day after the 1979 indemnity or the 1985 indemnity?
>
> [Counsel for Ontario]: Correct.[52]

52. The motion judge concluded that Ontario's position was absurd:

> 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.[53]

53. The motion judge also considered other contextual factors. None supported Ontario's position. Nor was any subsequent conduct probative: the fact that Resolute and its predecessors did not seek to claim on the Ontario Indemnity until the Director's Order cannot affect the meaning established by the parties in 1985.[54]

The motions judge did not err in starting with the text of the 1985 Indemnity

54. The motions judge first considered the "the plain and ordinary meaning of the words used in the Ontario Indemnity" and then considered the relevant context.[55] Starting with the text of a contract is not an error of law.[56] It is the natural place to begin contractual interpretation.

55. The modern approach to contractual interpretation requires a court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."[57] This

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[52] Transcript of Cross Examination of Trina Rawn, December 17, 2014, q. 119, JAR, Tab 31, p. 105.
[53] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[54] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[55] Motion Judge Reasons, para. 37, JAR, Vol. I, Tab 1, p. 8.
[56] Court of Appeal Reasons, para. 71, JAR, Vol. I, Tab 5, p. 51.
[57] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 47.

approach was well-summarized by the majority of the Court of Appeal as looking at the (i) language of the contract, (ii) the contract as a whole and (iii) the surrounding circumstances.[58]

56. On its face, Ontario's appeal is a critique of how the motion judge organized his reasons. This is the epitome of form over substance. This Court and others have found no legal error in writing first about the plain meaning of contractual language before considering the context.[59] Indeed, "the plain meaning of the words in a contract is the logical place to start the contractual interpretation exercise."[60] The concern, cited by Ontario, that words and context cannot be considered "at different stages of the interpretative process" relates to a different proposition altogether: that the factual matrix cannot be restricted only to cases of contractual ambiguity.[61] Resolute does not dispute that proposition, but it does not assist Ontario. The motion judge did as this Court required in *Sattva*:[62] he "correctly stated the law, and he included in his contractual interpretation analysis a consideration of the factual matrix."[63]

57. On a broader level, this appeal addresses a problem in post-*Sattva* cases, in which one party weaves a contextual narrative to depart from the plain meaning of the contract. In this narrative, contract interpretation becomes a revisionist exercise, where judges rewrite contracts on the basis of what the parties, in hindsight, *should* have agreed to instead of the contract the parties actually entered. Justice Laskin's dissent embraces this mode of interpretation, holding that "context controls meaning."[64]

58. But this is not the law. It never has been. The text of a contract controls its terms. The surrounding context is one of many tools to interpret the text. Contractual interpretation begins

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[58] Court of Appeal Reasons, para. 65, JAR, Vol. I, Tab 5, pp. 48-49.
[59] *Algo Enterprises Ltd. v. Repap New Brunswick Inc.*, 2016 NBCA 35, para. 21; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, paras. 4, 59; *Teal Cedar Products Ltd. v. Her Majesty the Queen in the Right of the Province of British Columbia as represented by the Ministry of Forests* (2011), paras. 177-179 (Arbitrator: Thomas R. Braidwood, Q.C.), Resolute's Responding Book of Authorities ("RRBOA"), Tab 1.
[60] Court of Appeal Reasons, para. 76, JAR, Vol. I, Tab 5, p. 52.
[61] *Starrcoll Inc. v. 2281927 Ontario Ltd.*, 2016 ONCA 275, paras. 16-17.
[62] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.
[63] Court of Appeal Reasons, para. 75, JAR, Vol. I, Tab 5, p. 52.
[64] Court of Appeal Reasons, para. 237, JAR, Vol. I, Tab 5, pp. 112-113.

with the "cardinal presumption that [parties] have intended what they have said."[65] The common law has long stressed the centrality and primacy of text: "the words of the agreement are paramount."[66] It follows then that "in case of conflict the words will always prevail over the context."[67] This is similar to statutory interpretation: when the words of a statutory provision are unequivocal, "their ordinary meaning plays a dominant role in the interpretative process."[68]

59. *Sattva* did not change this. This Court confirmed the pre-existing principle that surrounding circumstances are an interpretative tool important to understand the words of a contract, because words may not have "an immutable or absolute meaning."[69] But the Court repeatedly emphasized that text – not context – predominates:

> "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract."
>
> "While surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement."
>
> "While the surrounding circumstances are relied upon in the interpretive process, they cannot be used to deviate from the text such that the court effectively creates a new agreement."[70] [emphasis added]

60. The emphasis on the contractual text is consistent with other common law jurisdictions. The U.K. Supreme Court has affirmed that the surrounding circumstances "should not be invoked to undervalue the importance of the language of the provision which is to be

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[65] *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, para. 24.
[66] *The Canada Trust Company v. Browne*, 2012 ONCA 862, para. 71; *Eli Lilly v. Novopharm*, [1998] 2 S.C.R. 129, para. 55.
[67] Geoff R. Hall, *Canadian Contractual Interpretation*, 3rd ed., (Toronto: LexisNexis, 2016), p. 33, RRBOA, Tab 2.
[68] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, para. 88.
[69] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 47.
[70] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 57 (internal citations omitted); *see also Kilitzoglou v. Curé*, 2018 ONCA 891, para. 41; Geoff R. Hall, *Canadian Contractual Interpretation*, 3rd ed., (Toronto: LexisNexis, 2016), p. 36, RRBOA, Tab 2.

