SCC File No. 39122

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)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The following is the response on behalf of the Respondent, Mary Bailey, to the Application for leave to appeal filed by the Applicant, The City of Corner Brook (the **"City"**). The City seeks leave to appeal a decision of the Court of Appeal of Newfoundland and Labrador[1]. The Appeal Decision overturned an erroneous trial decision that a release signed by Mary Bailey and her husband (the **"Baileys"**), in one context, covered a subsequently issued third party claim in a different context, and that the third party claim should therefore be stayed with costs to the City.[2]

2. The Trial Decision deprived the Baileys' insurers the ability to bring a third party claim against the City in an action by a City employee, David Temple, for recovery of his damages resulting from a motor vehicle accident involving the Baileys (the **"Temple Action"**). The Baileys gave the release in the context of an action by them for recovery of their own damages resulting from the motor vehicle accident (the **"Bailey Action"**). The Temple Action was not specifically in the contemplation of the parties at the time when the release was given. The Court of Appeal found that the trail judge erred in his interpretation of the release: (i) by putting too much weight on its broad, general language; (ii) by failing to consider the things that were specifically in the contemplation of the parties at the time when the release was given; and (iii) by considering a dispute that had not emerged when the release was signed as relevant to the interpretation.[3] The Court of Appeal corrected these errors, supported by a unanimous body of jurisprudence regarding the interpretative approach applicable to releases.

3. There is no conflicting jurisprudence on the principles of contractual interpretation applicable to releases. The impetus for the City's Application for leave is not to raise an issue of national and public importance for this Honourable Court's review, but rather the City's disagreement with the Court of Appeal's overturning of the trial judge's erroneous

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[1] *Bailey v. Temple,* 2020 NLCA 3 (the "Appeal Decision").
[2] *Bailey v. Temple,* 2018 NLSC 177 (the "Trial Decision").
[3] Appeal Decision, at paragraph 71.

and analytically flawed decision and the City's wish to reargue the case. By these efforts, the City is attempting to regain the windfall conferred by the Trial Decision, which erroneously and unjustly permitted the City to apply the release to a subject matter other than that for which the City bargained.

4. This case does not raise issues of national and public importance and consequently, this Honourable Court should deny the City leave to appeal.

B. Statement of Facts

5. The Respondent takes no issue with the statement of facts recited by the City in its Memorandum of Argument, save for its incompleteness.[4] The City omitted the following relevant facts from its submission:

   a. The Baileys were served with the statement of claim in the Temple Action in March of 2011. The Baileys delivered the statement of claim to their insurers at that time, who promised to take care of the matter.
   b. Ms. Bailey was aware that Mr. Temple had been injured and that the City was potentially liable for the motor vehicle accident.
   c. The release stated that the claims were to include, but were not restricted to the claims in the Bailey Action, which were itemized as: special damages to be proven at trial, including property damages to the motor vehicle; general damages; costs; pre-judgment interest; and such further and other relief as the Court might deem just.
   d. The release referenced "the accident which occurred on or about March 3, 2009 and without limiting the generality of the foregoing from all claims raised or which could have been raised in" the Bailey Action, identified by its court file number, 2011 04G 0062.
   e. The third party claim, for contribution in the event the Baileys are found to be liable to Mr. Temple, was not raised in the Bailey Action, nor was it possible for it to have

[4] City's Memorandum of Argument, paragraphs 6 to 11.

been raised therein since the Baileys were only claiming in respect of their personal injury and property damage.

f. The quantum of the settlement referenced in the release was only $7,500.

g. The release did not reference either the Temple Action or the possibility of a third party claim by the Baileys against the City resulting from the Temple Action.

h. The exchange of correspondence between counsel for the Baileys and counsel for the City regarding settlement of the Bailey Action made no reference to the Temple Action or the possibility that at some future date any third party claim might be considered by the Baileys against the City in the Temple Action.

i. The third party claim by the Baileys against the City in the Temple Action was not filed until March 2016, and as such the City was not exposed to a third party claim by the Baileys at the time the released was signed in August 2011.

