SCC File No.: 37985

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

BETWEEN:

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

APPELLANT
(Appellant)

- and -

WEYERHAEUSER COMPANY LIMITED and RESOLUTE FP CANADA INC.

RESPONDENTS
(Respondents)

- and –

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENER

AND BETWEEN:

RESOLUTE FP CANADA INC.

APPELLANT
(Respondent)

- and –

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

RESPONDENT
(Appellant)

- and -

WEYERHAEUSER COMPANY LIMITED

RESPONDENT
(Respondent)

AND BETWEEN:

WEYERHAEUSER COMPANY LIMITED

APPELLANT
(Respondent)

- and –

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

APPELLANT
(Appellant)

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, IN RESOLUTE FP CANADA INC.'S APPEAL

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Resolute was unsuccessful in the Court of Appeal because, for its own business reasons, its predecessor Bowater chose to assign the 1985 Indemnity[1] to Weyerhaeuser.

2. Both the motions judge and the Court of Appeal reached the same finding. Section 3.1 of the 1998 APA assigned the "full benefits" of the 1985 Indemnity to Weyerhaeuser. The Court of Appeal also found that no provision was made by the parties for the transfer of the 1985 Indemnity back to Bowater following the severance of the WDS. For the first time, Resolute appeals the finding that it assigned the 1985 Indemnity to Weyerhaeuser.

3. Resolute appeals because of the further finding by the Court of Appeal that Bowater's assignment of the full benefits of the 1985 Indemnity means that Resolute can no longer rely on them. Resolute submits that this is unjust both as a legal principle and because Ontario did not argue the point before the motions judge.

4. There is no error and no injustice in the Court of Appeal's decision. Ontario submitted, both before the motions judge and the Court of Appeal, that Weyerhaeuser and Resolute could not both hold the benefits of the 1985 Indemnity at the same time. If Bowater assigned the 1985 Indemnity through the 1998 APA it was clearly an assignment of the full benefits. As such, Bowater gave up its and Resolute's rights. It is a straightforward principle of personal property and contract law that one cannot absolutely assign the full benefits of a chose in action and also retain them. It does not matter whether this is done through a legal or equitable assignment.

5. Resolute has always understood these basic legal tenets. In its factum before the motions judge it directly argued that Bowater did not assign the 1985 Indemnity to Weyerhaeuser as doing so would have left Bowater without recourse to its benefits.[2] The matter of whether it was

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[1] Unless otherwise indicated, capitalized terms are used in the same manner as in Ontario's appeal factum.

[2] Factum of Resolute FP Canada Inc. (Superior Court of Justice) at para 88, Joint Appeal Record [AR], Vol VII, Tab 38, p 119 [Resolute's SCJ factum].

assigned to Weyerhaeuser was fully argued in the courts below. It is a point in dispute between Resolute and Weyerhaeuser in Resolute's appeal.[3]

6. Resolute also argues that the subject matter of the 1985 Indemnity, along with the use of the word "successor" in its enurement clause, is evidence of an intention that it would enure to a growing class of past, present and future *successor landowners*. Resolute urges this conclusion as a way of recovering from Bowater's business decision to transfer the benefits in 1998. There is no support for these submissions.

7. The general meaning of "successor" within the context of a commercial transaction between corporate parties is "corporate successor". The Court of Appeal was correct in reaching this conclusion. Ontario has never contested that Bowater had the benefits of the 1985 Indemnity as a corporate successor to Great Lakes, *unless* it assigned them to Weyerhaeuser in 1998.

8. Effectively, Resolute attempts to do indirectly what it cannot do directly. The obligations Ontario has under the 1985 Indemnity are positive in nature. They require the payment of money. Positive covenants cannot run with the land. There is ample authority for this proposition.[4] In any event, Ontario does not own the Dryden Property so as to be impressed by any covenant that might run with it.

9. There is also no basis to expand the privity doctrine in the manner suggested by Resolute. *London Drugs Ltd. v Kuehne & Nagel International Ltd.*,[5] *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.*[6] and *Brown v Belleville (City)*[7] do not support Resolute. The expansion of the privity doctrine it seeks is far greater than the "incremental changes" made in those decisions. It also ignores the important distinction that, in those cases, the third party seeking to rely on the contractual benefits was not an original contracting party who once had control of the benefits and assigned them away.

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[3] Weyerhaeuser has recently been added as a respondent on Resolute's appeal.

[4] See Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 406-10, Respondent's Book of Authorities [BOA], Tab 12; Victor Di Castri, *Registration of Title to Land* (Toronto: Thomson Reuters Canada, 2016), §10.1.4(a).

[5] [1992] 3 SCR 299, 97 DLR (4th) 261 (SCC) [*London Drugs*].

[6] [1999] 3 SCR 108, 176 DLR (4th) 257 (SCC) [*Fraser River*].

[7] 2013 ONCA 148, [2013] OJ No 1071 [*Brown*].