constructed."[71] In New Zealand, context is "a necessary element of the interpretative process" but "the text remains centrally important."[72]

61. Since *Sattva*, this Court has maintained the limits and boundaries of the factual matrix. Context is used only to "assist in ascertaining what the parties understood the words used in the agreement to mean."[73] While a court must always turn its mind to the factual matrix when interpreting a contract, "[s]ometimes the factual matrix will prove a valuable aid in interpreting the meaning of a contract's language; other times it will not."[74] Where language is less clear, the factual matrix will be of more assistance – for example in reference to the phrase "or otherwise" in the 1998 asset purchase agreement between Bowater and Weyerhaeuser.[75] But, "the clearer the natural meaning" of the contractual text "the more difficult it is to justify departing from it."[76] In some cases, like this Court's most recent contractual interpretation case, the plain dictionary meaning can itself be determinative of contractual meaning.[77]

62. Most critically to this appeal, this Court has continued to reject Ontario's proposition that context controls meaning. The factual matrix can never override the parties' language and rewrite the agreement. Rather, "the use of the factual matrix in contractual interpretation is limited by the legal principle that contractual interpretation must remain grounded in the text of the contract so as to avoid effectively creating a new agreement between the parties."[78]

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[71] *Arnold v. Britton & Ors*, [2015] UKSC 36, para. 17.
[72] *Firm PI 1 Ltd. v. Zurich Australian Insurance and Body Corporate 398983*, [2014] NZSC 147, para. 63.
[73] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, para. 30 [emphasis added].
[74] Court of Appeal Reasons, para. 77, JAR, Vol. I, Tab 5, pp. 52-53.
[75] The lack of clarity of this contractual provision and the use of the factual matrix is addressed at paras. 91 - 95 of Resolute's Appellant Factum, dated January 7, 2019, in this case.
[76] *Arnold v. Britton & Ors*, [2015] UKSC 36, para.18; *see also Firm PI 1 Ltd. v. Zurich Australian Insurance and Body Corporate 398983*, [2014] NZSC 147, para. 63; *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, p. 1467.
[77] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, paras. 46-47.
[78] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para. 63 [emphasis added].

The factual matrix supports the meaning of the text of the Ontario Indemnity

63. Ontario argues that the motion judge "failed to appreciate" that the surrounding circumstances informed the meaning of the Ontario Indemnity.[79] But Ontario's position rises to "nothing more than a complaint about how much weight was allocated to the factual matrix – in effect, a disagreement about how the decision-maker interpreted the words of a contract in light of the factual matrix."[80]

64. Because contractual interpretation is "inherently fact specific,"[81] the motion judge's analysis of the factual matrix is entitled to substantial deference. For an error to be palpable and overriding, it is not enough to allege that the motion judge emphasized different portions of the factual matrix or drew different inferences than those desired by Ontario.[82] As this Court has quoted with approval "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye."[83]

65. The motion judge fulfilled his duty to consider the surrounding circumstances but ultimately found that they did not "support [Ontario's] position."[84] This section addresses Ontario's submission that this Court should reweigh each element of the surrounding circumstances.

The commercial context of the Ontario Indemnity is consistent with its plain meaning

66. As detailed at paras. 47-52 above, the motion judge held that the 1979 Indemnity and the Ontario Indemnity represent a broad bargain between Ontario and Great Lakes. Ontario secured the economic viability of Dryden through Great Lakes' purchase and continuing investment in the Dryden Mill. It also secured a hard-fought settlement with the First Nations through the substantial economic contribution of Great Lakes and Reed. In turn, Great Lakes secured broad

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[79] Ontario's Appellant Factum, para. 71.
[80] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para 65.
[81] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 55.
[82] *Housen v. Nikolaisen*, 2002 SCC 33, para. 56.
[83] *Benhaim v. St-Germain*, 2016 SCC 48, para. 39, citing *J.G. v. Nadeau*, 2016 QCCA 167, para. 77 ("une erreur manifeste et dominante tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil").
[84] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.

protection for itself and its successors from any and all further environmental liability. In the face of what Great Lakes gave, Ontario's interpretation of the bargain is commercially absurd.

67. Instead of acknowledging this bargain – or the finding of absurdity – Ontario "ignore[s] this 'big picture' disclosed by the record" and instead attempts to find error in "a fine parsing … of the motion judge's language."[85] To the extent there were any factual errors by the motion judge, Ontario's position tries to make immaterial errors into overriding ones.

Great Lakes provided consideration in 1985 for the Ontario Indemnity

68. The motion judge, in outlining the commercial absurdity of Ontario's position, held that (i) the Ontario Indemnity replaced the 1979 Indemnity; (ii) it was part of the settlement of the First Nations litigation in which Great Lakes agreed to pay millions of dollars; and (iii) Great Lakes "also continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden."[86]

69. Ontario alleges that the motion judge erred because Great Lakes "provided no fresh consideration" in 1985.[87] Ontario does not contest that the government validly gave the Ontario Indemnity. But it now argues that it did not get anything in return. The best evidence that Ontario got something it wanted is that Ontario negotiated and executed the binding Ontario Indemnity.

70. As noted above, Great Lakes and Reed contributed a significant majority of the funds for the 1985 settlement with the First Nations. The importance of their participation is evidenced by the 1982 letter from Minister Ramsay, which sought to bring Great Lakes back to the negotiating table with the First Nations because talks had reached an impasse. Ontario's plea worked: Great Lakes came back. Ontario achieved its goal of settlement.

