SCC File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

THE CITY OF CORNER BROOK

APPLICANT
(Respondent)

- and –

MARY BAILEY

RESPONDENT
(Appellant)

APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. Every day in Canada, litigants settle matters, taking strain off the court system. A full and final release and indemnity agreement typically governs the settlement.

2. This appeal raises the issue of how release and indemnity agreements are to be construed at common law. In particular, it asks whether they can be "full and final" or whether they are subject to special rules that require that they be construed more narrowly than other contracts.

3. In the case at hand, the Newfoundland and Labrador Court of Appeal imposed a narrow interpretation of a release and indemnity agreement that contradicted the express words in the agreement. It held that it was not enough for the parties to know the facts from which the cause of action arose (in this case a car accident), but that both the contracting parties were required to have specifically addressed all sources of liability, in explicit terms in the agreement, in order for them to be released.

4. The strictness of this interpretation is a marked departure from the prior case law and it is inconsistent with the approach taken in other provinces. For example, some courts rely

primarily on the text of the agreement.[1] Some rely on *Sattva*[2] and the ordinary principles of contractual interpretation.[3] Others, like the Court below, ignore the express words in the agreement and cite the *Blackmore Rule* to find that the general wording of the agreement is limited to what was "specially in the contemplation of the parties."[4] Even then, there are variations between provinces about what needs to be contemplated, and who must do the contemplating.

5. The result is that there are now three different multi-factor tests for the interpretation of a release being followed in Canada.[5] The applicant, the City of Corner Brook (the "**City**"), asks this Court to grant leave to appeal in order to settle this question across Canada's common-law jurisdictions.

Facts

6. The agreement concerns a motor vehicle accident that occurred on March 3rd, 2009 when a driver (the respondent) collided with a City employee who was shovelling cold patch into a pothole.

7. The employee sued the driver in negligence for his injuries. Subsequently, in a separate claim, the driver sued the City in negligence for her injuries and property damage. Both claims were properly served.

8. The driver, through her lawyer, settled her claim with the City. The settlement was contingent on the execution of a "full and final" release and indemnity agreement. As part

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[1] *R. v. Imperial Tobacco Canada*, 2012 ONSC 6027, aff'd 2013 ONCA 481; *Ontario v. Imperial Tobacco Canada Ltd*., 2013 ONCA 481; and, *Crosstown Transit Constructors v. Metrolinx*, 2019 ONCA 240.

[2] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("***Sattva***").

[3] *MHR Board Game Design Inc. v. Canadian Broadcasting Corporation*, 2013 ONCA 728, aff'g 2013 ONSC 4457; and, *Filkow et al v D'Arcy & Deacon LLP*, 2019 MBCA 61.

[4] *The Owners, Strata Plan BCS 327 v. IPEX Inc.*, 2014 BCCA 237; *Companies' Creditors Arrangement Act (ON)*, Re, 2006 CanLII 32429 (ON SC).

[5] *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 29 ("***Kaiser***") at para 17; *Biancaniello v. DMCT LLP*, 2017 ONCA 386 at para 42 ("***Biancaniello***"); *Terwillegar Towne Residents Association v Brookfield Residential (Alberta) LP*, 2015 ABQB 14 ("***Terwillegar***") at para 26.

of the negotiations, the driver's lawyer was provided with a copy of the agreement for his review. No revisions were requested. The driver signed the agreement in which she agreed to:

(a) release and forever discharge the City from all actions, claims and demands whatsoever, foreseen or unforeseen, arising out of or related to the accident;

(b) indemnify and save harmless the City from any further claims or demands, actions or suits which may be brought by her or in her name against the City, for and in respect of the matters or things set forth in the release; and,

(c) release the City from all claims raised or which could have been raised in her action against the City.

9. In the agreement the driver declared that she fully understood the terms of the agreement, and that she executed it with "full knowledge of any and all rights" which she might have as against the City. Further, she acknowledged that the settlement was "full and final".

10. Four years later, the employee's action was still outstanding. The driver commenced a third party action against the City, once again alleging that the City was negligent for the accident, notwithstanding the release and indemnity agreement.

11. The City moved for a summary trial to enforce the agreement and have the third party claim dismissed.

The Decisions Below

12. The Trial Judge found that the third party claim was barred by the agreement, on the basis that the driver was fully aware of the prospect of liability to the employee at the time she signed the agreement.

