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:

RESOLUTE FP CANADA INC.

Appellant

- and -

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

Respondent

AND BETWEEN:

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

Appellant

- and -

WEYERHAEUSER COMPANY LIMITED and RESOLUTE FP CANADA INC.

Respondents

AND BETWEEN:

WEYERHAEUSER COMPANY LIMITED

Appellant

- and -

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

Respondent

FACTUM OF THE APPELLANT, RESOLUTE FP CANADA INC.

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

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Andrew Bernstein
Tel: 416.865.7678
Email: abernstein@torys.com

Jeremy Opolsky
Tel: 416.865.8117
Email: jopolsky@torys.com

Jonathan Silver
Tel: 416.865.8198
Email: jsilver@torys.com

Counsel for the Appellant (Respondent), Resolute FP Canada Inc.

Power Law
1103 – 130 Albert St.
Ottawa, ON K1P 5G4
Tel/Fax: 613.702.5573

Maxine Vincelette
Email: mvinceletter@powerlaw.ca

Agent for the Appellant (Respondent), Resolute FP Canada Inc.

Attorney General for Ontario
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Fax: 416.326.4181

Leonard F. Marcello
Tel: 416.326.4939
Email: Leonard.Marsello@ontario.ca

Tamara D. Barclay
Tel: 416.326.4103
Email: Tamara.Barclay@ontario.ca

Nansy Ghobrial
Tel: 416.326.7246
Email: Nansy.Ghobrial@ontario.ca

Counsel for the Respondent (Appellant), Her Majesty the Queen as Represented by the Ministry of the Attorney General

Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Fax: 613.695.8580

Marie-France Major
Tel: 613.695.8855
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent (Appellant), Her Majesty the Queen as Represented by the Ministry of the Attorney General

Borden Ladner Gervais LLP
Barristers and Solicitors
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3
Fax: 416.367.6749

Christopher D. Bredt
Tel: 416.367.6165
Email: cbredt@blg.com

Markus Kremer
Tel: 416.367.6658
Email: mkremer@blg.com

Alannah Fotheringham
Tel: 416.367.6394
Email: afotheringham@blg.com

Counsel for the Appellant (Respondent), Weyerhaeuser Company Limited

Borden Ladner Gervais LLP
Barristers and Solicitors
World Exchange Plaza
Ottawa, ON K1P 1J9
Fax: 613.230.8842

Nadia Effendi
Tel: 613.787.3520
Email: neffendi@blg.com

Agent for the Appellant (Respondent), Weyerhaeuser Company Limited

TABLE OF CONTENTS

Page

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. In 1979, and again in 1985, the province of Ontario gave environmental indemnities to Great Lakes Forest Products Limited. It gave those indemnities to persuade Great Lakes to buy and invest $200 million in a pulp and paper mill, to settle environmental litigation with First Nations bands and to save the economy of Dryden, a single industry town. The 1985 indemnity, or "Ontario Indemnity", superseded the 1979 version and provided broad environmental indemnification to Great Lakes for an onsite landfill containing mercury byproducts, which had been buried by the previous owners. The Ontario Indemnity was intended to protect Great Lakes in perpetuity and contained a clause extending protection to Great Lakes' successors and assigns.

2. But in 2011, when environmental liabilities arose from the buried mercury, Ontario sought to renege from its bargain and refused to indemnify Great Lakes' successor, Resolute. This appeal will determine whether Resolute continues to benefit from the Ontario Indemnity.

3. The motion judge held that Resolute was entitled to benefit from the indemnity. No one had argued the contrary. In fact, the motion judge specifically held that "there is no dispute that Resolute, as the corporate successor of Great Lakes, has the benefit of the Ontario Indemnity."

4. After losing at first instance, Ontario made a new argument on appeal: Resolute could not benefit from the indemnity. In 1998, a third party, Weyerhaeuser, bought the mill. The parties intended to exclude the landfill from this transaction. However, they could not get a municipal severance in time for the deal to close. As a result, Weyerhaeuser had to take paper title of the landfill for two years. Weyerhaeuser never had control or beneficial ownership of the landfill and returned it as soon as the property was severed. Nonetheless, the Court of Appeal held that, as a result of this temporary transfer, all of Great Lakes' successors surrendered the right to claim on the indemnity, forever.

5. In analyzing this issue, the Court of Appeal failed to consider the context of both the Ontario Indemnity and the 1998 sale. The parties to each agreement did not intend to eliminate Resolute's only protection from the substantial environmental liabilities it faced in both 1985 and 1998. Instead, the Ontario Indemnity was intended to follow the environmental liability. The

Court of Appeal's brief, acontextual and high-level analysis contained three errors of law. Each of these errors warrants this Court reversing the Court of Appeal's determination that Resolute had no rights to claim under the indemnity.

6. First, the Ontario Indemnity expressly covers Great Lakes' successors and assigns. The Court of Appeal failed to appreciate that the indemnity applies to successors in perpetuity, regardless of whether it was assigned to another party. The text and context of the indemnity show that the parties intended for Great Lakes to be able to sell the landfill, pass on the benefit of the indemnity *and* maintain the protection for itself and its successors. Any other interpretation would either interfere with Great Lakes' ability to sell the property or expose Great Lakes to the liability that Ontario had agreed to shoulder.

7. Second, the Court of Appeal erred in finding that there was an absolute assignment of the Ontario Indemnity to Weyerhaeuser when Weyerhaeuser temporarily assumed bare title to the landfill in 1998. The Court's analysis failed to consider the surrounding circumstances of the sale and the commercial absurdity of this alleged assignment. Indeed, even Ontario conceded that it "does not objectively make commercial sense" and "is not commercially logical" for Resolute's predecessor to have given away the benefit of the indemnity.

8. Finally, the Court of Appeal failed to appreciate that any assignment was not valid in law and could only be valid in equity. Resolute therefore remained the legal owner of the Ontario Indemnity. Weyerhaeuser obtained, at most, an equitable interest. This means that both of these parties can enforce the indemnity: Resolute against Ontario and Weyerhaeuser against Resolute. It also means that Ontario cannot escape its legal obligation to indemnify Resolute by invoking Weyerhaeuser's equitable interest.

9. As this Court has acknowledged, statutory environmental liability is wide and deep. It affects everyone who has touched a property and lasts forever. The effect of the Court of Appeal's decision is to prevent parties from contractually allocating the risk created by this statutory liability.

10. But here, that is precisely what the parties did. The promise in the Ontario Indemnity was simple. Ontario took on the burden of the buried mercury in the landfill that Ontario had

previously induced Great Lakes to purchase. Great Lakes received protection for its successors in perpetuity, irrespective of whether it continued to own the property. The Court of Appeal's decision unwound that deal. It allowed Ontario to use formalistic arguments regarding assignment and the 1998 sale – to which Ontario was not party – to escape the environmental liability it had agreed to bear as the cost of keeping Dryden an economically viable community.

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.[1]

12. The Dryden Mill's bleaching process produced a mercury-contaminated waste byproduct.[2] The waste was discharged into the neighboring English and Woebigoon river systems.[3]

13. In 1971, Reed constructed a waste disposal site for the mercury-contaminated waste (referred to as the "landfill" or the "WDS").[4] Beginning in 1977, the Ministry of the Environment ("MOE") imposed compliance requirements on Reed and some of its subsidiaries with respect to the landfill. Reed's obligations were largely limited to water monitoring.[5]

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

14. 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.

---

[1] Reasons of the Superior Court of Justice, Commercial List, dated July 16, 2016 ("Motion Judge Reasons"), para. 9, Joint Appeal Record ("JAR"), Vol. I, Tab 1, p. 2; Reasons of the Ontario Court of Appeal, dated December 20, 2017 ("Court of Appeal Reasons"), para. 17, JAR, Vol. I, Tab 5, p. 31.
[2] Motion Judge Reasons, para. 7, JAR, Vol. I, Tab 1, p. 2.
[3] Court of Appeal Reasons, para. 10, JAR, Vol. I, Tab 5, p. 30.
[4] Court of Appeal Reasons, para. 11, JAR, Vol. I, Tab 5, pp. 30-31.
[5] 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.

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]

15. 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]

16. 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"). The 1979 Indemnity was conditional on Great Lakes committing to spend $200 million for the modernization and expansion of the Dryden Mill.[9]

17. In providing the 1979 Indemnity, Ontario made a conscious decision to take on the environmental risk associated with the landfill. The Treasurer of Ontario had 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.[10] 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."[11]

18. Based on Ontario providing the 1979 Indemnity, Great Lakes purchased the Dryden Mill from Reed. 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

---

[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. 15-16.
[8] Motion Judge Reasons, para. 9, JAR, Vol. I, Tab 1, p. 2.
[9] Motion Judge Reasons, para. 9, JAR, Vol. I, Tab 1, p. 2.
[10] 1979 Indemnity, Exhibit "I", Rawn Affidavit, JAR, Vol. IV, Tab 27I, pp. 135-136.
[11] 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.