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[85] Court of Appeal Reasons, para. 85, JAR, Vol. I, Tab 5, p. 55.
[86] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11; Court of Appeal Reasons, para. 86, JAR, Vol. I, Tab 5, pp. 55-56. *See* Great Lakes Forest Products, 1983 Annual Report, JAR, Vol III, Tab 19E, p. 125 ($7.5 million); Great Lakes Forest Products, 1984 Annual Report, JAR, Vol III, Tab 19F, p. 139 ($5.5 million and $13.8 million for new machine); Great Lakes Forest Products, 1985 Annual Report, JAR, Vol III, Tab 19G, p. 156 ($8.6 million).
[87] Ontario's Appellant Factum, para. 107.

71. Nor can Ontario argue that Great Lakes had already promised to settle the First Nations litigation in 1979. It had not. No such promise was referenced in the 1979 Indemnity nor the 1982 Ramsay letter imploring Great Lakes to bargain. Great Lakes and Reed had a $15 million deductible under the 1979 Indemnity. But that is neither a promise to settle nor a promise to write a cheque.

72. It is true that Great Lakes did not provide *a new commitment* for modernization in 1985. The motion judge did not find that it had. Instead, he noted that Great Lakes continued to spend significant amounts of money on modernization after the commitment in the 1979 Indemnity was met, which is correct.[88] This provided value, as the economic well-being of Dryden was of critical importance to Ontario. More importantly, the Ontario Indemnity replaced the 1979 Indemnity, which itself recognized the $200 million Great Lakes invested in the modernization of the Dryden Mill.[89] In short, the Ontario Indemnity was given in exchange for all of the contributions of Great Lakes from 1979 onwards.

The Ontario Indemnity is not limited to discharges from the landfill

73. Ontario argues that the terms of the 1985 MOA restricted the Ontario Indemnity to Reed's pre-1979 mercury discharges. This atextual argument is not consistent with the language of either the 1985 MOA or the Ontario Indemnity itself.

74. The settlement of the First Nations litigation was memorialized in the 1985 MOA. In the preamble, the 1985 MOA describes the background of the settlement as the "issues":

> The discharge by Reed and its predecessors of mercury and 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

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[88] Court of Appeal Reasons, para. 86, JAR, Vol. I, Tab 5, pp. 55-56; Great Lakes Forest Products, 1983 Annual Report, JAR, Vol III, Tab 19E, p. 125; Great Lakes Forest Products, 1984 Annual Report, JAR, Vol III, Tab 19F, p. 139; Great Lakes Forest Products, 1985 Annual Report, JAR, Vol III, Tab 19G, p. 156. There is no indication that the motion judge was confused about the terms of the indemnities: he described the modernization commitment accurately in 1979 and found no such commitment in 1985 (paras. 9 – 19).

[89] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.

> 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").[90]

75. The 1985 MOA requires that Ontario provide Great Lakes and Reed indemnities in "respect of the issues."

76. Ontario now argues that the definition of "issues" restricts the Ontario Indemnity to only the *discharge* of mercury. But this recital does no such thing. "Issues" makes repeated reference to the "presence" of mercury as well as its discharge. In any event, Ontario cannot use the recitals to rewrite the Ontario Indemnity, which specifically covers not only "discharge or escape" but also the "presence of any pollutant… in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd."[91] This covers the mercury buried in the landfill.

77. To interpret the 1985 MOA as carving out the landfill from the indemnity is commercially illogical. The recitals of the 1985 MOA were never intended to restrict the terms of the Ontario Indemnity. The "issues" are expressly focused on the effect of the discharge and ongoing presence of pollutants on the First Nations alone. On its terms, the Ontario Indemnity is far broader than these "issues". Indeed, the Ontario Indemnity had to be broader than the First Nations' "issues" in order to have any practical purpose because the First Nations had no claims after the 1985 Settlement in which they granted Great Lakes a full release.[92]

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[90] MOA, recitals, para. 1, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, p. 140 [emphasis added].
[91] Ontario Indemnity, MOA, Schedule "F", s. 1, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 189-190.
[92] Motion Judge Reasons, para. 13, JAR, Vol. I, Tab 1, p. 3; MOA, ss. 2.2, 2.5, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 144, 145; *English and Wabigoon River Systems Mercury Contamination Settlement Agreement, 1986,* S.O. 1986, c. 23, s. 39, RRBOA, Tab 6; *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23, s. 3(3), RRBOA, Tab 8.

78. Because the Ontario Indemnity is not restricted to discharges, Ontario's focus on an immaterial error of the motion judge in describing the mercury discharges is of no consequence. In the first paragraph of the facts, the motion judge correctly found that mercury-contaminated waste was buried in the landfill but incorrectly noted that the landfill discharged waste into the river system, when the discharges originated from the Dryden Mill.[93]

79. This mistake is a quintessential non-overriding error. It factored nowhere into the motion judge's analysis. Instead, the motion judge relied on the "unimpeachable finding" that, in 1985, it was known that the landfill posed a serious environmental liability.[94] To hold, as did the dissenting reasons below, that the landfill could not give rise to a pollution claim because it was "created and used as a solution to the mercury pollution problem" is to ignore the obvious. Great Lakes was purchasing eight buried concrete cells of mercury-contaminated waste with a contaminating lifespan of 64 years.[95] When Great Lakes refused to purchase the Dryden Mill without protection from environmental liabilities, the landfill would have been top of mind.