13. The Court of Appeal overturned this conclusion. Relying on this Court's decision in *R. v. Resolute*,[6] it found that the factual matrix overwhelmed the wording of the agreement.

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[6] *R. v. Resolute,* 2019 SCC 60 ("***Resolute***").

Specifically, the Court of Appeal found that the trial judge erred when he failed to consider that contribution and indemnity for the employee's injuries might not have been within the driver's contemplation when she signed the agreement, primarily because the driver had given the employee's Statement of Claim to her insurer and she thought they would take care of it.

14. The Court of Appeal also found that the City was not aware of the employee's Statement of Claim against the driver, so it could not have expected to benefit from the release or indemnity.

15. The decision of the Newfoundland and Labrador Court of Appeal renders much of the release, and the entire indemnity, meaningless. It represents a dramatic change in the *status quo* for Canadian litigants because it invalidates the portions of the agreement that defendants regularly rely on to close their files.

16. The decision reflects a departure from the principles espoused by this Court in *Sattva*, and reveals an unintended consequence of the decision in *Resolute*. Granting leave in this case will offer the Court an opportunity to clarify *Resolute* and to provide guidance on the interpretation of commonplace release and indemnity agreements in the context of a relatively simple factual matrix.

PART II – ISSUES

17. The issue on this application is whether this case raises issues of national or public importance that warrant a decision by the Court.

18. The City submits there are three central sub-issues that merit the Court's attention:

    a) Are release and indemnity agreements subject to ordinary rules of contractual interpretation, or is there a special rule that limits their scope regardless of what the release actually says?

    b) If there is a special rule, what is it? In particular, does it require that both parties explicitly describe every claim that could be released, or does it simply require that the releasor and/or releasee know the facts that could give rise to a released claim?

c) Lastly, can a releasor release unknown claims, and if so, can it do so by using broad and general language?

PART III – ARGUMENT

Parties need to know what a release and indemnity agreement covers

19. Litigants obtain release and indemnity agreements so that they can settle known and unknown claims. The purpose is to wipe the slate clean in respect of the dispute between the parties. If the releasee has insurance, the agreement allows the insurer to close its file. Some courts are interpreting these agreements in a manner that is consistent with this purpose.[7]

20. Finality has great value to litigants. It is an important part of what releasees are buying in exchange for settlement funds.

21. Finality necessarily includes the release of all claims arising from a particular set of facts. It includes the release of known, and unknown claims. In fact, unknown claims are arguably more important, as the process of discontinuing or dismissing the action combined with the passing of a limitation period already prevents the known claim from being pursued by the releasor. The release and indemnity agreement then must stand for something more than the known claim. It must pertain to unknown claims.

22. The decision below abruptly removes the primary purpose of a release – finality – by severely limiting the claims that are being released, regardless of the words of the agreement. This is inconsistent with the goal of settlement, and inconsistent with the way in which other courts across the country have approached the issue.[8]

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[7] *Biancaniello, supra* note 5 at para 17; and, *Kaiser, supra* note 5 at para 25.
[8] *Ibid*.

The *Blackmore* Rule does not automatically render the general wording in a release meaningless; it merely indicates that we should consider the factual matrix

23. The Newfoundland and Labrador Court of Appeal found that the Trial Judge erred when he used the words in the agreement to help interpret its scope.[9] The Court based its finding on the *Blackmore* Rule.

24. The *Blackmore* Rule dates back to 1870. It states that "[t]he general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."[10]

25. In *Hill v. Nova Scotia (Attorney General)*[11] Cory J. cited this principle with approval and noted, at para. 20:

> *What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. [Emphasis added by Cory J.]*

26. The Newfoundland and Labrador Court of Appeal found that the *Blackmore* Rule has been subsumed into the principles of contractual interpretation, and that evidence regarding what was specially in the contemplation of the parties can overwhelm the words of the agreement.

27. The City agrees that, insofar as there is a factual matrix which informs the words in the release, the decision maker ought to consider that factual matrix to determine what was within the contemplation of the parties when the release was executed. However, in circumstances where the parties are represented by counsel, have equal bargaining power, and have an opportunity to review and revise the agreement, the express wording of the

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[9] *Bailey v Temple,* 2020 NLCA 3 at para 48 and 71 ("***Bailey***").

[10] *Directors of London & South Western R. Co. v. Blackmore (*1870), L.R. 4 H.L. 610 at p. 623.