6. The evidence at trial did not establish, as a matter of fact that the City was aware of the Temple Action at the time of the execution of the release. The Court of Appeal held, consequently that it would not be possible to reach the conclusion that the Temple Action was within the contemplation of both parties.[5]

PART II – STATEMENT OF THE QUESTION IN ISSUE

7. The question raised by the City's Application is this: Does the Appeal Decision raise issues of such national or public importance as to warrant granting leave to appeal?

PART III – STATEMENT OF ARGUMENT

8. The Respondent respectfully submits that the City has failed to establish that the Appeal Decision raises issues of such national or public importance as to warrant this Honourable Court granting leave to appeal.

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[5] Appeal Decision, paragraph 43.

9. The City exaggerates the impact of the Appeal Decision. While litigants obtain releases so that they can settle known and unknown claims, such contracts apply only to their subject matter, and nothing more. A release obtained in respect of one subject matter (in this case, known and unknown first party claims) does not bar claims respecting different subject matters (in this case, known and unknown third party claims), for which the contracting litigants did not bargain. The Appeal Decision does not violate the concept of finality achieved by use of a release; rather, it holds that such finality applies only to the subject matter of the release, which is to say the known and unknown claims specifically contemplated by the releasor and the releasee. The Appeal Decision is consistent with the goal of settlement.

10. The City misstates the Court of Appeal's reasons in its Application for leave. The Court of Appeal decision did not adopt an interpretation of the release that was unduly narrow, nor one that contradicted or ignored the express words of the contract, nor one that allowed the factual matrix to overwhelm the words of the contract.[6] Rather, the interpretation adopted by the Court of Appeal is consistent with the approach to contract interpretation espoused by this Honourable Court in *Sattva*[7], *Ledcor*[8], and, most recently, *Resolute*[9], as well as with the interpretative approaches articulated in jurisprudence addressing, specifically, the interpretation of releases.

11. The Court of Appeal did not hold that both contracting parties must specifically address all sources of liability in explicit terms in the contract in order for them to be released, as argued by the City[10]. Rather, the Court of Appeal held that the words used, the context, and the exchange of correspondence between counsel regarding the release were all consistent with the release being interpreted as a release only of the Baileys' claims respecting their own damages (known and unknown, whether asserted directly by the Baileys, indirectly

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6 City's Memorandum of Argument, at paragraphs 13, 26 and 76.
7 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 ("*Sattva*").
8 *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23 ("*Ledcor*").
9 *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 ("*Resolute*").
10 City's Memorandum of Argument, at paragraph 3.

by some other person on their behalf, or by subrogation) and not a claim to recover damages of a third party.[11]

12. The City's assertion that Canadian courts now apply three different multi-factor tests for the interpretation of releases, which must be settled, is simply incorrect.[12] This assertion ignores the restatement of the general principles of contract interpretation made by this Honourable Court in *Sattva*[13], *Ledcor*[14] and *Resolute*[15], and the restatement's congruency with the rule in *London and South Western Railway*[16]. The Court of Appeal expressly recognized the settlement of the interpretative approach achieved by the jurisprudence in stating, at paragraphs 30 and 31:

> [30] The Court in *Resolute* made no reference to *London and South Western Railway* and the appellant suggests that this was because the Court was addressing an indemnity instead of a release.
>
> [31] I conclude, however, that the rule originally stated in *London and South Western Railway* has over time, been subsumed into the principles of contractual interpretation affirmed by the Court in *Sattva* and *Ledcor*. It is, in effect, a particular application of the general approach to contractual interpretation which approach requires taking account of surrounding circumstances known to the parties at the time of contracting, for the purpose of giving meaning to the words used.[17]

13. The City's hypothesis that there exist three different multi-factor tests for interpretation of releases does not survive a discriminating examination. The interpretative approaches in, *Kaiser*[18], *Terwillegar*[19] and *Biancaniello*[20], to which the City points, are substantively similar to each other, and to the approach adopted by the Court of Appeal in the case at

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[11] Appeal Decision, paragraph 71.
[12] City's Memorandum of Argument, at paragraphs 5 and 46.
[13] *Sattva*, at paragraphs 46 to 49.
[14] *Ledcor,* at paragraph 65.
[15] *Resolute,* at paragraphs 73 to 80.
[16] *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.) ("*London and South Western Railway*").
[17] Appeal Decision, at paragraphs 30 to 31.
[18] *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291 ("*Kaiser*").
[19] *Terwillegar Towne Residents Association v. Brookfield Residential (Alberta) LP,* 2015 ABQB 14 ("*Terwillegar*").
[20] *Biancaniello v. DMCT LLP,* 2017 ONCA 386 ("*Biancaniello*").