80. The dissenting judge cites evidence from the Director's Order and contemporaneous correspondence to show that there is little risk from the landfill. Evidence occurring 30 years after the Ontario Indemnity is not properly part of the contemporaneous factual matrix. Moreover, if subsequent evidence was relevant, the lengths taken in 1998 by Weyerhaeuser to protect itself against liability from the landfill demonstrate how seriously parties took the risk.[96] Finally, the Director's Order does show that the landfill poses real risk because a "contaminant plume" has created a potential for "impact to groundwater."[97] As stated in the Ontario Indemnity, Great Lakes was equally concerned about the costs of pollution discharge as it was the costs for addressing the buried contaminants in the landfill.

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[93] Motion Judge Reasons, para. 7, JAR, Vol. I, Tab 1, p. 2.
[94] Court of Appeal Reasons, para. 82, JAR, Vol. I, Tab 5, p. 54; Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[95] Director's Order, dated August 25, 2011, para. 1.33, Exhibit "A", Rawn Affidavit, pp. 22-23.
[96] This is discussed at paras. 98, 107-108 of Resolute's Appellant Factum, dated January 7, 2019.
[97] Director's Order, dated August 25, 2011, paras. 1.31-1.32, Exhibit "A", Rawn Affidavit, p. 22.

Section 2 and 3 of the Ontario Indemnity

81. The Ontario Indemnity covers a broad variety of claims. To address such claims, the Ontario Indemnity provides Ontario with a right to elect to either take carriage of the defence or participate in the defence (section 2) and provides that the indemnitees will cooperate with Ontario in the defence of any claim (section 3).

82. Justice Laskin held that these provisions are only "meaningful" for third-party claims.[98] But there is no dispute that the Ontario Indemnity covers third-party claims and that these procedural protections are standard for indemnities. These sections have no bearing on whether the indemnity also covers first-party claims. The sections are, at best, inconclusive. Contrary to Ontario's submissions, the motion judge did not ignore these provisions or its argument. He just did not agree that they were especially instructive, stating "[i]In my view, the requirement to notify the Province of any pollution claims cannot override the clear, unambiguous and broad wording of s. 1 of the Ontario Indemnity."[99]

Subsequent conduct does not assist Ontario

83. Resolute's predecessors abided by a series of regulatory orders on the landfill, but they did not claim on the Ontario Indemnity until substantially more burdensome requirements were imposed by the 2011 Director's Order. This post-1985 conduct is, as the motion judge held, not helpful in determining the parties' objective intent in 1985.[100] Subsequent conduct evidence is a poor tool of contractual interpretation. There can be many reasons why a party chooses not to exercise its indemnity rights at every small opportunity: "the fact that a party does not enforce his strict legal rights does not mean that he never had them."[101] Instead, subsequent conduct is only admissible when a contract is unclear on its text and factual matrix.[102] There is no such

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[98] Court of Appeal Reasons, para. 268, JAR, Vol. I, Tab 5, p. 126.
[99] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[100] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11; Court of Appeal Reasons, paras. 114-117, JAR, Vol. I, Tab 5, p. 67.
[101] *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, para. 44.
[102] *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, paras. 44, 46.

ambiguity here, nor did Ontario plead or argue that Resolute had waived its rights or was estopped from exercising them by its subsequent conduct.[103]

Statutory context: the Spills Bill

84. The Ontario Indemnity expressly applies to actions, claims or proceedings, whether "statutory or otherwise," commenced by governments, including "any province" or "any agency, body or authority created by statutory or other authority."[104] The motion judge held that the protection from statutory claims was consistent with interpreting "any province" as including Ontario, as well as its statutory agencies, such as the MOE.[105] Because the Dryden Mill was in Ontario, Ontario was the only province that could make statutory claims. It is certainly not a palpable or overriding error to conclude that an indemnity for claims by "any province… or any agency" includes the province in which the Dryden Mill was located.[106]

85. Moreover, the reference to claims or proceedings, statutory or otherwise, brought by "any agency, body or authority created by statute" is an obvious reference to regulatory action. Other than the federal government, the only agencies, bodies or authorities with jurisdiction over the Dryden Mill and landfill are in Ontario.

86. In contrast, Ontario argues that the reference to "statutory" claims has a narrow meaning, referring only to provisions proclaimed into the *EPA* in 1985 known as the "Spills Bill."[107] That Bill created a statutory cause of action against polluters that was available to both third parties and governments.[108] The dissent below goes further, holding that the Spills Bill was "undoubtedly" why the reference to "statutory" claims was made in the Ontario Indemnity.[109]

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[103] Court of Appeal Reasons, para. 117, JAR, Vol. I, Tab 5, p. 67.
[104] Ontario Indemnity, MOA, Schedule "F", s. 1, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 189-190.
[105] *Interprovincial Co-operatives Ltd. et al. v. R.* (1975), [1976] 1 S.C.R. 477; Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[106] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[107] *The Environmental Protection Amendment Act, 1979,* S.O. 1979, c. 91, s. 2, Book of Authorities of the Appellant, Resolute FP Canada Inc., ("RABOA"), Tab 11.
[108] *The Environmental Protection Amendment Act, 1979,* S.O. 1979, c. 91, s. 2 [68i(2)], RABOA, Tab 11.
[109] Court of Appeal Reasons, para. 249, JAR, Vol. I, Tab 5, p. 119.