[11] *Hill v. Nova Scotia (Attorney General),* 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69 at para 20.

agreement ought to be conclusive. Only clear and cogent evidence of a contrary intention should set aside express wording.

28. In the case at hand the language used to release every claim, including unknown claims, could not have been clearer:

> *…the Releasors... hereby release and forever discharge the Releasees…from all actions, suits, causes of action…foreseen or unforeseen…and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009…*

29. As stated above, the City's purpose in settling the driver's claim was finality. The dispute being settled concerned the City's negligence for the accident. The facts giving rise to the employee's action (and the driver's third party action against the City) were known to the parties when the agreement was signed. All of this was within the contemplation of the parties when the agreement was signed. Nevertheless, the Court found that the third party claim was not within the driver's contemplation because she had given the employee's statement of claim to her insurer and she thought they would take care of it. It found that it was not within the City's contemplation because it did not know that the employee had issued and served a statement of claim on the driver.

30. This interpretation of the *Blackmore* Rule is inconsistent with the interpretation used in other provinces.

31. The Courts of Appeal in Ontario and British Columbia have taken very different approaches. This inconsistency is not because of statutory differences; rather, these Courts simply take different views of the common law principles for interpreting releases.

32. The leading Ontario case is the 2017 decision in *Biancaniello v. DMCT LLP* which involved a dispute between an accounting firm and its client. The client failed to pay the bill, so the accountants sued for payment. In its defence, the client alleged that the accountants' services were deficient. The claim was settled for $35,000. The accompanying release released the accountants from:

> *all manner of actions…which against each other they had, now have or hereafter may, can or shall have for or by reason of any cause, manner or*

> *thing whatsoever existing to the present time with respect to any and all claims arising from any and all services provided by* [the accountants] *to* [the client] *through to and including December 31, 2007…*

33. Four years after the release was given, the client learned that, as a result of the accountants' deficient work, it could be subject to a tax liability of $1.24 million. The client sued the accountants. The accountants filed a motion for summary judgment to dismiss the action on the basis that it was barred by the release.

34. The Ontario Court of Appeal allowed the motion and dismissed the claim on the basis that it was barred by the release. The Court cited *Ali*,[12] a decision of the House of Lords, in which Lord Nicholls (concurring), agreed that unknown claims are covered by broad general language, relying on the need for finality:

> *The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary,* ***part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality.*** *When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable.* ***The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release.*** *The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made.* [emphasis added]

35. As the Ontario Court of Appeal stated: for the bank in Ali, the purpose of the release was finality.[13] It was concluded that the release in *Ali* included unknown claims and that the exclusion of unknown claims would give the release a "strained construction."

36. The Court in *Biancaniello* did not disavow the so-called *Blackmore* Rule. Rather, it relied on the rule to conclude that the meaning of the general wording of the release was confined to the type of claims to which the release was directed. It agreed that the release did not

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[12] *Bank of Credit and Commerce International SA v. Munawar Ali,* [2001] UKHL 8; [2001] 1 All E.R. 961 ("***Ali***").

[13] *Biancaniello, supra* note 5 at para 39.

purport to release all possible claims, without limitation, that may exist between the parties.[14]

37. Similarly, in the case at hand, the agreement signed by the driver does not purport to release the City from all possible claims that might exist between the driver and the City. For example, if the driver had a subsequent accident involving the City, that would not be covered.

The decision below throws the finality of releases into doubt

38. The Ontario Court of Appeal in *Biancaniello* found that the release was given as part of the settlement of a fees action by the accountants against their clients, and because the release was given as part of the settlement of the fees claim, its purpose was to wipe the slate clean in respect of any dispute between the parties arising from the accountants' services.[15] As a result, the Court found that the claim for extensive tax liabilities arising from an unknown error in the accountants' work was barred by the release.

39. In the case at hand, the release and indemnity agreement was given as part of the settlement of a negligence action brought by the driver against the City in regards to the accident. The purpose was to wipe the slate clean. As a result, a subsequent negligence claim brought by the driver against the City in regards to the same accident must also be barred. To exclude such a claim from the agreement results in a strained construction.

40. To be clear, the City knew that its employee was injured in the accident.[16] It knew of the facts giving rise to the claim. What it did not know was that its employee had served an action on the driver. The position of the City is that knowledge of the issued action is not critical for the claim to be within the contemplation of the City.