Lakes agreed to indemnify Reed for any environmental liabilities arising from the Dryden Mill, including the "presence of any pollutant, including mercury."[12]

Great Lakes settles the 1985 the First Nations litigation and gets the Ontario Indemnity

19. 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.[13]

20. 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.[14]

21. 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").[15]

22. Under the MOA, the parties agreed "to settle all claims and causes of action, past, present and future" arising out of the relevant issues.[16] Reed and Great Lakes made significant payments to the First Nations, and the First Nations agreed to the dismissal of their litigation with full releases.[17] The First Nations agreed that the settlement would "preclude any further claims" in respect of the contamination.[18]

---

[12] Memorandum of Agreement made as of the 7th day of December, 1979 between Great Lakes Forest Products Limited, Reed Ltd. and Reed International (excerpts), ss. 5.3, 11.4, JAR, Vol. III, Tab 27.
[13] Motion Judge Reasons, para. 1, JAR, Vol. I, Tab 1, p. 1.
[14] Letter from R. H. Ramsay to C. J. Carter dated January 28, 1982, JAR, Vol. III, Tab 21, pp. 175-176.
[15] Motion Judge Reasons, para. 11, JAR, Vol. I, Tab 1, p. 2.
[16] Motion Judge Reasons, para. 13, JAR, Vol. I, Tab 1, p. 3.
[17] Court of Appeal Reasons, para. 27, JAR, Vol. I, Tab 5, p. 36.
[18] Memorandum of Agreement, executed November 22, 1985 ("MOA"), Exhibit "J", ss. 2.2, 2.5, Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 144-145.

23. 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. It is this Ontario Indemnity that is the subject of this litigation.

The Ontario Indemnity is broad and enures to successors and assigns in perpetuity

24. 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").[19] [Emphasis of Court of Appeal]

25. The Ontario Indemnity provided protection in perpetuity. It was expressly "valid without limitation as to time."[20]

26. Section 6 of the Ontario Indemnity contains an enurement clause, which states:

> The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto.[21]

---

[19] Court of Appeal Reasons, para. 31, JAR, Vol. I, Tab 5, pp. 37-39.
[20] Motion Judge Reasons, para. 18, JAR, Vol. I, Tab 1, p. 5.
[21] Motion Judge Reasons, para. 19, JAR, Vol. I, Tab 1, p. 5.

27. Contemporaneously, Great Lakes provided an indemnity to Reed (the "Great Lakes Indemnity") requiring Great Lakes to indemnify Reed for environmental liabilities.[22] The indemnities were expressly drafted as back-to-back agreements: to the extent that Reed claimed on its indemnity against Great Lakes, Great Lakes was entitled to claim under its indemnity against Ontario.[23] Section 1 of the Ontario Indemnity expressly linked the two indemnities:

> It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith between Great Lakes, Reed and International.[24]

28. These indemnities were essential because Great Lakes and Reed faced significant common law and statutory liability in 1985 for environmental contamination related to the landfill. First, both parties were exposed to third parties asserting torts and other claims for harm arising from the contamination. Second, the Ontario *Environmental Protection Act* ("*EPA*") at the time empowered the Minister to make various environmental orders, including remediation orders against a party who had caused or permitted the discharge of contaminants into the environment.[25] Reed had deposited the mercury in the landfill, and Reed's liability would flow to Great Lakes under the Great Lakes Indemnity. Great Lakes was also itself liable for any prohibited discharges it caused or permitted to occur after its purchase of the Dryden Mill, which could include the migration of mercury or other pollutants from the landfill.[26]

Sale of the Dryden Mill to Weyerhaeuser in 1998

29. In 1998, Bowater Pulp and Paper Canada Inc. ("Bowater"), the successor of Great Lakes (and predecessor of Resolute), sold the Dryden Mill to Weyerhaeuser. This transaction was

---

[22] Great Lakes Indemnity, MOA, Schedule "D", Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 180-185.
[23] Ontario Indemnity, MOA, Schedule "F", s. 1, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 189-190.
[24] Motion Judge Reasons, para. 17, JAR, Vol. I, Tab 1, pp. 3-4.
[25] *The Environmental Protection Act*, S.O. 1971, c. 86, s. 17, Resolute FP's Book of Authorities ("BOA"), Tab 10.
[26] *The Environmental Protection Amendment Act, 1979*, S.O. 1979, c. 91, s. 2 [68g(1), 68i(2)], BOA, Tab 11.

effected by an asset purchase agreement dated August 4, 1998 ("1998 APA")[27] and amended on September 30, 1998 (the "Amending Agreement").[28] The parties to the transaction were represented by sophisticated counsel: Fraser & Beatty and McCarthy Tétrault.[29]

30. There is nothing in the 1998 APA suggesting that Bowater intended to assign the benefit of the Ontario Indemnity to Weyerhaeuser. The 1998 APA does not refer to the indemnity. Rather, the issue about the indemnity only arises because the definition of the "Purchased Assets" in the 1998 APA includes "Agreements, Contracts and Commitments" and "Warranty Rights." It states:

> 3.1 Property and Assets to be Purchased and Sold
>
> Subject to the terms and conditions hereof, the Vendor agrees to sell, assign and transfer to the Purchaser and the Purchaser agrees to purchase as, at and from the Effective Time the following property and assets of the Business:
>
> (vii) Agreement, Contracts and Commitments - the full benefit of all unfilled orders received by the Vendor or relating to the Business and all right, title and interest of the Vendor in, to and under all agreements, contracts and commitments and other rights of or relating to the Business, whether written or oral, including without limitation, full benefit and advantage of all forward commitments by the vendor for supplies or materials entered into in the ordinary course of the Business which are exclusively for use in the Business whether or not there are any written agreements, contracts or commitments with respect thereto.
>
> (xiv) Warranty Rights - the full benefit of all representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and the like and all security therefore received by the Vendor on the purchase or other acquisition of any part of the Purchased Assets or otherwise.[30]

31. "Business" is defined as the "businesses currently carried on by" Bowater, including the manufacturing of various paper products and the growing and harvesting of timber. Importantly,

---

[27] Asset Purchase Agreement between Weyerhaeuser and Bowater – Part I of III (Main Agreement) ("1998 APA"), Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, pp. 24-115.
[28] Amending Agreement dated September 30, 1998 ("Amending Agreement"), Exhibit "O", Rawn Affidavit, JAR, Vol. V, Tab 27O, pp. 117-120.
[29] 1998 APA, Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, p. 24.
[30] Motion Judge Reasons, para. 20, JAR, Vol. I, Tab 1, p. 5.

it did not include the landfill, which had ceased to operate and was not used by the business in 1998.[31]

32. "Effective Time" was defined as the closing date of the transaction, which was September 30, 1998.[32]

33. At the time of the 1998 APA, Bowater faced increased and indefinite environmental liability regarding the landfill. Following the approach of comparable 1980 American legislation,[33] the Ontario government had introduced retrospective liability to the *EPA* in 1990. These amendments gave the government jurisdiction to make orders against anyone who "owns or owned" or who "has or had" management or control of an undertaking or property.[34] As a result of these amendments, Bowater became liable for environmental contamination from the landfill in perpetuity, whether it transferred the landfill or not. Indeed, this lawsuit arose because the government made orders against Resolute and Weyerhaeuser under the modern equivalent of those provisions, even though neither party owned or controlled the landfill at the time of the Director's Order.[35]

34. Because of the environmental liability, Weyerhaeuser did not want the landfill. Thus, the landfill was expressly excluded from the definition of the Purchased Assets.[36] However, because of an unanticipated delay in obtaining the required planning consents, a severance of the property was not obtained until approximately two years after the closing date. As a result, Weyerhaueser held legal title to the landfill for this two-year period. After that, it reverted back to Bowater.[37]

---

[31] 1998 APA, "Business", Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, p. 31.
[32] 1998 APA, "Effective Time", Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, p. 33; Court of Appeal Reasons, para. 39, JAR, Vol. I, Tab 5, p. 41.
[33] *See e.g., U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, pp. 732-734 (8th Cir. 1986), BOA, Tab 3; Delmar R. Ehrich & Michael A. Ponto, "Insurance Coverage for Corporate Successors under CERCLA" (1994) 7 Envtl. Cl. J. 125 (HeinOnline).
[34] *Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18, s. 21, BOA, Tab 9.
[35] *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 18(1).
[36] Motion Judge Reasons, para. 21, JAR, Vol. I, Tab 1, pp. 5-6; *see also*, 1998 APA, s. 3.2(v), Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, pp. 47-48.
[37] Motion Judge Reasons, paras. 22-23, JAR, Vol. I, Tab 1, p. 6; 1998 APA, s. 13.1.9, Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, pp. 86-87.

35. To address the need to transfer title to the landfill, Weyerhaeuser and Bowater entered into two further agreements before the 1998 transaction closed. First, the Amending Agreement made the landfill a Purchased Asset. Second, Weyerhaeuser leased the landfill back to Bowater (the "Lease"). The Lease was intended to be "solely an interim agreement" until the severance could be completed and the landfill returned to Bowater. [38] Weyerhaeuser did not have any beneficial interest in the landfill nor did it possess or exercise any control over it.[39] In fact, the Lease expressly provided that Weyerhaeuser would not have any "charge, management or control" over the landfill.[40]

36. Weyerhaeuser was aware of the Ontario Indemnity while it negotiated the Amending Agreement and the Lease. In fact, its representative in this proceeding remembered it as a "unique, very odd document."[41] Nonetheless, neither the Amending Agreement nor the Lease listed the indemnity among the Purchased Assets or, indeed, made any reference to it at all.