bar. They are not "very different approaches" as argued by the City.[21] Considering each in turn:

a. In *Kaiser*, which predates *Sattva*, the British Columbia Court of Appeal cited the interpretative approach set out in *Chitty on Contracts* that had been distilled from the relevant case law, including *London and South Western Railway*. The British Columbia Court of Appeal wrote, at paragraph 17:

> [17] *Chitty on Contracts* sums up the relevant case law with respect to the interpretation of a discharge of a contract or release as follows (pp. 1074-5):
>
> > 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
> >
> > 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
> >
> > 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
> >
> > 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
> >
> > 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.[22]

b. In *Terwillegar*, which was not subsequently appealed, the Court of Queen's Bench of Alberta cited the same excerpt from *Chitty on Contracts* as cited in *Kaiser*, and then applied it at paragraph 23:

> [23] The third and fourth points are applicable here. In my view, this is plainly one of those situations in which the knowledge of the parties as at the date of the Termination Agreement has to be taken into account. Not

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[21] **City's Memorandum of Argument, at paragraph 31.**
[22] ***Kaiser*, at paragraph 17.**

only is it appropriate to consider this knowledge, it is appropriate to give effect to it.[23]

c. In *Biancaniello,* the Ontario Court of Appeal cited the rule in *London and South Western Railway* and the House of Lords' subsequent treatment of the rule in *Ali*[24]. The Ontario Court of Appeal subsequently distilled the interpretative approach, at paragraph 42:

> [42] ...I have discussed the opinions in the *Ali* case at some length because the Law Lords considered virtually every interpretive issue that could arise in applying the concept of what was "in the contemplation of the parties" when faced with a broadly-worded release. One can distill the following principles from these reasons:
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> 1. One looks first to the language of a release to find its meaning: at para. 8.
>
> 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: at paras. 9-10.
>
> 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: at para. 13.
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> 4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them: at para. 23.
>
> 5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties: at para. 28.[25]

d. In the Appeal Decision, the Court, having cited the rule in *London and South Western Railway* and its having been subsumed into the principles of contractual interpretation affirmed by this Honourable Court in *Sattva* and *Ledcor*, cited its agreement with the structure of the analysis to the interpretation of a release

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[23] *Terwillegar*, at paragraph 23.
[24] *Bank of Credit and Commerce International SA v. Munawar Ali*, [2001] UKHL 8; [2001] 1 All E.R. 961 ("*Ali*").
[25] *Bianacaniello*, at paragraph 42.

outlined in *Kaiser*.[26] This is the same approach that was adopted by the trial judge in the lower court.[27]

14. The Applicant misstates the Court of Appeal's reasons when it states that the Court of Appeal did not rely on *Sattva* and the ordinary principles of contractual interpretation.[28] The Court of Appeal found, rather that the trial judge's reasons specifically reflected an incorrect application of the interpretative principles set out in *Sattva, Ledcor* and *Resolute*.[29] The Court of Appeal stated, at paragraphs 50 to 56:

> [50] Firstly, what was in the contemplation of the City in drafting the Release is not determinative of mutual intent.
>
> [51] Secondly, it was in fact necessary to determine what was "specifically" contemplated by both parties.
>
> [52] Thirdly, it was not sufficient that the broad general wording of the Release potentially covered a subsequent third party action for contribution if the surrounding circumstances suggested otherwise.
>
> [53] A trial judge is required to assess the surrounding circumstances for the purpose of determining what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding (*Sattva* at paragraph 47).
>
> *[54] Ledcor,* at paragraph 21, confirms that "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" will not meet the correctness standard of review.
>
> [55] The mistaken approach in this case had a material effect upon the result; the judge concluded that because the words were broad and general, the parties must have contemplated releasing both first party and third party claims.
>
> [56] To similar effect, in *Resolute,* the primary issue addressed by the Court was whether the scope of an indemnity ("Indemnity") granted by the province of Ontario to former owners of a pulp and paper mill, applied to a remediation order issued to the former owners by an agency of the province twenty-six years later. In its analysis, the Court distinguished third party