41. When we consider that the release and indemnity agreement is specific to the accident, it can easily be interpreted in accordance with the *Blackmore* Rule and in a way that is consistent with *Sattva* and the modern day principles of contractual interpretation.

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[14] *Biancaniello, supra* note 5 at para 44.

[15] *Biancaniello, supra* note 5 at para 43.

[16] The fact of the employee's injuries were plead in the driver's statement of claim against the City.

However, if the decision of the Newfoundland and Labrador Court of Appeal is allowed to stand then much of the agreement is rendered meaningless and a tension is created between that court's interpretation of the *Blackmore* Rule and the rule in *Sattva*. Granting leave in this case would afford this Court the opportunity to confirm that the *Blackmore* Rule and the modern principles of contractual interpretation can operate harmoniously.

42. Further, if we take the decision of the Court of Appeal at face value, releasees will not be able to negotiate for the release of unknown claims and litigants will not be able to close their files with finality.

43. In the jurisdiction of Newfoundland and Labrador, the possibility of a third party claim can linger indefinitely. Many personal injury claims are settled before a defence has been filed. If a defence has not been filed, a third party claim can be issued at any time without leave.[17] No deadline or limitation applies. If the decision of the Court of Appeal is allowed to stand, a matter such as this one could be settled and a third party claim could arise 5, 10 or 15 years later. This would result in prejudice and financial uncertainty for litigants.

44. The uncertainty created by the Court of Appeal's decision has disrupted the insurance industry. The release clauses commonly used by insurers are now in doubt, as is the very ability of insurers, and indeed, all litigants, to "wipe the slate clean" with opposing parties in the settlement of litigation. This uncertainty is likely to discourage the settlement of personal injury claims, and will encourage parties to withhold relevant information from other parties in the hopes of obtaining an advantage.

45. To mimic the words of the leave judge in *Biancaniello*, this issue is an important one that extends beyond the interests of the parties and that could have an impact on the administration of justice.[18] It is an issue of public importance because although the release is not, strictly speaking, a standard-form contract, it uses language that is standard in many common release and indemnity documents.[19]

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[17] *Limitations Act*, SNL 1995, c L-16.1 at section 11(1).
[18] *Biancaniello, supra* note 5 at para 14.
[19] *Biancaniello, supra* note 5 at para 22.

Different tests mean that the same release would enjoy different interpretations in different provinces

46. There are now at least three different multi-factor tests for the interpretation of a release being relied upon by Canadian courts.

47. The most recent is the five-point test articulated in *Biancaniello,* where the Ontario Court of Appeal distilled the following five principles from *Ali:* 1. Look first to the language of a release to find its meaning; 2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that a party intended to release claims of which it was unaware; 3. General language in a release will be limited to the thing or things that were specially in the contemplation of the parties when the release was given; 4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them; and 5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties.[20] These five principles have been regularly cited by Ontario Courts interpreting releases.[21]

48. In *Kaiser* the British Columbia Court of Appeal cited approvingly the seven-point test set out in *Chitty on Contracts.* Unlike the second point of the *Biancaniello* test, which provides that a party can, with clear language, release claims of which it is unaware, the *Kaiser* test provides that a release "will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution." The *Kaiser* test does not state, as does the *Biancaniello* test, that the purpose of a litigation release is to wipe the slate clean between the parties. If the *Kaiser* test had been applied to the facts in *Biancaniello* the result would have been different, since the client did not know of the tax liability at issue when the release was given.

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[20] *Biancaniello, supra* note 5 at para 42.

[21] *Quantech Electrical Contractors Limited v. Asco Construction Ltd.,* 2019 ONSC 1906 at para 62 ("***Quantech***"); *IAP Claiming H-15019 v. P. James Wallbridge,* 2019 ONSC 1617 at para 12; *Clearway Construction Inc. v. The City of Toronto,* 2018 ONSC 1736 at para 46; *Crosstown Transit Constructors v. Metrolinx,* 2018 ONSC 4650 at para 18, aff'd 2019 ONCA 240; *Kerzner v American Iron & Metal Company Inc.,* 2017 ONSC 4352 at para 111, varied on other grounds 2018 ONCA 989.