87. The statutory context in 1985, including the Spills Bill, is a part of the factual matrix. But Ontario does not seek to use the Spills Bill for an understanding of the contemporaneous law. Instead, Ontario argues that the only reason that the phrase "statutory" does not appear in the Dryden Agreement in 1979, but does in the Ontario Indemnity, was that the 1985 proclamation of the Spills Bill "caused the parties to insert the words 'statutory or otherwise'" into the Ontario Indemnity.[110] In other words, Ontario asks this Court to infer that the parties discussed the Spills Bill in their negotiations and added a term to the indemnity to address it.

88. This inference should be rejected. Courts do not consider nor rely on evidence of the parties' negotiations for the purpose of contractual interpretation and "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."[111]

89. But even if this Court considers the Spills Bill, it provides no clues to interpreting the Ontario Indemnity. Neither the Spills Bill's timing nor its content supports Ontario's position.

90. While the Spills Bill came into force only in 1985, it was enacted and widely known long before. The Bill was first introduced in 1978,[112] was debated in the legislature between March and December 1979, and was given Royal Assent on December 20, 1979.[113] The "Spills Bill" was the Ontario Legislature's response to several well-known spills that occurred in Ontario in the 1970s.[114] In other words, if the Spills Bill is a legitimate part of the factual matrix, the parties would have known about it around the time of the Dryden Agreement, which was made

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[110] Court of Appeal Reasons, para. 111, JAR, Vol. I, Tab 5, p. 65, citing Factum of the Appellant, Her Majesty the Queen (Court of Appeal for Ontario), JAR, Vol. VIII, Tab 42.
[111] Court of Appeal Reasons, para. 112, JAR, Vol. I, Tab 5, pp. 65-66.
[112] Ontario, Legislative Assembly, 31st Parl., 2nd Sess., (14 December, 1978).
[113] Ontario, Legislative Assembly, 31st Parl., 3rd Sess., (20 December, 1979).
[114] They include the Dowling PCB Spill of 1973 and the Mississauga train derailment of 1979. *See e.g.* Ontario, Legislative Assembly, 31st Parl., 3rd Sess., (15 May 1979) and Ontario, Legislative Assembly, 31st Parl., 3rd Sess., (13 November 1979).

December 7, 1979. There is no basis to conclude that the Bill was "undoubtedly"[115] why the words "statutory or otherwise" were present in 1985 but not 1979.

91. Further, the Spills Bill was not the only new statutory liability facing Great Lakes in 1985. In 1984, new amendments under the *EPA* were proclaimed, allowing Ontario to make environmental orders against those, like Great Lakes, who owned a site containing pollutants, like the landfill.[116] Those amendments were the "genesis" of the provisions used under the 2011 Director's Order.[117] It is simply impossible to point to the Spills Bill as the only relevant statutory liability faced by Great Lakes.

92. In any event, the Spills Bill does not support Ontario's claim that "statutory or otherwise" refers only to third-party claims. While the Spills Bill did create a statutory cause of action for private parties, it made the same cause of action available to Ontario.[118] The Bill also created a new governmental power to make orders in the public interest, including remediation and preventative orders.[119] There is no reason to conclude that the Ontario Indemnity covers third-party actions under the Spills Bill but not the very same claim when Ontario is plaintiff.

The language of historical agreements does not determine the Ontario Indemnity

93. Ontario relies on the language of three pre-1985 agreements to determine the effect of the Ontario Indemnity: the 1979 Indemnity, the Dryden Agreement and the 1982 Letter. The motion judge considered and rejected this argument on two bases.

94. First, as a matter of principle, a contract must be determined on the meaning of *its own* words: "The Ontario Indemnity is a separate agreement and must be interpreted by considering the words used by the parties in it, not a previous agreement."[120] To do anything else is to replace

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[115] Court of Appeal Reasons, para. 249, JAR, Vol. I, Tab 5, p. 119.
[116] *Environmental Protection Amendment Act, 1983*, S.O. 1983, c. 52, s. 6, RRBOA, Tab 7.
[117] Court of Appeal Reasons, para. 110, JAR, Vol. I, Tab 5, pp. 64-65.
[118] *The Environmental Protection Amendment Act, 1979*, S.O. 1979 c. 91, s. 2 [68i(2)], RABOA, Tab 11.
[119] *The Environmental Protection Amendment Act, 1979*, S.O. 1979, c. 91, s. 2 [68g(1)], RABOA, Tab 11.
[120] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.

the text of the Ontario Indemnity with a different agreement, which the factual matrix cannot do. Parties must be free to draft new agreements, with new and different terms, over time.

95. Second, even if relevant, none of the language in the previous agreements are helpful to Ontario's position. Each of these three agreements are reviewed briefly below. As the motion judge held, the fact that these agreements had restrictive language means that, if anything, the lack of such language indicates an intention for the Ontario Indemnity to be free of such restrictions.[121] The motion judge made no error in this regard.

96. ***The 1979 Indemnity.*** The reference in the recitals of the 1979 Indemnity to "environmental damages" does not support Ontario's interpretation. The operative paragraph includes no such restriction. Ontario is required to indemnify Great Lakes if "it is required to pay any monies ... in respect of pollution caused by Reed Ltd."[122] Ontario argues that these recitals support its theory that the 1979 Indemnity was restricted only to third-party claims, but the motion judge held that this interpretation was "commercially absurd."[123] Moreover, there is no reason to interpret the 1985 Ontario Indemnity to be identical to the 1979 Indemnity. In fact, the different language used in 1985 suggests the parties intended to broaden Great Lakes' protection as compared to 1979.