37. Instead, the 1998 APA and Lease created an elaborate structure whereby Bowater would indemnify Weyerhaeuser for environmental liability. In the 1998 APA, the parties agreed to share certain environmental costs in relation to the Dryden Mill.[42] However, this provision did not apply to the landfill.[43] Instead, Bowater fully indemnified Weyerhaeuser for the landfill in the Lease. This broad indemnity included any environmental claims or damages related to "the presence or release of mercury and any other contaminant, substance or waste on or in" the landfill. Bowater's obligations continued in perpetuity, surviving the termination or expiry of the 20-year term of the Lease.[44]

---

[38] Lease in favour of Bowater dated September 30, 1998, s. 1.09 ("Lease"), Exhibit "P", Rawn Affidavit, JAR, Vol. V, Tab 27P, p. 123
[39] Motion Judge Reasons, para. 22, JAR, Vol. I, Tab 1, p. 6.
[40] Lease, s. 1.09, Exhibit "P", Rawn Affidavit, JAR, Vol. V, Tab 27P, p. 123.
[41] Excerpts from the transcript of the cross-examination of Charles K. Douthwaite held March 26, 2015, q. 108, JAR, Vol. VI, Tab 32, p. 131.
[42] 1998 APA, ss. 10.5, Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, pp. 68-70, 86-87.
[43] Amending Agreement, s. 3.6, Exhibit "O", Rawn Affidavit, JAR, Vol. V, Tab 27O, p. 119.
[44] Lease, Art. IX, Exhibit "P", Rawn Affidavit, JAR, Vol. V, Tab 27P, pp. 126-127.

38. Once the severance was granted in August 2000, Weyerhaeuser transferred the landfill back to Bowater.[45] The site remained in the possession and control of Bowater and its successors until the CCAA Proceedings (as explained below).[46]

The Director's Order

39. In 2009, Bowater sought and obtained protection under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"). After that, the landfill was abandoned.[47]

40. On August 25, 2011, the MOE issued a Director's Order requiring Weyerhaeuser and Resolute, as Great Lakes' corporate successor, to conduct mandatory environmental monitoring and reporting and to make a substantial payment to Ontario as financial assurance in respect of the landfill.[48]

41. The CCAA Proceedings were still ongoing when the Director issued the order. Weyerhaeuser filed a proof of claim in the CCAA Proceedings seeking indemnification under the Lease. In its proof of claim, Weyerhaeuser stated that the 1998 transaction was intended to transfer the landfill in a manner that limited Weyerhaeuser's exposure to liability:

> During this time Weyerhaeuser technically had paper title to the [landfill]. To avoid transfer of any liability associated with the [landfill] while the severance was being completed, Bowater and Weyerhaeuser entered into a lease agreement for the [landfill] so that use, control and all environmental liability associated with the [landfill] (including future liability) remained with Bowater. [49]

42. Weyerhaeuser has consistently taken the position that it held title to the landfill "solely on paper" and "never had any beneficial interest in the Site, never possessed the Site, never exercised any physical control over the Site and never used it in any way." Instead, "Bowater remained in control and possession of the Site."[50]

---

[45] Motion Judge Reasons, para. 23, JAR, Vol. I, Tab 1, p. 6.
[46] Rawn Affidavit, paras. 37-40, JAR, Vol. IV, Tab 27, p. 12.
[47] Motion Judge Reasons, para. 25, JAR, Vol. I, Tab 1, p. 6.
[48] Motion Judge Reasons, para. 26, JAR, Vol. I, Tab 1, p. 6.
[49] Proof of Claim of Weyerhaeuser Company Limited dated November 15, 2012, JAR, Vol. III, Tab 26, p. 197.
[50] Affidavit of Charles K. Douthwaite, sworn November 24, 2014, paras. 25, 26, JAR, Vol. VI, Tab 28, p. 9.

43. 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

44. The motion judge granted summary judgment in favour of Resolute and Weyerhaeuser against Ontario.

45. On the summary judgment motion, no one disputed that Resolute could benefit from the indemnity. Instead, Ontario's position was that the Ontario Indemnity does not apply to the Director's Order and, in the alternative, Weyerhaeuser never properly received an assignment of the indemnity. Ontario argued that an assignment would have made no commercial sense, stating in its factum on the motion:

> The notion of Bowater assigning the Indemnity to Weyerhaeuser is illogical for another reason. Having provided Weyerhaeuser with the broad Lease Indemnity, it would make no commercial sense for Bowater to also give up any rights it had to seek recourse from Ontario even if the Indemnity only covers third party claims.[51]

46. Resolute and Weyerhaeuser agreed that it would not have been commercially reasonable for Bowater to have *exclusively* assigned the Ontario Indemnity. Rather, Weyerhaeuser argued that it and Bowater could both benefit from the Ontario Indemnity.[52]

47. Although Ontario was aware that it could have disputed Resolute's right to benefit from the indemnity on the summary judgment motion, [53] it opted not to do so. As the motion judge

---

[51] Factum of Her Majesty the Queen as represented by the Ministry of the Attorney General (Superior Court of Justice), para. 84, JAR, Vol. VII, Tab 36, p. 24.
[52] Factum of the Proposed Intervener, Resolute FP Canada Inc. (Superior Court of Justice), para. 88, JAR, Vol. VII, Tab 38, pp. 118-119; Factum of the Plaintiff, Weyerhaeuser Company Limited (Superior Court of Justice), para. 99, JAR, Vol. VII, Tab 37, p. 89.
[53] Excerpts from the transcript of the cross-examination of Trina Rawn held December 17, 2014, q. 115, JAR, Vol. VI, Tab VI, p. 104.

held, "*[t]here is no dispute* that Resolute, as the corporate successor of Great Lakes, has the benefit of the Ontario Indemnity."[54]

48. The motion judge granted summary judgment in favour of Resolute and Weyerhaeuser. He held that the Ontario Indemnity covered the costs of complying with the Director's Order, concluding that its wording is "clear and unambiguous."[55]

49. The motion judge put considerable weight on the factual matrix surrounding the Ontario Indemnity. He recognized that in the 1979 Indemnity, Ontario offered Great Lakes and its successors future protection from environmental liability to encourage it to acquire the Dryden Mill. He acknowledged that the Ontario Indemnity replaced the 1979 Indemnity as part of a multi-million dollar settlement in 1985. He therefore concluded that "it would be commercially absurd" to construe the Ontario Indemnity as not applying to an order that Great Lakes' successors address the environmental contamination in the landfill.[56]

50. The motion judge also concluded that Weyerhaeuser could benefit from the Ontario Indemnity, both as a successor-in-title and as an assignee. He held that under the 1998 APA, "Bowater expressly assigned to Weyerhaeuser the 'full benefit of all representations, warranties, guarantees, indemnities' relating to the Dryden Property" and therefore "the Ontario indemnity [*sic*] was assigned by Bowater to Weyerhaeuser."[57] Resolute did not contest this conclusion because Ontario had not disputed that Resolute could benefit from the indemnity whether or not Bowater had assigned it.

Court of Appeal holds Resolute cannot benefit under the Ontario Indemnity even though it was not disputed below

51. Justice Brown, writing for the majority of the Court of Appeal, agreed with the motion judge that the Ontario Indemnity applied to the Director's Order.[58]

---

[54] Motion Judge Reasons, para. 55, JAR, Vol. I, Tab 1, p. 13 [emphasis added].
[55] Motion Judge Reasons, para. 47, JAR, Vol. I, Tab 1, p. 10.
[56] Motion Judge Reasons, para. 48, JAR, Vol. I, Tab 1, pp. 10-11.
[57] Motion Judge Reasons, para. 64, JAR, Vol. I, Tab 1, p. 15.
[58] Court of Appeal Reasons, paras. 78, 98, JAR, Vol. I, Tab 5, pp. 53, 61.

52. However, Justice Brown reversed the motion judge on Resolute's entitlement to benefit from the indemnity, even though Ontario had not disputed this at first instance.

53. Ontario again argued that it would be commercially illogical for Bowater to have assigned the Ontario Indemnity to Weyerhaeuser.[59] But, for the first time on appeal, Ontario also argued that if there was an assignment, Bowater lost its right to claim on the indemnity.[60] After the hearing, the Court requested supplementary submissions from Ontario and Weyerhaeuser on the interpretation of the 1998 APA and whether Bowater assigned the indemnity to Weyerhaeuser. The Court of Appeal did not ask for, and therefore did not receive, supplementary submissions from Resolute on this issue.[61]

54. The majority found that Bowater assigned the Ontario Indemnity to Weyerhaeuser in 1998, thereby depriving Bowater of any rights. They made this determination even though the parties to that transaction agreed that the transfer of the landfill was only of "paper title" and only temporary while the severance was pending. The majority was unpersuaded by the comprehensive indemnity that Bowater gave Weyerhaeuser in the Lease. Instead, the majority concluded that Weyerhaeuser was maximizing its protection in light of the scope of potential environmental liability from the landfill:

> Owning the WDS had no up-side; only down-sides, which included the expanded liability resulting from the 1990 amendment to the *EPA* making former owners of polluting sites liable under a variety of regulatory orders, such as preventative measures orders: *Environmental Protection Statute Law Amendment Act*, 1990, S.O. 1990, c. 18. That Weyerhaeuser would seek to maximize its protection against environmental liabilities associated with the WDS was commercially reasonable.[62]

55. The majority considered the transaction only from Weyerhaeuser's perspective. They did not ask whether it would have been commercially reasonable for Bowater to have left itself

---

[59] Factum of the Appellant, Her Majesty the Queen as represented by the Ministry of the Attorney General (Court of Appeal for Ontario), para. 49, JAR, Vol. VIII, Tab 42, p. 24.
[60] Factum of the Appellant, Her Majesty the Queen as represented by the Ministry of the Attorney General (Court of Appeal for Ontario), para. 50, JAR, Vol. VIII, Tab 42, p. 25.
[61] Letter from the Court of Appeal for Ontario requesting further written submissions, JAR, Vol. VIII, Tab 48, pp. 176-178.
[62] Court of Appeal Reasons, para. 159, JAR, Vol. I, Tab 5, p. 81.

totally exposed to environmental liability, by both giving up its rights under the Ontario Indemnity and indemnifying Weyerhaeuser under the Lease. This was a serious omission considering that: (i) as the successor to Great Lakes, Bowater had historical environmental liability for the landfill; (ii) the 1998 APA only temporarily transferred legal title to Weyerhaeuser, requiring that the landfill be returned to Bowater as soon as the severance was complete; (iii) as a former owner and person in management and control of the landfill, Bowater would have perpetual risk of environmental liability; and (iv) Weyerhaeuser had no contractual obligation to look to the Ontario Indemnity before looking to Bowater, leaving Bowater exposed to *both* Ontario and Weyerhaeuser for environmental liability.