49. The third enumerated test was articulated by the Alberta Court of Queen's Bench in *Terwillegar*. Under this approach, to determine whether a release captures "unknown" claims, a Court should apply the discoverability principle to determine whether the claim in question was discoverable at the time the release was signed.[22] The *Terwilligar* test states that where there is reference to an action in the release, the appropriate approach would be to ask whether the claim now sought to be advanced would be *res judicata* or subject to the doctrine of merger if the matter had been taken to judgment.[23] Neither the *Biancaniello* nor *Kaiser* test engages this consideration.

50. The differences between these tests means that an unknown but discoverable claim can be included by a release interpreted in Alberta, but not included by an identical release interpreted in British Columbia. These differences interfere with the ability of parties to settle matters nationwide.

The problem cannot be solved by adding more words to the agreement

51. The release and indemnity agreement in the case at hand already purported to release the City from all claims and demands of any kind or nature whatsoever arising out of or related to the accident. The addition of "third party claims" would be redundant.

52. Further, in regards to unknown claims, the agreement already refers to all claims foreseen or unforeseen. As stated by the Ontario Court of Appeal in *Biancaniello*:

> *Had it said "including known and unknown claims", that would just have been another way of saying that the release includes all claims.*
>
> *…More words would not assist. I agree with the observation by Lord Hoffmann in Ali, at para 38, the solution does not lie with more verbiage. The problem is not that the words used are unclear, but that the claim that arose was unanticipated.*[24]

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[22] *Terwillegar, supra* note 5 at para 26.

[23] *Ibid*.

[24] *Biancaniello, supra* note 5 at para 50.

53. In light of the decision of the Newfoundland and Labrador Court of Appeal, the City is hard pressed to think of additional wording that would guarantee the release of an unknown third party action in this context.

In the absence of clear and cogent evidence to the contrary, a contract is the best evidence of the agreement between the parties

54. In 2014, this Court issued the *Sattva* decision, which usefully restated the principles governing the interpretation of contracts. In *Sattva*, Rothstein J. held that the factual context surrounding the execution of a contract is important to guide a decision maker on the true meaning of the words used, but cannot overwhelm the words used by the parties.[25]

55. The factual matrix should be considered but it cannot render meaningless significant portions of an agreement. The court cannot use the surrounding circumstances to "deviate from the text such that the court effectively creates a new agreement."[26]

56. Part of the rationale for this lies in the fact that, in many cases, the written agreement itself is the best evidence of the agreement struck between the parties. For example, sometimes in settlement negotiations, very little correspondence is exchanged, and instead the understanding is codified by the agreement.

57. In the case at hand, the factual matrix confirms that the City felt strongly that it was not liable for the accident, that the settlement was meant to be full and final and that the settlement was contingent on the execution of a full and final release and indemnity agreement.

58. Further, the City provided the agreement to the driver's counsel for his review. Had the driver's counsel required clarification or revision, those issues would have been negotiated. However, no such clarifications or revisions were requested.

59. The fact that there was very little correspondence between the parties, and the fact that the substance of the agreement was open for negotiation, indicates that the driver accepted all

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[25] *Sattva, supra* note 2 at para 57.
[26] *Ibid*.

the words used in the agreement. It is the best evidence of the agreement between the parties.

60. The wording of the agreement is clear. If the driver or her counsel (who both knew or ought to have known of the employee's action) had any question or concern whether a third party claim was captured by the agreement, they could have sought clarification or revision. They failed to do so.

61. Despite this, the Court of Appeal chose to render the following aspects of the agreement meaningless in the context of a third party claim:

- the driver's promise to release and forever discharge the City from all claims and demands of any kind or nature whatsoever arising out of or related to the accident;
- her promise to indemnify and save harmless the City from any further claims or demands, actions or suits which may be brought by her or in her name against the City, for and in respect of the matters or things set forth in the release;
- her promise to release the City from all claims raised or which could have been raised in her action against the City;
- her declaration that they fully understood the terms of the agreement; and,
- her declaration that they executed the agreement with "full knowledge of any and all rights" which she might have as against the City.

62. Was it reasonable for the driver, having read the release and having declared that she understood it, to <u>assume</u> that her involvement in the employee's claim and her third party action against the City would not be captured by the agreement? The City says no. We know for certain that the driver knew of the employee's claim. Her lawyer ought to have known about it.[27] A reasonable person, after reading the agreement, and having the opportunity to request revisions to the agreement, must have an onus to at least request that the above-mentioned provisions be clarified. The factual matrix shows that the driver and

[27] Her lawyer drafted the driver's statement of claim against the City which stated that she struck and injured the City employee.

her lawyer declined the opportunity to request revisions in exchange for an expeditious receipt of funds.