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[26] **Appeal Decision, at paragraphs 31 and 33.**
[27] **Trial Decision, at paragraph 13.**
[28] **City's Memorandum of Argument, at paragraph 4.**
[29] **Appeal Decision, at paragraph 49.**

> pollution claims brought against the former mill owners (admittedly covered by the Indemnity) from direct first party claims against the former mill owners (including those by an agent of the province to recover remediation costs associated with regulatory compliance). The majority concluded in part that the motion judge had failed to give sufficient regard to the factual matrix when interpreting the scope of the Indemnity.[30]

15. The Court of Appeal did not rely on the rule in *London and South Western Railway* as one separate and apart from the approach in *Sattva, Ledcor*, and *Resolute*. Rather, the Court of Appeal addressed the Trial Decision on the basis of the rule due to both counsel having relied on the rule at trial.[31] The Court of Appeal expressly stated that whether one approached the matter on the basis of the application of the rule in *London and South Western Railway* or on the basis of general contractual interpretation principles, one would reach the same result in this case. [32]

16. The Court of Appeal determined that the trial judge erred in his interpretative approach by failing to assess the surrounding circumstances for the purpose of determining what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding, as required by the general principles of contractual interpretation.[33] Instead of doing so, the trial judge had concluded that because the words were broad and general, the parties must have contemplated releasing both first party and third party claims.[34] The Court of Appeal's determination is consistent with this Honourable Court analysis and conclusion in *Sattva, Ledcor* and *Resolute.*

17. It is reasonable to expect that in the future, courts tasked with interpreting releases will conclude, as the Court of Appeal of Newfoundland and Labrador did, that the rule originally stated in *London and South Western Railway* has now been subsumed into the general principles of contractual interpretation espoused in *Sattva, Ledcor*, and *Resolute*, and will apply those general principles. In doing so, the interpretative approach stated in

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[30] *Ibid*, at paragraphs 50 to 56.
[31] Appeal Decision, at paragraph 32.
[32] *Ibid*, paragraph 32.
[33] *Ibid,* at paragraph 53.
[34] *Ibid*, at paragraph 55.

Chitty on Contracts and in *Ali* will continue to guide courts' application of the relevant interpretative principles.

18. Despite the clear guidance of *Sattva*, *Ledcor* and *Resolute,* the City rejects that surrounding circumstances and specific references in the release should inform the broad words used in the release in the manner determined by the Court of Appeal. Rather, the City maintains that the broad words used in the contract alone ought to be determinative as directing that the release is applicable to both first party and third party claims; that is to say, irrespective of whether an objective assessment of the surrounding circumstances supports the contract applying to such a broad subject matter.[35] The City further maintains that the words of the release clearly indicated such a broad application[36], despite the fact that the release does not include any specific references consistent with its applying to third party claims. This approach runs counter to this Honourable Court's guidance in *Resolute,* for example, at paragraphs 76 and 77:

> [76] Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in *Sattva*, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).
>
> [77] This is not to say that the words of the contract are to be read in isolation. This Court's direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances – sometimes referred to as the "factual matrix" – which consists of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law,* at pp. 33-34).[37]

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[35] **City's Memorandum of Argument, at paragraph 27.**
[36] **City's Memorandum of Argument, at paragraph 28.**
[37] ***Resolute,* at paragraphs 76 to 77.**

19. The Appeal Decision does not render parts of the release meaningless, nor does it create any tension between the rule in *London and South Western Railway* and the general principles of contract interpretation set out in *Sattva.*[38] The City argues, for example, that the indemnity clause in the release "squarely addresses a scenario such as the third party claim which is currently being brought by the driver's insurer in her name", and that such clause was "completely ignored" by the Court of Appeal.[39] This is false. The third party claim brought by Ms. Bailey in the Temple Action is not a claim for recovery of the Baileys' own damages; it is a claim for indemnity or contribution from the City for recovery of Temple's damages. The indemnity clause is not rendered meaningless by the Appeal Decision; rather, its scope is justifiably limited to that which was specifically contemplated by the parties, being claims for recovery of the Baileys' damages. The Court of Appeal reflected this outcome in stating, at paragraph 71, that the release properly interpreted was "...a release only of the Baileys' claims in the Bailey action (whether asserted directly by the Baileys, indirectly by some other person on their behalf, or by subrogation) and not a claim to recover damages of a third party".[40]

20. That the rule in *London and South Western Railway* has been subsumed into the principles of contractual interpretation affirmed by this Honourable Court in *Sattva* does not require confirmation by this Honourable Court.