56. Having concluded that Weyerhaeuser had been assigned the indemnity, the majority held that Resolute could no longer benefit from it. Justice Brown acknowledged that the issue had not been disputed before the motion judge.[63] Nonetheless, he concluded that the Court of Appeal could determine the issue at first instance and then held that "an absolute assignment of a chose in action, which leaves no interest in the assignor, extinguishes the assignor's right to later call on the obligor to perform the contract."[64]

57. The majority concluded that the "assignment was absolute and unequivocal." They drew this conclusion from the language in the 1998 APA indicating that Bowater sold and transferred to Weyerhaeuser the "full benefit" of contracts and indemnities. They did not perform any additional contractual analysis, either of the context of the agreement, related agreements (like the Lease) or the broader factual matrix.[65]

58. Justice Laskin, in dissent, did not address this issue, because he held that the Ontario Indemnity did not apply to the Director's Order.[66] Whether the Ontario Indemnity applies to the Director's Order is the subject of Ontario's appeal. However, that issue only matters to Resolute if this Court determines that Resolute can benefit from the indemnity.

---

[63] Court of Appeal Reasons, paras. 187, 190-192, JAR, Vol. I, Tab 5, p. 93.
[64] Court of Appeal Reasons, para. 194, JAR, Vol. I, Tab 5, pp. 95-96.
[65] Court of Appeal Reasons, para. 195, JAR, Vol. I, Tab 5, p. 96.
[66] Court of Appeal Reasons, para. 206, JAR, Vol. I, Tab 5, p. 100.

PART II – THE ISSUES

59. The fundamental issue on Resolute' s appeal is whether Resolute's predecessor Bowater permanently surrendered Resolute's rights under the Ontario Indemnity in 1998. Resolute submits that the Court of Appeal made three errors. They are:

(1) failing to find that, under the terms of the Ontario Indemnity, Resolute is entitled to benefit from the Ontario Indemnity because Resolute is the corporate successor to Great Lakes, regardless of whether Bowater assigned any rights under the indemnity to Weyerhaeuser;

(2) erroneously concluding that Bowater absolutely assigned the Ontario Indemnity to Weyerhaeuser in 1998; and

(3) failing to consider whether, if there was an assignment, it is only effective in equity, not in law, because it did not comply with the *Conveyancing and Law of Property Act*, therefore leaving Resolute the legal owner of the Ontario Indemnity.

If the Court agrees with Resolute about any of these errors, it must reverse the decision below and hold that Resolute is entitled to the benefit of the Ontario Indemnity.

PART III – STATEMENT OF ARGUMENT

Resolute retains the benefit of the Ontario Indemnity

60. When Great Lakes negotiated the Ontario Indemnity in 1985, and when its successor Bowater sold the Dryden Mill to Weyerhaeuser in 1998, they faced the enormous potential environmental liability associated with owning a mercury-containing landfill. They would have recognized that this indemnity was their only protection from this massive liability. The Court of Appeal did not address this at all, and therefore erred in not turning its mind to the most fundamental principle of contractual interpretation: the objective intention of the parties. This Court must therefore consider whether Resolute's predecessors would have agreed to terms that stripped them of the indemnity's critical protection.

Resolute is entitled to benefit from the Ontario Indemnity

61. On any sensible, contextual interpretation of the Ontario Indemnity and the 1998 transactions, Resolute would not have given up, and did not give up, its rights to indemnification, even if it transferred or assigned the Ontario Indemnity.

62. Justice Brown determined this issue for the first time on appeal because it had not been disputed below. He found that the assignment of the Ontario Indemnity to Weyerhaeuser (an issue that is addressed more fully below) effectively barred Resolute from relying on the enurement clause. He based this finding on a single issue of law, concluding in the abstract that an absolute assignment of a chose in action, such as an indemnity, "extinguishes the assignor's right to later call on the obligor to perform the contract."[67]

63. This was an error made because the majority failed to appreciate the nature of this indemnity, the circumstances in which it was negotiated and the nature of liability it protected against. In short, Justice Brown failed to interpret the contract as a whole, in the context of the factual matrix.

64. There is no legal principle that required the Court of Appeal to apply this "hot potato" theory, in which only the singular legal owner of an indemnity may rely on it. This Court relaxed the requirement of privity more than 25 years ago. Rather, the relevant question is what the parties to the Ontario Indemnity objectively intended. The only reasonable interpretation of the indemnity is that the parties intended to protect Great Lakes and its successors *and* assigns, in perpetuity. Any other interpretation is fundamentally inconsistent with the nature of the environmental liability that the Ontario Indemnity was given to protect against.

Contracts may benefit persons other than their owners

65. Historically, contracts were understood as only being capable of benefiting the parties to a contract. But this is no longer the law. There is currently no reason why parties cannot intend that a class of beneficiaries, such as successors, share the benefits of a contract.

---

[67] Court of Appeal Reasons, para. 194, JAR, Vol. I, Tab 5, pp. 95-96.

66. *Brown v. Belleville* considered an enurement clause, similar to the one here, in the context of a municipality promising to maintain and repair a storm sewer. Subsequent co-landowners sought to claim on the agreement. Even though the subsequent landowners did not have an ownership interest in the contract, they were permitted to benefit from it. The Ontario Court of Appeal held that the enurement clause "unequivocally confirms that the contracting parties intended and agreed that the benefit of the Agreement would extend to an aggregation or class of persons" and "they intended the benefit of the Agreement to be shared" by that class of future landowners.[68]

67. This Court has rendered similar decisions in the context of third party beneficiaries. In *London Drugs v. Kuehne & Nagel*, this Court extended the benefit of a limitation of liability clause to a broad class of beneficiaries: all employees of the contracting company.[69] In *Fraser River Pile & Dredge*, this Court held that an anti-subrogation clause in an insurance contract benefitted, and was enforceable by, any "charterer" despite the fact that it was not a party to the insurance contract.[70] In doing so, the Court separated the parties who legally own the rights in a contract from the classes of people who can benefit from it.

68. Central to the decisions in *Belleville*, *London Drugs*, and *Fraser River* was a careful examination of whom the contracting parties intended to ultimately benefit from the contract.[71] The decision in *Fraser River* was "dependent upon the express intention of the parties…to extend the benefit of the provision to certain named classes" of beneficiaries. [72] After *Belleville*,

---

[68] *Brown v. Belleville (City)*, 2013 ONCA 148, para. 84. While the Court of Appeal considered this case in the context of whether Weyerhaeuser could benefit under the enurement clause, it did not consider its application to Resolute.

[69] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (WL).
[70] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.
[71] *Brown v. Belleville (City)*, 2013 ONCA 148, paras. 85, 100-101; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, paras. 259, 265 (WL); *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, paras. 32-36.
[72] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, para. 43.

one academic has suggested that the modern approach turns entirely on the "intention, express or implied, of the parties to a contract" to extend benefits to a class of beneficiaries.[73]

69. Placing the parties' intentions at the centre of the analysis is consistent with this Court's broader view of contract law: "the goal of contractual interpretation" is nothing more than "to ascertain the objective intentions of the parties."[74]

Environmental indemnities require a broader conception of benefit

70. There can be little doubt that the original parties to the Ontario Indemnity intended Resolute, as Great Lakes' successor, to benefit from it. This is because, by purchasing the Dryden Mill and the landfill, Great Lakes assumed significant environmental liability that would flow to its successors. The liabilities arose from both the statutory regime as well as Great Lakes' indemnification of Reed. But under the Court of Appeal's analysis, regardless of this intention, Resolute is barred from claiming on the indemnity by operation of law.

71. The comprehensive nature of statutory environmental liability is an excellent example of why the common law approach to contractual beneficiaries was overly restrictive. Liability under Ontario's *EPA* does not attach based on past fault or current property ownership. Instead, it potentially attaches, jointly and severally, to everyone who has touched the property, in perpetuity.[75] All that must be proved is past or present ownership, management or control of contaminated land.