97. ***The 1979 Dryden Agreement.*** Ontario relies on the purchase agreement whereby Great Lakes bought the Dryden Mill from Reed in 1979. Ontario was not a party. Nevertheless, Ontario points to that agreement's environmental indemnity provisions and the fact that any costs incurred with respect to the Control Order were expressly carved out from a costs-sharing mechanism between the parties in relation to the indemnity.

98. This argument is doomed to fail. The way that Reed and Great Lakes decided to arrange their affairs in 1979 has no particular bearing on how Ontario and Great Lakes arranged theirs in 1985. Moreover, the 1985 Ontario Indemnity lacks the carve-out that Ontario relies on. The

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[121] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[122] 1979 Indemnity, Exhibit "I", Rawn Affidavit, JAR, Vol. IV, Tab 27I, pp. 135-136.
[123] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.

motion judge's rejection of this argument and failure to rely on the Dryden Agreement cannot have been a palpable and overriding error.

99. ***1982 Letter.*** In 1982, R. H. Ramsay, the Provincial Secretary for Resources Development, wrote to Great Lakes to seek its assistance in facilitating a settlement with the First Nations, which were at an impasse.[124] The Minister offered an indemnity to Great Lakes to induce it to negotiate. The indemnity was limited to "damages awarded by any court or for any settlement," which included "personal injury, property damages and economic claims."[125]

100. The motion judge did not refer to the 1982 Letter in his reasons. He did not need to. The letter is inadmissible as part of the factual matrix and has no probative value. The letter is little more than Ontario's unilateral offer of indemnity three years before the actual Ontario Indemnity was mutually agreed. While it may have formed part of the negotiations between the parties, such contractual negotiations do not form part of the factual matrix.[126] At best, such negotiations "tend to show only what a party wanted, not what they got, in the ultimate bargain."[127] As a result, it cannot replace or even help interpret the language of the Ontario Indemnity.

Fettering doctrine does not affect Ontario Indemnity

101. Ontario argues that even if the Ontario Indemnity applies to the Director's Order on its terms – which it does – Ontario is not bound by it because of the rule that the Crown cannot indirectly fetter the Ontario Legislature's right to change the law. It argues that the motion judge implied a term into the Ontario Indemnity and that term indirectly fetters the powers of the Legislature.

102. In fact, the long-standing prohibition against fettering the power of the legislature is irrelevant to the construction of the Ontario Indemnity. The term protecting against the Director's Order is express, not implied. It neither directly nor indirectly limits legislative sovereignty.

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[124] Court of Appeal Reasons, para. 24, JAR, Vol. I, Tab 5, pp. 34-35.
[125] Court of Appeal Reasons, para. 24, JAR, Vol. I, Tab 5, pp. 34-35.
[126] *The Canada Trust Company v. Browne*, 2012 ONCA 862, para. 71.
[127] *Jones Collombin Investment Counsel Inc. v. Fickel*, 2016 ONSC 6536, para. 26.

103. Ontario asks this Court to require judicial rewriting, and indeed reading down, of any contractual promise made by a province to fully indemnify an opposite party from all future liability. It asks this Court to conclude that provincial governments do not have the contractual freedom to bind themselves to cover not-yet-enacted causes of action. This is neither sensible policy nor is it required to protect legislative sovereignty.

No implied term regarding future legislation

104. Contrary to Ontario's argument, the motion judge did not imply a term into the Ontario Indemnity about claims related to "future legislative acts." He did not need to find that the indemnity had any implied terms[128] because he simply applied the express terms.

105. The Ontario Indemnity expressly covers claims that arose both before and after 1979. Section 1 refers not only to claims, actions and proceeds "existing at December 17, 1979" but also to claims, actions and proceedings that "may arise or be asserted thereafter (including those arising or asserted after the date of this agreement)." The motion judge held that the Director's Order was a statutory claim or proceeding that imposes costs contemplated by the indemnity.[129] The Court of Appeal agreed.[130]

106. Ontario repeatedly asserts that courts are reluctant to impose obligations arising from future legislation absent express wording.[131] It is wrong both in fact and in law. First, there *is* express language in the Ontario Indemnity. Second, there is no such principle of contractual interpretation. The one case that Ontario relies on actually stands for almost the opposite proposition, which is that the Court should not imply that the government has the right to change a contract simply by making new regulations.[132] Applying that principle to this appeal suggests

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[128] Ontario argues here that the motion judge erred by not recognizing an implied term, but Ontario did not argue that any term was implied. Factum of Her Majesty the Queen (Ontario Superior Court of Justice), paras. 77-79, JAR, Vol. VII, Tab 36, pp. 22-23; Motion Judge Reasons, paras. 31, 50, JAR, Vol. I, Tab 1, pp. 7, 12.

[129] Motion Judge Reasons, para. 46, JAR, Vol. I, Tab 1, p. 10.
[130] Court of Appeal Reasons, para. 122, JAR, Vol. I, Tab 5, pp. 68-69.
[131] Ontario's Appellant Factum, paras. 91, 128.
[132] *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629, pp. 641-642.

that Ontario should not be able to escape its indemnity obligations just because the statutory framework has changed.

107. Finally, the Director's Order did not impose liability that was unknown to the parties in 1985. As noted above, the genesis of the provisions under which the Director's Order was issued came into force in 1984.[133] While the section has been amended since, the basis for that statutory liability was in effect at the time the parties entered into the Ontario Indemnity.