63. Generally speaking, when a person is served with a civil action she may not shirk her responsibilities or purposely put it out of her mind, even if her own insurer indicates that it will take care of it. If plaintiffs are allowed to 'forget' that they have been served with an action, chaos will ensue.

64. The majority of Canadians have little direct involvement in the civil justice system. Being served with a statement of claim, and confronted with an unfamiliar and potentially costly process, is not something a person is likely to forget. But if plaintiffs are incentivized, or can gain advantage in litigation, by being permitted to 'forget' that they were served with a civil claim, defendants and their insurers will be less likely to settle, may settle for less, or may settle much closer to trial. Any of these outcomes will put more demands on already scarce judicial resources to the collective disadvantage of all users of the courts.

65. At best, the Court of Appeal decision below – by allowing the third party claim to proceed – gives licence to releasors to make unreasonable assumptions about the meaning of an agreement even when those assumptions explicitly contradict the wording in the agreement. At worst, the decision encourages releasors to withhold information pertaining to unknown claims, and accept settlement funds in bad faith.

<u>This appeal is an opportunity to refine *Resolute* and avoid unintended consequences</u>

66. The agreement at issue between the driver and the City contained an indemnity which was completely ignored by the Newfoundland and Labrador Court of Appeal. The City submits that the Court erred when it failed to consider the effect of the indemnity, which states:

> *AND for the consideration aforesaid, the Releasors…hereby …agree and undertake to indemnify and save harmless and to keep indemnified the Releasees…from all further claims, demands, actions or suits which may be brought by or on behalf of or in the name of the Releasors against the Releasees…for and in respect of any of the matters or things hereinbefore set forth;*

67. The wording of the indemnity, specifically when it says "by or on behalf of or in the name of the Releasors against the Releasees" squarely addresses a scenario such as the third party

claim which is currently being brought by the driver's insurer in her name. \There is nothing in the factual matrix that detracts from the enforceability of this indemnity.

68. This Court in *Resolute* considered whether an indemnity applied to an order requiring Resolute to pay for the costs of maintaining, monitoring and testing a waste disposal site. The factual underpinning was complex. The majority of the Court adopted the dissenting reasons of Justice Laskin in the Ontario Court of Appeal and found that the 1985 indemnity did not include the Order.

69. As the relevant interpretative principle, Justice Laskin referred to the following quotation:

> *The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement.*[28]

70. Justice Laskin went on to state as follows:

> *… Context controls meaning. Rarely can the words of an agreement be understood without some knowledge of their context. Thus, as Doherty J.A. said in Starrcoll Inc. v. 2281927 Ontario Ltd.[7]: "The words of an agreement, and the context in which those words are used, cannot be separated and approached at different stages of the interpretative process."*[29]

71. In the present case, the Newfoundland and Labrador Court of Appeal has taken this guidance to the extreme by allowing elements of the context to overpower the meaning of the agreement. In the case at hand there are no facts that provide context specifically to the indemnity. How then can the indemnity be rendered meaningless?

72. The City recognizes that an indemnity is distinguishable from a release. This appeal presents the court with an opportunity to build on its decision in *Resolute* and to offer guidance on the interpretation of a release (as distinct form an indemnity).

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[28] *Weyerhaeuser Company Limited v. Ontario (Attorney General),* 2017 ONCA 1007, at para 236 ("**Justice Laskin's Reasons**") citing *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59.

[29] *Ibid* at para 237, citing *Starrcoll Inc. v. 2281927 Ontario Ltd*., 2016 ONCA 275.

The factual matrix here is ordinary and succinct

73. The lack of factual complexity inherent in this case affords this Court the opportunity to clarify some of the principles regarding the interpretation of release and indemnity agreements in a way that is easily digested by the bench, the bar, and the public.

74. The evidence in this case consists of mainly the following documents, all of which are attached to this submission:

- the release and indemnity agreement;
- the driver's statement of claim against the City;
- an email chain consisting of 15 brief emails;
- two sets of answers to the City's interrogatories; and,
- the affidavit and supplementary affidavit of Dale Park, City employee.

75. The factual context is common: a motor vehicle accident involving three parties, at least two of whom may have been at fault. The clauses in the release and indemnity agreement are common throughout Canada and can be found in a variety of civil litigation contexts. The interpretation of that agreement by the Newfoundland and Labrador Court of Appeal, however, is inconsistent with the interpretations in other provinces.