72. The idea that only one party (the "owner") can benefit from an indemnity is totally inconsistent with parties contractually protecting themselves against a statutory system of environmental liability that this Court has described as "wide and deep".[76] By analogy, in *London Drugs*, Justice Iacobucci developed the principled exception to privity in accordance with several policy principles: (i) the parties' allocation of risk; (ii) sound commercial practice;

---

[73] M.H. Ogilvie, "Re-Defining Privity of Contract: *Brown v. Belleville (City)*" (2015) 52:3 Alta. L. Rev. 731, p. 743 (HeinOnline).
[74] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 55.
[75] *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 17, 18.
[76] *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52, para. 9.

and (iii) reifying the reasonable expectations of the parties.[77] The same principles explain why a "single owner theory" is inconsistent here with the nature of environmental indemnities. First, the parties allocated the risk of environmental liability to Ontario and away from Great Lakes and its successors. Depriving Resolute of the benefit of the Ontario Indemnity does not respect the parties' allocation of risk. Second, it is inconsistent with sound commercial practice (by essentially "freezing" the asset in the hands of a single owner forever) and ignores the realities of environmental regulation. Most importantly, it defeats the parties' reasonable expectations at the time of contracting.

73. On the other hand, interpreting this indemnity as extending benefits to all successors is consistent with its purpose. Without it, the asset would be stranded: no seller would sell the indemnity with the land, but no buyer would permanently purchase the land without the indemnity.

74. In short, there is no principled reason why a class of beneficiaries cannot share the benefit of an environmental indemnity, even if the "ownership" of the contractual indemnity is assigned to a subsequent property owner. The common law's historical rigidity should not stand in the way of allowing parties to allocate risk of environmental liability as they see fit.

75. Since a contract *can* clearly benefit a class of beneficiaries beyond its owner, the only relevant question is whether the Ontario Indemnity *does* have that effect. This question must be answered by examining the objective intentions of the original parties to the environmental indemnity.

Ontario Indemnity intended to protect Resolute and all successors of Great Lakes

76. Resolute submits that the Ontario Indemnity was intended to apply to Great Lakes and its successors, irrespective of whether the property was sold and the indemnity assigned.

77. The starting point in this analysis should be the reasons of the motion judge. He did not specifically consider the effect of the assignment on Resolute because Ontario did not dispute

---

[77] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, paras. 252-253 (WL).

Resolute's right to benefit from the Ontario Indemnity. However, in considering whether Weyerhaeuser also benefitted from the indemnity, the motion judge determined that the mutual intention of the parties to the Ontario Indemnity was to indemnify all future owners of the landfill against any environmental liability that might arise.[78] This is a finding of fact relating to the factual matrix and the parties' objective intentions and should not be overturned absent palpable and overriding error.

78. In contrast, the Court of Appeal did not look at the intention of the parties or really interpret the enurement clause at all. Instead, it simply concluded that once the Ontario Indemnity had been assigned, Resolute could not benefit from it.

79. Respectfully, the Court of Appeal was wrong. Looking at the Ontario Indemnity as a whole, including the text and the surrounding circumstances, all successors were intended to be indemnified from environmental liability. This is evident from (i) the language of the enurement clause; (ii) the indefinite term of the indemnification; (iii) the existence of multiple beneficiaries; (iv) the contemporaneous threat of environmental liability; and (v) the purpose of the indemnity.

80. ***Enurement Clause.*** Section 6 of the Ontario Indemnity provides that the benefit of the indemnity enures to the "successors and assigns" of Great Lakes, Reed and its parent, Reed International.[79] The language of a similar enurement clause was described in *Belleville* as "broad and unqualified" and "unequivocally" confirming that the clause intended to cover a broad "aggregation or class of persons."[80] Here that class of people is *both* the successors *and* the assigns of Great Lakes. The Court of Appeal would rewrite the enurement clause to be successors *or* assigns, *i.e.*, once there has been an assignment, no benefit can enure to a successor. This is not the language of the clause and does not reflect the intent of the parties.

81. ***Indemnity valid in perpetuity.*** The Ontario Indemnity is "valid without limitation as to time."[81] The indemnification covers any claims existing as of December 17, 1979 or "which may

---

[78] Motion Judge Reasons, para. 63, JAR, Vol. I, Tab 1, p. 15.
[79] Motion Judge Reasons, para. 19, JAR, Vol. I, Tab 1, p. 5.
[80] *Brown v. Belleville (City)*, 2013 ONCA 148, para. 84.
[81] Motion Judge Reasons, para. 18, JAR, Vol. I, Tab 1, p. 4.

arise or be asserted thereafter."[82] There is no basis to believe that Ontario expected Great Lakes to keep the landfill forever. But that is the term of the indemnity. Instead, the parties must have intended that Great Lakes could sell or transfer the landfill in a manner that would both provide protection to a purchaser while simultaneously protecting Great Lakes and its successors from the environmental liability that had already accrued. Anything else would leave the landfill as an albatross around Great Lakes' neck and potentially prevent it from realizing the value in the Dryden Mill, in which it had already invested over $200 million. In *Belleville*, the perpetual nature of the obligation indicated an intent to protect non-assignee successors.[83]

82. ***Multiple beneficiaries.*** Interpreting the Ontario Indemnity as applying only to one beneficiary at a time stands is at odds with the way it was drafted. Separate and apart from the enurement clause, the Ontario Indemnity expressly extended to numerous parties, including not only Great Lakes, Reed and Reed International, but also all the subsidiaries and affiliates of Reed International.[84] The multiple beneficiaries show that Ontario intended to bear responsibility for the mercury contamination in the landfill, irrespective of which, or how many, parties were involved in later claims or proceedings. Moreover, by indemnifying both Reed and Great Lakes, all of the parties recognized the importance of the indemnity being held simultaneously by a former owner (Reed) and a current owner (Great Lakes), not merely one or the other.

83. ***Single obligation.*** The Ontario Indemnity was granted with respect to a specific property and a specific source of liability: the discharge, escape or presence of a pollutant related to Reed or its predecessors. Ontario's potential liability does not materially change based on the number of beneficiaries that can claim under the indemnity. In short, Ontario agreed to indemnify against all liabilities arising from the historical mercury contamination. Whether there are two or twelve indemnitees, the scope of that liability remains the same.

---

[82] Ontario Indemnity, MOA, Schedule "F", ss. 1, 4, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 189-190, 191.
[83] *Brown v. Belleville (City)*, 2013 ONCA 148, paras. 86-87.
[84] Ontario Indemnity, MOA, Schedule "F", s. 1, Exhibit "J", Rawn Affidavit, JAR, Vol. IV, Tab 27J, pp. 189-190.

84. ***Purpose of the indemnity.*** The Ontario Indemnity was provided to replace the 1979 Indemnity, which was given to induce Great Lakes to purchase and invest more than $200 million in the Dryden Mill. Both Ontario and Great Lakes understood the Ontario Indemnity's importance to the transaction. Even in 1979, Ontario had to indemnify both buyer and seller to consummate the sale. In 1985, the indemnity was replaced and expanded. The environmental liability would follow Great Lakes and its successors forever; the purpose of the Ontario Indemnity was equally to protect Great Lakes and its successors for the same period.

85. In sum, mirroring this Court's prescription in *London Drugs*, denying Resolute access to the Ontario Indemnity would allow Ontario to "circumvent or escape" the very environmental indemnification "to which it had expressly consented."[85] Ontario promised to assume the risk and liability of the buried mercury in the landfill. It specifically promised to indemnify Great Lakes and its successors for that risk and liability. Ontario should not be permitted to thrust the risk it assumed back onto the shoulders of Great Lakes' successor, Resolute, merely by claiming that the legal owner of the indemnity has changed.

There was no assignment

86. As discussed above, Resolute should be able to benefit under the Ontario Indemnity regardless of who legally owns it. But if this Court concludes that is not the case, then it must consider whether Bowater actually assigned away its rights under the Ontario Indemnity as part of the 1998 APA. It did not.

87. By 1998, the Ontario environmental protection regime exposed Bowater to unlimited environmental liability, in perpetuity. The transfer of the paper title of the landfill to Weyerhaeuser was temporary and Bowater fully indemnified it under the Lease. Nonetheless, the Court of Appeal concluded that Bowater relinquished its rights under the Ontario Indemnity to Weyerhaeuser in 1998 and did not get them back when the landfill reverted two years later. This is inconsistent with the words and context of the 1998 APA and would be commercially absurd.

---

[85] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, para. 247 (WL).

No deference owing on question of assignment

88. Resolute acknowledges that the motion judge concluded that there was an assignment and that, ordinarily, his answer to this question of mixed fact and law would be entitled to deference in the Court of Appeal. But, in the circumstances of this case, giving deference was an error.

89. Because Ontario made the strategic decision not to dispute Resolute's rights at first instance, all parties proceeded on the basis that the assignment or non-assignment did not affect whether Resolute could benefit under the Ontario Indemnity. There was no suggestion before the motion judge that any assignment would deprive corporate successors of their rights under the Ontario Indemnity. Instead, the motion judge treated the assignment as an issue between only Ontario and Weyerhaeuser (incidentally, this view was continued in the Court of Appeal, which, when requesting supplementary submissions on the nature and scope of assignment, invited only Ontario and Weyerhaeuser to make submissions, excluding Resolute). This deprived Resolute of the opportunity to make full submissions on the issue of assignment or reply to any arguments about the effect of the assignment because no one had made any.

90. This was unfair to Resolute. Interpreting the 1998 APA to conclude that Bowater relinquished its rights under the Ontario Indemnity would have been commercially absurd. Ontario conceded as much. But because the rights of corporate successors, like Resolute, were not in issue before the motion judge, he did not consider this commercial absurdity. Nor did he consider whether any assignment was partial or absolute because it did not impact the outcome. The motion judge's findings on the assignment were therefore incomplete. Indeed, the factual matrix changed when the Court of Appeal found that the effect of Bowater assigning the Ontario Indemnity was for Bowater to lose all of the right under that indemnity. If the Court of Appeal was going to decide for the first time whether an assignment stripped Bowater and Resolute of their rights, it should have reviewed the question of whether there had been an absolute assignment *de novo*. If it had done so, it would have concluded that there was no assignment.