Applying the Ontario Indemnity is not fettering

108. Contracts are critical to the operation of government. Provincial governments do almost all of their business, and implement much of their policy, through contracts. They procure goods and services, employ people, lease land to and from private parties, borrow vast amounts of money, and even deliver social services and infrastructure through private parties, all by contract.[134] This appeal attempts to use the doctrine of fettering to set different contracting rules for the Crown to allow it to resile from its contracts, at its whim, without consequence.

109. This is not the law. When the Crown chooses voluntarily to enter into a contract, it is governed "primarily by the private law of contract" and is "bound by its contracts in the same way as a private person."[135]

110. The doctrine of fettering is a narrow exception to that principle protecting legislative sovereignty. Nothing can hinder the legislature's right to "make or unmake any law whatever."[136] The executive branch of government therefore cannot "unilaterally fetter the legislature's law-making power."[137] Any contract that purports to do so "would be merely ineffective in this regard (since it cannot bind the legislature)."[138] But the doctrine is limited to

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[133] *Environmental Protection Amendment Act, 1983*, S.O. 1983, c. 52, s. 6, RRBOA, Tab 7.
[134] Karen Horsman and Gareth Morley, *Government Liability: Law and Practice*, (Toronto: Thomson Reuters, 2018), p. 2-1, RRBOA, Tab 3.
[135] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), pp. 304-305, RRBOA, Tab 4.
[136] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 324, RRBOA, Tab 4.
[137] *Reference re Pan-Canadian Securities*, 2018 SCC 48, para. 59.
[138] *Reference re Pan-Canadian Securities*, 2018 SCC 48, para. 67.

restrictions on the making or unmaking of law. When the Crown breaches a contract, it must compensate its counterparty for the breach, like any private party, absent explicit legislation to the contrary.[139]

No indirect fettering

111. Ontario does not suggest that the Ontario Indemnity interferes with the Legislature's ability to enact or repeal legislation. Instead, it alleges an "indirect" fetter, because the costs of complying with (or breaching) the Ontario Indemnity could be a disincentive to take legislative action. But this Court rejected that doctrine, under analogous circumstances, in *Wells v. Newfoundland*.

112. In *Wells*, the Court concluded that requiring a provincial government to pay damages for breaching a contract did not fetter its authority to legislatively abrogate that contract. It distinguished between "the Crown legislatively avoiding a contract" (which is permitted) and "altogether escaping the legal consequences of doing so."[140] Making the Crown pay a contractual counterparty in no way diminishes the legislature's ability to alter or terminate those contracts.[141]

113. In fact, the Court held that the Crown was obliged to abide by its legal obligations in order to uphold the principle of the rule of law:

> 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.[142]

114. *Wells* was complicated by this Court's municipal law decision in *Pacific National Investments No. 1* ("*PNI #1*").[143] In that case, the majority refused to find an implied term in a

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[139] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, para. 47.
[140] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, paras. 41, 48.
[141] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, para. 48.
[142] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, para. 46 [emphasis added].
[143] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64.

contract between a municipality and a developer to compensate the developer in the case of a zoning change. The majority held that a municipal agreement to compensate for the legislative zoning change was an improper "restriction on the legislative power."[144] The Court left *Wells* in place, distinguishing it because it "did not deal with a contract governing the exercise of municipal legislative powers."[145]

115. *PNI #1* has been the "subject of considerable criticism."[146] Only four years later, the same parties returned to this Court. This Court unanimously allowed the developer's unjust enrichment claim against the municipality ("*PNI #2*"). [147] In a decision that is directly contrary to *PNI #1*, this Court rejected the idea that financial consequences create an impermissible disincentive to the use of municipal legislative powers and held the municipality liable for the financial consequences of its legislative actions.

116. Some commentators and lower courts have gone further, suggesting that *PNI #1* was wrongly decided altogether. Professor Hogg writes that "the decision is wrong ... [I]n a society governed by the rule of law, no level of government should be free to be heedless of private rights, even in response to changes in public opinion."[148] On the basis that *Wells* was still good law, lower courts have declined to follow *PNI #1*, one writing that there is "a very strong argument that *Pacific National No. 1* is wrong."[149]

117. There are no public policy objectives that are furthered by the doctrine of indirect fettering. While on its face the indirect fettering doctrine may appear to assist governments, "the benefit to government is illusory. In the long-run the doctrine would impair the credit of

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[144] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, para. 63.
[145] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, para. 61.
[146] *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, para. 34; *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58, para. 49.
[147] *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, para. 1.
[148] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 328, RRBOA, Tab 4.
[149] *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550, para. 153; *see also*, *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36, para. 31.

government, forcing government to pay higher prices (risk premiums)."[150] Instead, it "is a benefit, not a hindrance, that the Crown has the legal capacity to bind itself for the future.[151]

118. This Court has agreed. In *PNI #2*, criticizing *PNI #1*, the unanimous Court held that it was not "good public policy" to have municipalities make development commitments and then repudiate them as illegal, "scoop[ing] a financial windfall at the expense of those who contracted with them in good faith."[152] When the provincial Crown is the contractor, as Sovereign, it owes a *greater* duty than a private party to fulfil its contractual obligations.[153]

119. This Court could clarify the law and expressly overrule *PNI #1* as wrongly decided. In the alternative, this Court should endorse the narrow interpretation of the decision almost uniformly given by lower courts and academics that *PNI #1* applies "only to the municipal level of government."[154] A municipality is a creation of statute and possesses only those powers delegated to it. *PNI #1* was decided solely on the basis of these municipal powers. The analysis is not applicable to the provincial Crown, who contracts as a natural person. Indeed, the majority in *PNI #1* distinguished *Wells* on the basis that it did not deal with municipalities. *Wells* therefore continues to be the governing law for the provincial Crown.[155]