21. The City exaggerates and misstates the impact of the Appeal Decision in claiming that releasees will not be able to negotiate for the release of unknown claims, and that litigants will not be able to close their files with finality.[41] In the case at bar, the releasees negotiated for and obtained a release that applies to known and unknown first party claims; the release simply does not apply to known or unknown third party claims.[42] The Court of Appeal referenced that it is standard practice in the insurance industry for an insurer to require a release on settlement of a personal injury or property claim, and that the release in this case

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[38] City's Memorandum of Argument, at paragraphs 15, 41 and 61.
[39] City's Memorandum of Argument, at paragraphs 66 to 67.
[40] Appeal Decision, at paragraph 71.
[41] City's Memorandum of Argument, at paragraphs 22 and 42.
[42] *Ibid,* at paragraphs 67 to 71.

referenced release only of "any and all rights which they may have as against the Releasees and the issues raised in the Action." The action was defined on page one of the release as the Bailey Action and it related to the losses suffered by the Baileys, not damages suffered by a third party.[43]

22. The Appeal Decision does not impede litigants from negotiating releases in the future that will cover known and unknown first and third party claims, where that is the litigants' mutual intent. In such cases, the settling litigants may clearly indicate by the words used in their release, the context, and the exchange of correspondence between them, their mutual intent to cover both first and third party claims, both known and unknown. The decision has not created disruptive uncertainty to the insurance industry, as argued by the City.[44]

23. The Appeal Decision does not cause litigants, nor the insurance industry at large, any risk of financial uncertainty, nor does it discourage settlement of personal injury claims. The City's claim that the Appeal Decision "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" is simply false.[45] What the Appeal Decision represents, rather, is a confining of the effect of a release to that subject matter for which the releasor and releasee bargained, and no more. To allow a releasee to use a release obtained in one context (in settling claims for the releasor's damages) as a bar against claims in a different context (indemnity in connection with claims by third parties for their own damages), for which the releasee did not bargain, would be an unjust and inequitable result. The Appeal Decision held, correctly, justly and equitably, that the releasee should not be allowed such a windfall.

24. The Court of Appeal corrected an error by the trial judge. In doing so, the Court of Appeal did not raise any issues of national or public importance.

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[43] ***Ibid*, at paragraph 69.**
[44] **City's Memorandum of Argument, at paragraph 44.**
[45] **City's Memorandum of Argument, at paragraph 15.**

PART IV – SUBMISSIONS RESPECTING COSTS

25. The Respondent requests this Honourable Court award her the costs of this Application.

PART V – ORDER SOUGHT

26. The Respondent requests this Honourable Court dismiss this Application for leave to appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of April, 2020.

J. Alexander Templeton

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

	CASES	Cited in paragraphs
1.	*Bailey v. Temple*, 2020 NLCA 3	1, 2, 6, 11, 13, 14, 15, 16, 19, 21, 22, 23
2.	*Bailey v. Temple*, 2018 NLSC 177	1, 13
3.	*Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291	13
4.	*Bank of Credit and Commerce International SA v. Munawar Ali*, [2001] UKHL 8; [2001] 1 All E.R. 961	13, 17
5.	*Biancaniello v. DMCT LLP*, 2017 ONCA 386	13
6.	*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23	10, 12, 14, 16, 17, 18
7.	*London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.)	12, 15, 17, 19, 20
8.	*Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60	10, 12, 14, 16, 17, 18
9.	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633	10, 12, 14, 16, 17, 18, 19, 20
6.	*Terwillegar Towne Residents Association v. Brookfield Residential (Alberta) LP*, 2015 ABQB 14	13

	STATUTORY PROVISIONS	Cited in paragraphs
	Nil	