No proper analysis of 1998 APA regarding assignment

91. Neither the motion judge nor the Court of Appeal conducted a complete contractual interpretation to determine whether the 1998 APA absolutely assigned the Ontario Indemnity to

Weyerhaeuser. If they had, they would have concluded that the parties never intended for the Ontario Indemnity to be assigned.

92. The modern approach to interpreting contracts is to discern the parties' objective intentions using the words of the agreement, its context and the surrounding circumstances. In contrast, the motion judge decided whether there had been an assignment in three short sentences, relying only on the words in s. 3.1(xiv) that the "full benefit of all representations, warranties, guarantees, indemnities" were assigned.[86] While Weyerhaeuser had also raised section 3.1(vii), the motion judge did not rely on this section, as it only applied to the transfer of agreements "exclusive for use in the Business." This could not include the Ontario Indemnity because neither it nor the landfill had any role in Bowater's operating business at the time.

93. The Court of Appeal recognized that the motion judge's analysis was incomplete because s. 3.1(xiv) is limited to "representations, warranties, guarantees, indemnities … *received by the Vendor on the purchase or other acquisition of any part of the Purchased Assets or otherwise*" (emphasis added). Justice Brown acknowledged that the Ontario Indemnity was not acquired on the purchase or other acquisition of the Purchased Assets. Nonetheless, he held that the indemnity was assigned through the "or otherwise" language in that same section.[87]

94. Looking at the 1998 APA without the benefit of its context or its factual matrix was an error of law. Although the factual matrix can "never be allowed to overwhelm the words of [an] agreement," courts must look at the surrounding circumstances when interpreting a contract.[88] Courts should not attempt to give words meaning "apart from their context" because "no contractual language can be understood without some knowledge of its context and the purpose of the contract."[89]

95. The factual matrix is especially helpful where the words in the contract are unclear. When Justice Brown looked at the two words "or otherwise" in the 1998 APA and decided that

---

[86] Motion Judge Reasons, para. 64, JAR, Vol. I, Tab 1, p. 15.
[87] Court of Appeal Reasons, para. 156, JAR, Vol. I, Tab 5, p. 80.
[88] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 57.
[89] *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59, para. 52.

they effected an absolute assignment of the Ontario Indemnity, he did so divorced from the context of the 1998 APA and the commercial reasonableness of his conclusion. These errors are explained below.

The context of the 1998 APA shows that there was no assignment

96. The context of the commercial deal making up Bowater's 1998 sale of the Dryden Mill to Weyerhaeuser is critical to understanding the mutual and objective intentions of both parties.[90]

97. It is undisputed that neither party originally intended Bowater to transfer the landfill. Both intended Bowater to retain it. This changed only because of the delay in obtaining a municipal severance. When that occurred, the parties amended their agreement. But the landfill had to be returned to Bowater as soon as possible.

98. Although the parties could not prevent this unintended outcome and keep their closing date, they re-structured the transaction so that Weyerhaeuser held title to the landfill temporarily and in name only. Furthermore, the parties ensured that the environmental risk for the landfill remained with Bowater. In particular:

(1) Bowater remained in possession and control of the landfill;

(2) Weyerhaeuser never had a beneficial interest in the landfill and did not possess or exercise any control over it;

(3) Weyerhaeuser leased the landfill back to Bowater;

(4) Title over the landfill was to return to Bowater as soon as the severance was complete;

(5) Environmental liability for the landfill was carved out of the environmental indemnity in the 1998 APA, which provided for some cost-sharing between the parties;

---

[90] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 57.

(6) Bowater covenanted in the Lease to fully indemnify Weyerhaeuser from all claims, costs and losses related in any way to the landfill, including those expressly arising from the presence of mercury; and

(7) In court filings, Weyerhaeuser described its ownership as "paper title" such that Weyerhaeuser would "avoid transfer of any liability associated with the [landfill]" and "all environmental liability associated with the [landfill] (including future liability) remained with Bowater."[91]

99. There is nothing to indicate that, despite organizing the transaction as if the landfill had not been transferred, the parties intended to transfer the Ontario Indemnity and leave it in Weyerhaeuser's hands indefinitely. After it was evident that the landfill would have to be temporarily transferred, there would have been clear signs if the parties also intended to take the significant step of transferring the Ontario Indemnity. For example, the Amending Agreement or the Lease could have made reference to the indemnity. Neither do, even though Weyerhaeuser was aware of its existence. Moreover, the parties would have addressed the return of the Ontario Indemnity to Bowater following the return of the landfill. At the very least, the agreement would have required Weyerhaeuser to seek indemnification first from Ontario before claiming on its indemnity from Bowater, instead of potentially allowing Ontario to avoid liability altogether. Any of these simple steps would have clarified the status of this important protection. Yet none were taken.

100. Furthermore, to effect a successful assignment, notice should have been given to Ontario of the purported assignment or, in the very least, the 1998 APA had to clearly identify the Ontario Indemnity as a subject of an assignment. Indeed, as explained below, the assignment does not comply with the requirements of the *Conveyancing Law and Property Act* because no notice of the assignment was given to Ontario. In the absence of such compliance, an equitable assignment can take effect, but this requires the assignment to "adequately identify" the rights

---

[91] Proof of Claim of Weyerhaeuser Company Limited dated November 15, 2012, JAR, Vol. III, Tab 26, p. 197.

being assigned.[92] The language of "or otherwise" in s. 3.1(xiv) does not comply with this requirement.

101. Instead of assuming that these sophisticated commercial parties, represented by sophisticated counsel, repeatedly neglected to make their intention known, the better interpretation is the simple one: they did not intend to assign the Ontario Indemnity. Rather, Weyerhaeuser would have recourse against Bowater, and Bowater would have recourse against Ontario. Everyone would be protected.

Absolute assignment is commercially absurd

102. When looked at in its full context, interpreting the 1998 APA as an absolute assignment of the Ontario Indemnity is commercially absurd.

103. It is trite law that in interpreting a commercial transaction, the court must "avoid such an interpretation that would result in a commercial absurdity."[93] Instead, a commercial contract should be interpreted "in accordance with sound commercial principles and good business sense."[94] Any consideration of commercial reasonableness must be objective, not viewed "from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other."[95]

104. In this case, both Ontario and Resolute argued that any absolute assignment of Bowater's interest in the Ontario Indemnity would be commercially absurd. Weyerhaeuser did not disagree. Instead, Weyerhaeuser argued that this concern was inapplicable because, properly interpreted, both Weyerhaeuser and Bowater maintained access to the Ontario Indemnity.

---

[92] *Bank of Nova Scotia v. Newfoundland Rebar Co*. (1987), 65 Nfld. & P.E.I.R. 165, para. 12 (Nfld. S.C.); *University of British Columbia v. Kapelus*, 2012 BCSC 486, para. 69, aff'd 2014 BCCA 42; *Ritchie v. Jeffrey* (1915), 52 S.C.R. 243, p. 253.
[93] *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, p. 441; *see also, Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, para. 50; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance. Co*, [1980] 1 S.C.R. 888, p. 902.
[94] *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42, para. 27 (Ont. C.A.).
[95] *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42, para. 27 (Ont. C.A.).

105. Even though Ontario stood to benefit from Bowater losing access to the Ontario Indemnity, Ontario conceded that interpreting the transaction as a complete assignment would result in an absurdity. Ontario's factum in the Court of Appeal stated:

> For Bowater to have assigned the 1985 Indemnity to Weyerhaeuser as part of the transaction **does not objectively make commercial sense** given how the parties agreed to allocate risk under the 1998 APA with respect to environmental claims. Bowater first gave Weyerhaeuser contractual indemnifications for both regulatory and third party tort risk under the 1998 APA. When the parties decided to proceed with the transaction without obtaining the contemplated severance, Bowater assumed full responsibility for performance of all environmental regulatory work on the WDS and gave an undisputed comprehensive indemnity under the lease to Weyerhaeuser. **It is not commercially logical for Bowater to have assumed all of the environmental risk but left itself completely exposed by giving up any right of recourse against Ontario that it may have had**.[96]

106. In 1998, Bowater faced multiple different heads of potential environmental liability related to the landfill. First, under the Lease, it had granted an unconditional environmental indemnity to Weyerhaeuser. Second, following the 1990 amendments to the *EPA*, it was exposed to historical and future environmental liability as an owner of the landfill. Third, it owed potential liability to third parties asserting claims for harm from historical contamination. Fourth, as Great Lakes' successor, Bowater was liable to Reed and Reed International under the Great Lakes Indemnity for any environmental liabilities borne by those companies.

107. The Ontario Indemnity was Bowater's only protection against these liabilities. There is no reason why it would have surrendered it. On the contrary: the transaction was painstakingly structured to leave *all* of the landfill liability in the hands of Bowater. Specifically, while the parties generally agreed to share some environmental liability under Article 10 of the 1998 APA, Bowater agreed to indemnify Weyerhaeuser for *all* landfill-related environmental risks. The indemnity was exhaustive, without limitations as to cost or time. It is not objectively reasonable to think that Bowater would keep the environmental risks of the landfill but also surrender to

---

[96] Factum of the Appellant, Her Majesty the Queen as represented by the Ministry of the Attorney General (Court of Appeal for Ontario), para. 49, JAR, Vol. VIII, Tab 42, p. 24, [emphasis added]; *see also,* Factum of the Respondent, Weyerhaeuser Company Limited (Court of Appeal for Ontario), para. 55, JAR, Vol. VIII, Tab 44, p. 122.