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[150] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 330, RRBOA, Tab 4.
[151] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 305, RRBOA, Tab 4.
[152] *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, para. 57.
[153] *Agricultural Research Institute of Ontario et al. v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), paras. 29-30, per Abella J.A. (as she then was).
[154] Court of Appeal Reasons, para. 124, JAR, Vol. I, Tab 5, p. 69; Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), pp. 327-328, RRBOA, Tab 4; Karen Horsman and Gareth Morley, *Government Liability: Law and Practice*, (Toronto: Thomson Reuters, 2018) p. 2-13 - 2-14, RRBOA, Tab 3; S.M. Waddams, *The Law of Contracts*, 7th ed., (Toronto: Thomson Reuters, 2017), para. 654, RRBOA, Tab 5; *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58, para. 48; *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, paras. 34, 44; *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, paras. 53-59.
[155] It is not enough to argue, as Ontario does, that the indirect fettering rule is more necessary at the provincial level because the public purse is larger. The fettering doctrine is designed to

120. If *PNI #1* is confined to municipalities, it has no application to this appeal. But even on a broader interpretation of *PNI #1*, there is no indirect fettering at issue because (i) the Ontario Indemnity has no effect on the legislative powers of the Ontario Legislature; and (ii) the Ontario Indemnity is a business contract. Each are discussed below.

No fettering of legislative authority

121. *PNI #1* was concerned exclusively with "contracts concerning the exercise of legislative powers."[156] The Ontario Indemnity does not qualify. It has no effect on legislative powers. The indemnity does not create any cost or disincentive to Ontario enacting environmental legislation. Indeed, Ontario Indemnity could not indirectly fetter the 1990 amendments to the *EPA* because the statute's enactment did not trigger a claim under the indemnity. Rather, a non-legislative act, the 2011 issuance of the Director's Order, created the claim.

122. Ontario also suggests that the Ontario Indemnity impermissibly fetters the exercise of ministerial discretion because of those very costs created by the Director's Order. But there is no authority that the Crown can escape the monetary consequences of its obligations because it could affect its executive decision-making.[157] Such non-legislative fettering finds no basis in parliamentary sovereignty: while the Crown-as-Executive cannot bind the Legislature, the

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protect parliamentary sovereignty, but the cost of a change in government policy should be "borne by the government (the general body of taxpayers) and not by the innocent private party." Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 306, RRBOA, Tab 4.

[156] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, para. 63.

[157] The Crown relies on two authorities, but neither assist. *R. v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500, is the case of a contract that exceeded the Postmaster's statutory jurisdiction. And *Rederiaktiebolaget Amphitrite v. R.*, [1921] All ER Rep 542, Book of Authorities of the Appellant, Her Majesty the Queen in Right of Ontario, Tab 2, is a case where the Court found there never was a contract. Professor Hogg labels this case "discredited". Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed., (Toronto: Carswell, 2011), p. 305, RRBOA, Tab 4.

Crown-as-Executive *can, and does*, bind itself by contract. Indeed, the spectre that the Crown could not bind its future decision-making would have drastic consequences, including for government contracting, procurement and, notably for this case, the settlement of litigation.

The Ontario Indemnity is a business agreement

123. In *PNI #1*, the majority differentiated between contracts concerning the exercise of legislative powers, like a promise not to change zoning, and business agreements. The latter were not subject to the doctrine of fettering: "municipalities will be bound by their business contracts. They will not be free to break them on a whim. They will have to pay compensation to the other party barring an express statutory provision denying any form of compensation ..."[158]

124. The meaning of business agreement is not defined. But, in the narrowest sense, a business agreement must include contracts that are non-governmental in nature, *i.e.*, those that private parties could enter in the course of doing business. Indemnities are regularly given by non-governmental parties. Indeed, Great Lakes gave indemnities similar to the Ontario Indemnity to Reed in both 1979 and 1985.[159]

125. The Indemnity is also a business agreement when considered in the larger context of the 1985 MOA, which was a multi-party settlement of complex litigation. The settlement of civil litigation is one of the most fundamental forms of a business agreement.[160]

126. Ontario's proposal to require "unequivocal evidence of contractual intent" for the Crown to pay compensation in respect of a future legislative action contradicts the holding of *Wells*, which, absent clear legislative intent, requires such compensation. Moreover, Ontario itself negotiated the contracts that it now seeks to avoid. Ontario argues that this is necessary because governments "do not make such commitments lightly." But the Crown should not make *any*

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[158] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, para 69.
[159] Dryden Agreement, JAR, Vol. III, Tab 17, pp. 19, 46-47. and Great Lakes Indemnity, Schedule "D", MOA, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 180-185.
[160] *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, paras. 47, 58.

commitments lightly: "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."[161]

PART IV – COSTS

127. Resolute FP Canada Inc. submits that costs should follow the event, and if the appeal is dismissed, seeks its costs in this Court and in the proceedings below, on the terms awarded by the motion judge.

PART V – ORDER SOUGHT

128. Resolute FP Canada Inc. requests an order dismissing this appeal and granting Resolute FP Canada Inc. its costs of this appeal and the proceedings below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

par Andrew Bernstein

pour Jeremy R. Opolsky

pour Jonathan Silver

Counsel for the Respondent,
Resolute FP Canada Inc.

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[161] *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, para. 59.

PART VI – TABLE OF AUTHORITIES

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