The decision of the Newfoundland and Labrador Court of Appeal contradicts the leading jurisprudence on the interpretation of release and indemnity agreements in the other provinces

76. The Newfoundland and Labrador Court began its analysis of the agreement by stating that "[t]he judicial tendency is to interpret releases narrowly."[30] If this statement represents an interpretive principle, it would present a marked departure from the principles set out in *Sattva*. A release, as a contract, should be interpreted neither narrowly nor broadly but in accordance with the intentions of the parties.

77. The statement also conflicts with the decisions of the appellate and trial courts of other jurisdictions.

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[30] *Bailey*, *supra* note 9 at para 34.

78. In *Taberner* the British Columbia Court of Appeal stated that a "full and final release," described by the court to be in the "general form," must be interpreted very liberally:

> *…more importantly the release is stated to be a full and final release and I think that the clause must be given a very general interpretation because of the kind of release it was intended to be".* [31]

79. In the more recent British Columbia Court of Appeal decision in *Kaiser,* the Bank's pension plan was being wound up and distributed to its members. The appellant had previously signed a release in relation to the pension plan after his departure from the Bank. The appellant was the former CEO. The Bank was in financial trouble. The CEO voluntarily reduced his salary, and negotiated a deal to sell the bank to a Hong Kong company. The release indicated that he would accept approximately one million dollars for "all other payments or benefits due or accruing due under any agreement or arrangement with the bank."

80. There was no evidence that the parties specifically contemplated the appellant's entitlement to the commuted value of the pension plan. Nevertheless, reading the release, the Court found that the intent of the parties was to "completely sever their relationship." The release allowed the appellant to "leave the Bank with honour and integrity; it permitted the Bank to make a clean start to solving its financial woes under new leadership. [32] The British Columbia Court of Appeal consequently interpreted the release to cover the pension plan.

81. The Appellate Courts of many provinces have stated that every word in a contract is presumed to have meaning.[33]

82. In a very recent decision of the Ontario Superior Court in *Quantech,* the applicant municipality had engaged the defendant, a general contractor, to oversee a construction project. The parties executed a settlement agreement releasing the municipality from "all claims which [the Defendant] was aware of, or reasonably ought to have been aware of, up

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[31] *Taberner v. World Wide Treasure Adventures Inc,* 1994 CanLII 2062 (BC CA) at para 7.

[32] *Kaiser, supra* note 5 at paras 23 and 25.

[33] *Economical Mutual Insurance Company v. Lapalme*, 2010 NBCA 87 at para 42*; Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd*., 2003 BCCA 580 at para 17; *Keephills Aggregate Company Limited v. Riverview Properties Inc*., 2011 ABCA 101 at para 13

to January 17, 2017." The Defendant later tried to third party the municipality into the claim of subcontractor.

83. Unlike the Newfoundland and Labrador Court of Appeal, the Ontario Superior Court was guided by the broad language of the release, which it relied on to find that the release was intended to provide a clean slate for the completion of the project:

> *I conclude that an objective reading of the language chosen by the parties reveals that they intended to resolve all known claims and to provide a clean slate for the completion of the Project.*[34]

84. Guidance is needed to clarify how *Sattva*'s interpretative principles apply to releases. Are releases intended to be interpreted narrowly, as stated by the Newfoundland and Labrador Court of Appeal or are they to be read liberally, as set out by the Ontario and British Columbia Courts of Appeal? Are litigation releases intended to "wipe the slate clean" between the settling parties, or are they to be interpreted like any other contract, with a view to the intentions of the parties, as set out in *Sattva*?

85. These issues impact the public interest because release and indemnity agreements are so common. Any uncertainty surrounding their interpretation will result in fewer settlements and more litigation requiring final determination.

This is an opportunity to clarify the good faith obligations contracting parties owe to each other during the settlement process

86. Despite the driver's acceptance of the language of the release and indemnity agreement, and despite her silence as to the employee's action, the Newfoundland and Labrador Court of Appeal found that "what was in the contemplation of the City in drafting the agreement was not determinative of mutual intent."[35]

87. The effect of the Newfoundland and Labrador Court of Appeal's decision is that a party with greater knowledge can frustrate the intentions of the party with lesser knowledge as to the effect of unequivocal contract language merely by staying silent.