Weyerhaeuser a separate indemnity that protected it from that very same liability, particularly when the landfill would again return to Bowater upon the completion of the severance.

108. Any argument that the assignment was not absurd because Weyerhaeuser wanted to maximize its protection against environmental liabilities views the transaction solely from Weyerhaeuser's perspective.[97] But contractual interpretation is not about giving one party suspenders and a belt, while leaving the other with its pants falling down. It is about discerning the objective mutual intent of the parties. While Weyerhaeuser may now say that it needed the Ontario Indemnity to protect it against the risk that Bowater would become insolvent, there is no objective evidence that Weyerhaeuser had any such concerns at the time of the transaction. It did not ask for any insolvency protection in any of the other environmental indemnification provisions in the 1998 APA, such as a holdback, security or a sinking fund. An absolute assignment would merely add a backup indemnity to Weyerhaeuser's protective armour while it would leave Bowater naked and exposed to the risks associated with the landfill. Conversely, both parties are protected if there was no absolute assignment.

Conclusion: a contextual interpretation rejects assignment

109. Justice Brown's entire analysis supporting an absolute assignment is based purely on a textual analysis of the two words "or otherwise" in section 3.1(xiv). The ultimate question, as in all modern contractual interpretation cases, is whether the parties intended that phrase to include an absolute assignment of the Ontario Indemnity. In the context of the surrounding commercial transaction, and in the face of the commercial absurdity of the transfer, the answer is clearly 'no.'

---

[97] Court of Appeal Reasons, para. 159, JAR, Vol. I, Tab 5, p. 81. Justice Brown notes that the motion judge addressed this issue, but the motion judge did not. The motion judge did not address the commercial absurdity of the assignment; he addressed the commercial absurdity only in the context of the scope of the protection of the Ontario Indemnity. The paragraph quoted by Justice Brown at para. 158 is out of context.

In the alternative, any assignment is partial

110. In the event that this Court concludes that there is an assignment of the Ontario Indemnity, any such assignment must be partial, not absolute.

111. The 1998 APA provides for the assignment or transfer of Purchased Assets only "as, at and from the Effective Time."[98] If the Ontario Indemnity constitutes a Purchased Asset, its protections are only assigned in respect of liabilities arising in relation to the ownership of the landfill on or after the Effective Time of September 30, 1998. Bowater would retain the benefit of the Ontario Indemnity for any liability related to its ownership of the landfill before September 30, 1998, while Weyerhaeuser would have the benefit of the Ontario Indemnity for any liability related to its subsequent ownership of the landfill.

112. This interpretation is consistent with the surrounding circumstances, the underlying commercial transaction and the commercial reasonableness, all as explained above. A partial assignment would not have impaired the value of the Ontario Indemnity to Weyerhaeuser at all, while providing Bowater with some protection for its historical liability under the *EPA*.

113. The Director's Order is an example of a claim or proceeding for which both Weyerhaeuser and Resolute, as Bowater's successor, could claim on the indemnity. Weyerhaeuser's liability arises under the *EPA* for its ownership after September 30, 1998, while Resolute's liability arises, at least in part, from the ownership of the landfill by Great Lakes/Bowater before that same date.[99] Under a partial assignment, there should be no bar for the claim of either party.

Under an equitable assignment, Resolute retains legal rights in the Ontario Indemnity

114. Even if the Court concludes that the 1998 APA assigned the Ontario Indemnity to Weyerhaeuser, the assignment did not comply with the requirements of the *Conveyancing Law and Property Act* ("*CLPA*"). As a result, it was an assignment in equity only. Resolute therefore

---

[98] Motion Judge Reasons, para. 20, JAR, Vol. I, Tab 1, p. 5.
[99] Director's Order, para. 1.16, Exhibits "A", Rawn Affidavit, JAR, Vol. IV, Tabs 27A, p. 20.

continues to hold legal title to the Ontario Indemnity and can assert it against Ontario in a manner that is consistent with Weyerhaeuser's equitable interest.

Any assignment is equitable, not legal

115. The common law of assignment did not historically permit the holder of a chose in action (*i.e.*, a right that can be enforced or claimed by bringing an action, such as an indemnity[100]) to assign that right to another party.[101] Rather, assignment was only possible in equity, where the court of Chancery "would compel the assignor to collaborate with the assignee in asserting his claim in the Common Law Courts."[102]

116. Legal assignment only became possible through the *CLPA* amending the common law.[103] The *CLPA* sets out specific requirements to make a legal assignment effective. First, the assignment must be absolute: it must assign the whole debt or chose in action. Second, the assignment must be in writing and signed by the assignor. Third, express notice of the assignment must be provided, in writing, to the counterparty.[104]

117. Where a purported assignment fails to meet the *CLPA* requirements, it is invalid in law. Nonetheless, there may be an assignment in equity. An "equitable assignment is deemed to exist where a sufficient expression of an intention to assign can be found." An equitable assignment must also adequately identify the chose in action to be assigned.[105]

118. A legal assignment of a chose in action enables the assignee to enforce it by suing in its own name, without the assignor. In contrast, an equitable assignment requires that the assignor be joined to the lawsuit. This is because the equitable assignee has no legal right to enforce the chose. Rather, the equitable assignee must bring an action essentially requiring the assignor (*i.e.*, the owner) to sue the counterparty for the benefit of the assignee. While rules of civil procedure

---

[100] *Torkington v. Magee*, [1902] 2 K.B. 427, p. 430, BOA, Tab 2; *DiGuilo v. Boland*, [1958] O.R. 384 para. 5 (C.A.) (WL), aff'd [1961] S.C.R. vii (QL).
[101] *Fredrikson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145, para. 43 (C.A.).
[102] *DiGuilo v. Boland*, [1958] O.R. 384, para. 6, (C.A.) (WL), aff'd [1961] S.C.R. vii (QL).
[103] *DiGuilo v. Boland*, [1958] O.R. 384, paras. 7, 10, (C.A.) (WL), aff'd [1961] S.C.R. vii (QL).
[104] *Conveyancing and Law of Property Act*, R.S.O. 1990 c. C. 34, s. 53(1).
[105] *University of British Columbia v. Kapelus*, 2012 BCSC 486, para. 69, aff'd 2014 BCCA 42.

have relaxed this requirement in certain jurisdictions, that does not change the legal status of an equitable assignor: it remains the legal owner of the chose.[106]

119. If this Court finds that Bowater assigned the Ontario Indemnity to Weyerhaeuser, it must have been an equitable, not legal, assignment. Neither Bowater nor Weyerhaeuser gave notice to the counterparty, Ontario, of the alleged assignment at all. Indeed, it appears that the Court of Appeal did not turn its mind to the nature of the assignment. While the majority cited the *CPLA* to explain the effect of an assignment, it did not consider whether the parties actually complied with the *CLPA* and effected a legal assignment here.[107] Because there was no notice, they could not have done so.

Effect of an equitable assignment

120. Justice Brown erred in concluding that Bowater's assignment to Weyerhaeuser "extinguishes [Bowater's] right to call on the obligor to perform the contract" because it "had no remaining legal interest in the indemnity."[108] This is not consistent with an equitable assignment.

121. Rather, as both this Court and leading scholars have explained, under an equitable assignment, the assignor retains the legal ownership of the assigned right, and the assignee takes an equitable interest in the legal right or chose in action through the "*creation* of new rights" in equity.[109] As the leading English text on assignment explains, "[a]ny attempt to transfer title to a legal chose by equitable means must leave the legal estate vested in the original holder, the

---

[106] C. H. Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses" in Jason Neyers, Richard Bronaugh & Stephen G. A. Pitel, eds., *Exploring Contract Law*, (Portland, OR: Hart Publishing, 2009) 283, p. 291, BOA, Tab 5; *DiGuilo v. Boland*, [1958] O.R. 384, para. 22, (C.A.) (WL), aff'd [1961] S.C.R. vii (QL).
[107] Court of Appeal Reasons, paras. 194, JAR, Vol. I, Tab 5, pp. 95-96.
[108] Court of Appeal Reasons, paras. 193-94, 198, JAR, Vol. I, Tab 5, pp. 95-97.
[109] James Edelman & Steven Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 Law Q. Rev. 228, p. 229, BOA, Tab 7 [emphasis in original]; Marcus Smith & Nico Leslie, *The Law of Assignment*, 2nd ed (Oxford: Oxford University Press, 2013), §11.17, BOA, Tab 8; *Deisler v. United States Fidelity Co. & Guaranty Co.* (1917), 59 S.C.R. 676, para. 11 (WL); *Fraser v. Imperial Bank of Canada* (1912), 47 S.C.R. 313, para. 96 (WL); *R. v. J.B. & Sons Co.* (1969), [1970] S.C.R. 220, para. 30 (WL).

assignor."[110] The obligor remains liable to fulfill its obligations;[111] it cannot rely on an equitable assignment as a defence to a chose in action.

122. While some courts and authors have sometimes described assignments as effecting a transfer, those statements should be viewed with caution. Many of those decisions and texts fail to differentiate between legal and equitable assignments.[112] These passing references do not change this Court's characterization of equitable assignment and are not consistent with the principles underlying it.