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[34] *Quantech*, *supra* note 21 at para 68.

[35] *Bailey*, *supra* note 9 at para 50.

88. This finding contradicts other Canadian jurisprudence. In *Bhasin v. Hrynew*[36] this Court recognized an organizing principle "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.[37] In the same vein, in *York University v. Michael Markicevic,*[38] the Ontario Superior Court cited *Ali* for the proposition that a knowledge imbalance between contracting parties must be carefully supervised, and a party with knowledge should not be allowed to take advantage of a party without knowledge:

> *…where the party receiving the benefit of the release knew that the other party might have a claim and also knew the other party was ignorant of the claim, taking a general release without disclosing the existence of the possible claim would constitute unacceptable sharp practice for which a remedy should be provided.*[39]

89. Further guidance as to the effect of a knowledge imbalance in this context and the continuing relevance of *Bhasin* would be useful.

PART IV – SUBMISSIONS ON COSTS

90. This application for leave to appeal raises issues of public importance within the meaning of subsection 40(1) of the *Supreme Court Act*. If leave is granted, the Applicant requests that costs be awarded in the cause.

PART V – ORDER SOUGHT

91. The Applicant respectfully requests an order granting leave to appeal the judgment rendered by the Newfoundland and Labrador Court of Appeal on February 4, 2020, with costs.

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[36] *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 ("***Bhasin***").

[37] *Ibid* at para 63.

[38] *York University v. Michael Markicevic,* 2013 ONSC 378.

[39] *Ibid* at para 52.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed: April 6th, 2020

FOR STEWART McKELVEY

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PART VI – TABLE OF AUTHORITIES

	Authority	Citing Paragraph(s)
1	*Bailey v Temple*, 2020 NLCA 3	23, 76, 86
2	*Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, [2000] B.C.W.L.D. 645	5, 19, 48, 49 79, 80
3	*Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71, [2014] 3 SCR 494	88, 89
4	*Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 OR (3d) 210	5, 19, 32-36, 38, 45, 47, 48, 49, 52
5	*Clearway Construction Inc. v. The City of Toronto*, 2018 ONSC 1736	47
6	*Companies' Creditors Arrangement Act (ON)*, Re, 2006 CanLII 32429 (ON SC)	4
7	*Crosstown Transit Constructors v. Metrolinx*, 2019 ONCA 240	4
8	*Crosstown Transit Constructors v. Metrolinx*, 2018 ONSC 4650	47
9	*Economical Mutual Insurance Company v. Lapalme*, 2010 NBCA 87	81
10	*Filkow et al v D'Arcy & Deacon LLP*, 2019 MBCA 61	4
11	*Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69	25
12	*AP Claiming H-15019 v. P. James Wallbridge*, 2019 ONSC 1617	47
13	*Keephills Aggregate Company Limited v. Riverview Properties Inc.*, 2011 ABCA 101	81
14	*Kerzner v American Iron & Metal Company Inc.*, 2017 ONSC 4352	47
15	*Limitations Act*, SNL 1995, c L-16.1	43
16	*London and South Western Railway v Blackmore*, (1870) 39 L.J. Ch. 713 (H.L.)	4, 23, 24, 26, 30, 36, 41
17	*MHR Board Game Design Inc. v. Canadian Broadcasting Corporation*, 2013 ONCA 728, aff'g 2013 ONSC 4457	4

18	*Ontario v. Imperial Tobacco Canada Ltd.*, 2013 ONCA 481	4
19	*Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.*, 2003 BCCA 580	81
20	*Quantech Electrical Contractors Limited v. Asco Construction Ltd.*, 2019 ONSC 1906	47, 82, 83
21	*R. v. Imperial Tobacco Canada*, 2012 ONSC 6027, aff'd 2013 ONCA 481	4
22	*Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60	13, 16, 68
23	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633	4, 16, 41, 54, 55, 76, 84
24	*Taberner v. World Wide Treasure Adventures Inc*, 1994 CanLII 2062 (BC CA)	78
25	*Terwillegar Towne Residents Association v Brookfield Residential (Alberta) LP*, 2015 ABQB 14	5, 49
26	*The Owners, Strata Plan BCS 327 v. IPEX Inc*, 2014 BCCA 237	4
27	*Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007	69, 70
28	*York University v. Michael Markicevic*, 2013 ONSC 378, [2013] OJ No 249	88