123. Indeed, in a law review article, Justice James Edelman of the High Court of Australia has debunked the Court of Appeal's transfer theory.[113] Among Justice Edelman's rationales are the concepts of joinder and privity. First, an equitable assignment of a legal chose in action is not a transfer because the assignee must still join the assignor as a necessary party in a claim on the contract.[114] Only the assignor has the legal relationship with the obligor – he or she retains the contractual rights. Second, non-transfer best accords with the common law doctrine of privity.[115] The transfer theory cannot explain how equity can allow an assignee, like Weyerhaeuser, to sue a third party debtor with whom it has no relationship.[116]

---

[110] Marcus Smith & Nico Leslie, *The Law of Assignment*, 2nd ed (Oxford: Oxford University Press, 2013), §11.09, BOA, Tab 8.
[111] *Weyerhaeuser Company Limited v. Hayes Forest Services Limited*, 2008 BCCA 69, para. 35.
[112] *See e.g., Sanofi Pasteur Limited v. UPS SCS, Inc.*, 2015 ONCA 88, para. 66; *Makar v. "Rivtow Lion", (The)* (1982), 140 D.L.R. (3d) 6, para. 34 (Fed. C.A.)(WL); *Vladescu v. CTVglobemedia Inc.*, 2013 ONCA 448, paras. 62, 85; Daphne A. Dukelow, The Dictionary of Canadian Law, 4th ed (Toronto: Carswell, 2011), *sub verbo* "assign", BOA, Tab 6.
[113] James Edelman & Steven Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 Law Q. Rev. 228, BOA, Tab 7; *see also*, C. H. Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses" in Jason Neyers, Richard Bronaugh & Stephen G. A. Pitel, eds., *Exploring Contract Law*, (Portland, OR: Hart Publishing, 2009) 283, p. 290, BOA, Tab 5; Ben McFarlane & Robert Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1, pp. 19-21, BOA, Tab 4; Ben McFarlane, "Property and the New Doctrinalism: Comment" (2015) 163 U. Pa. L. Rev. Online 293, pp. 296-297.
[114] *DiGuilo v. Boland*, [1958] O.R. 384, paras. 11, 22-23 (C.A.) (WL), aff'd [1961] S.C.R. vii (QL); *Nadeau v. Caparelli*, 2016 ONCA 730, paras. 27-30.
[115] *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] UKHL 1, [1915] A.C. 847, p. 853 (H.L.), BOA, Tab 1.
[116] James Edelman & Steven Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 Law Q. Rev. 228, p. 245, BOA, Tab 7.

124. If there was an equitable assignment, Bowater (and then Resolute) retained legal title to the Ontario Indemnity. This directly conflicts with the Court of Appeal's conclusion that "Resolute has no legal interest in the Ontario Indemnity upon which it can assert a claim against Ontario."[117]

125. While Weyerhaeuser would have an equitable interest in the indemnity, Weyerhaeuser's and Resolute's interests are aligned because they are both jointly and severally liable under the Director's Order. Every dollar that Resolute collects from Ontario on the indemnity to contribute towards clean-up costs is a dollar that Weyerhaeuser is relieved from paying. This enures to its benefit and is therefore consistent with Weyerhaeuser's equitable interest.

126. In 1985, Ontario made a bargain with Great Lakes to be liable for the mercury contamination in the landfill. This promise was made in perpetuity. It cannot now escape its bargain by playing Resolute and Weyerhaeuser off against each other. Ontario cannot invoke those dealings to avoid its legal obligation to indemnify Resolute. Ontario remains liable.

PART IV – COSTS

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

PART V – ORDER SOUGHT

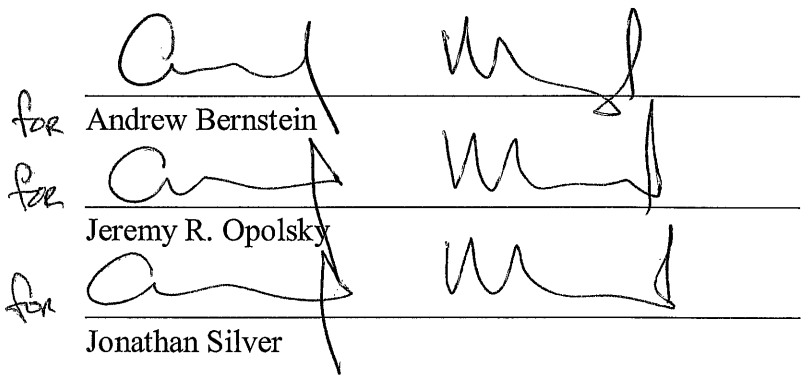
128. Resolute FP Canada Inc. requests an order allowing this appeal, setting aside the judgment of the Court of Appeal for Ontario, and granting Resolute FP Canada Inc. its costs of this appeal and the proceedings below.

---

[117] Court of Appeal Reasons, para. 198, JAR, Vol. I, Tab 5, p. 97.

DATED AT TORONTO, ONTARIO THIS 7TH DAY OF JANUARY 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



for Andrew Bernstein

for Jeremy R. Opolsky

for Jonathan Silver

Counsel for the Appellant,
Resolute FP Canada Inc.

PART VI – TABLE OF AUTHORITIES

Authority		Paragraph(s)
CASES		
1	*Bank of Nova Scotia v. Newfoundland Rebar Co*. (1987), 65 Nfld. & P.E.I.R. 165 (Nfld. S.C.)	100
2	*Brown v. Belleville (City)*, 2013 ONCA 148	66, 68, 80, 81
3	*Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52	72
4	*Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., [1980] 1 S.C.R. 888	103
5	*Deisler v. United States Fidelity Co. & Guaranty Co.*, (1917) 59 S.C.R. 676 (WL)	121
6	*DiGuilo v. Boland*, [1958] O.R. 384 (C.A.) (WL), aff'd [1961] S.C.R. vii (QL)	115, 118, 123
7	*Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59	94
8	*Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] UKHL 1, [1915] A.C. 847, BOA, Tab 1	123
9	*Fraser v. Imperial Bank of Canada* (1912), 47 S.C.R. 313, (WL)	121
10	*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108	67, 68
11	*Fredrikson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145 (C.A.)	115
12	*Kentucky Fried Chicken Canada v. Scott's Food Services Inc* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.)	103
13	*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37	103
14	*London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (WL)	67, 68, 72, 85
15	*Makar v. "Rivtow Lion", (The)* (1982), 140 D.L.R. (3d) 6, (Fed. C.A.) (WL)	122
16	*Nadeau v. Caparelli*, 2016 ONCA 730	123
17	*R. v. J.B. & Sons Co.* (1969), [1970] S.C.R. 220 (WL)	121
18	*Ritchie v. Jeffrey* (1915), 52 S.C.R. 243	100

19	*Sanofi Pasteur Limited v. UPS SCS, Inc.*, 2015 ONCA 88	122
20	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53	69, 94, 96
21	*Torkington v. Magee*, [1902] 2 K.B. 427, BOA, Tab 2	115
22	*Toronto (City) v. W.H. Hotel Ltd.* [1966] S.C.R. 434	103
23	*University of British Columbia v. Kapelus*, 2012 BCSC 486, aff'd 2014 BCCA 42	100, 117
24	*U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), BOA, Tab 3	33
25	*Vladescu v. CTVglobemedia Inc.*, 2013 ONCA 448	122
26	*Weyerhaeuser Company Limited v. Hayes Forest Services Limited*, 2008 BCCA 69	121
SECONDARY SOURCES		
27	Ben McFarlane & Robert Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1, BOA, Tab 4	123
28	Ben McFarlane, "Property and the New Doctrinalism: Comment" (2015) 163 U. Pa. L. Rev. Online 293	123
29	C. H. Tham, "The Nature of Equitable Assignment and Anti-Assignment Clauses" in Jason Neyers, Richard Bronaugh & Stephen G. A. Pitel, eds., *Exploring Contract Law*, (Portland, OR: Hart Publishing, 2009) 283, BOA, Tab 5	118, 123
30	Daphne A. Dukelow, The Dictionary of Canadian Law, 4th ed. (Toronto: Carswell, 2011), BOA, Tab 6	
31	Delmar R. Ehrich & Michael A. Ponto, "Insurance Coverage for Corporate Successors under CERCLA" (1994) 7 Envtl. Cl. J. 125 (HeinOnline)	33
32	James Edelman & Steven Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 Law Q. Rev. 228, BOA, Tab 7	121, 123
33	M.H. Ogilvie, "Re-Defining Privity of Contract: *Brown v. Belleville (City)*" (2015) 52:3 Alta. L. Rev. 731 (HeinOnline)	68
34	Marcus Smith & Nico Leslie, *The Law of Assignment*, 2nd ed (Oxford: Oxford University Press, 2013), BOA, Tab 8	121

LEGISLATION		
35	*Conveyancing and Law of Property Act*, R.S.O. 1990 c. C. 34, s. 53(1)	114, 116, 117, 119
36	*Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 17, 18	33, 71, 106, 112, 113
37	*Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18, s. 21, BOA, Tab 9	33, 54
38	*The Environmental Protection Act*, S.O. 1971, c. 86, s. 17, BOA, Tab 10	28
39	*The Environmental Protection Amendment Act, 1979*, S.O. 1979, c. 91, s. 2 [68(g)(1), 68(i)(2)], BOA, Tab 11	28