10. There is also no basis to support Resolute's overly general proposition that "environmental indemnities require a broader conception of benefits." The contractual arrangement represented by the 1985 Indemnity is unique. Care should be taken to avoid pronouncements that might have generalized unintended consequences.

11. On the facts of this case there is no support for Resolute's submission that it is entitled to the benefits of the 1985 Indemnity forever, no matter how its predecessors chose to deal with those benefits.

B. Facts

(i) Background Facts

12. Ontario repeats and relies on the facts set out in the factum filed in its appeal as well as on the following additional facts.

13. The Director's Order imposes obligations which are joint and several in nature.[8] This has implications for Resolute's "equitable assignment" arguments, as discussed below.

14. The 1998 APA reflected a $790M acquisition by Weyerhaeuser of, amongst other things, Bowater's Dryden assets. The 1998 APA provided:

> 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) Agreements, Contracts and Commitments – the *full benefit of* all unfilled orders received by the Vendor 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* …
> …
> (xiv) Warranty Rights – the *full benefit of all* representations, warranties, guarantees, *indemnities*, undertakings, certificates, covenants, agreements and the like and all security therefor received by the Vendor on the purchase or other acquisition of any part of the Purchased Assets or otherwise.[9] [Italics added]

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[8] Affidavit of Trina Rawn, sworn October 14, 2014 [Rawn Affidavit] at Exhibit A, Vol IV, Tab 27A.

[9] *Ibid* at Exhibit N, sections 3.1 (vii) and (xiv), AR, Vol V, Tab 27N, pp 45, 47.

15. During his cross-examination, Weyerhaeuser's Vice President and Assistant General Counsel, Charles K. Douthwaite, indicated that Weyerhaeuser had purchased the full benefits of the 1985 Indemnity pursuant to sections 3.1 (vii) and (xiv).[10] Counsel for Resolute was present during Mr. Douthwaite's cross-examination.

16. The 1998 APA required Bowater to obtain a severance of the WDS under the *Planning Act* such that Bowater would retain title on closing.[11]

17. The severance was not obtained before the closing date. The parties then chose to complete the transaction notwithstanding that Weyerhaeuser would become the owner of the entire Dryden Property. The parties executed an Amending Agreement and a lease ("Lease") under which the WDS was leased back to Bowater.[12] They also agreed that following the severance the WDS would be conveyed to Bowater.

18. No language in any of the 1998 transactional documents reflects either the retention of any of the benefits of the 1985 Indemnity by Bowater or its transfer back to Bowater after the severance and conveyance.[13]

19. The Lease contained a broad indemnity ("Lease Indemnity") under which Bowater agreed to indemnify Weyerhaeuser for all obligations relating to the WDS. The Lease Indemnity expressly survived the termination of the Lease and was successfully relied on by Weyerhaeuser to make a claim in Bowater's *CCAA* proceeding.[14]

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[10] Cross-examination of Charles K. Douthwaite, conducted on March 26, 2015 [Douthwaite Cross-examination] at QQ 71-76, AR, Vol VI, Tab 32, pp 125-27.
[11] Affidavit of Charles K. Douthwaite, sworn November 24, 2014 [Douthwaite Affidavit] at para 22, AR, Vol VI, Tab 28, p 8; Rawn Affidavit, *supra* note 8 at Exhibit N, section 13.1.7, AR, Vol V, Tab 27N, p 86.
[12] Rawn Affidavit, *supra* note 8 at Exhibits O-P, AR, Vol V, Tabs 27O-P.
[13] Douthwaite Cross-examination, *supra* note 10 at QQ 96, 103-105, AR, Vol VI, Tab 32, pp 129-30.
[14] Rawn Affidavit, *supra* note 8 at Exhibit P, Clause 9.01, AR, Vol V, Tab 27P, pp 126-27; Letter from Weyerhaeuser regarding Sale of all Shares of Resolute FP Inc., dated April 10, 2015, AR, Vol VI, Tab 33.

(i) Procedural Facts – The Proceedings Below as Relevant to this Appeal

a) The Summary Judgment Motions

20. There were three main issues before the motions judge: (a) the scope of the 1985 Indemnity; (b) whether Bowater had assigned it to Weyerhaeuser; and (c) whether the 1985 Indemnity enured to the benefit of all property owners, past and present, of the Dryden Property.

21. Resolute argued that it could rely on the 1985 Indemnity as a corporate successor to Great Lakes. It also submitted that Bowater never assigned the 1985 Indemnity to Weyerhaeuser. Weyerhaeuser argued that it was entitled to its benefits as both a successor and assign.

22. Ontario submitted that the 1985 Indemnity only covered third party Pollution Claims and did not create an obligation to compensate Resolute or Weyerhaeuser for any costs incurred to comply with the Director's Order.[15] It further submitted that it made no commercial sense for Bowater to assign the 1985 Indemnity to Weyerhaeuser; however, if it had, Resolute was no longer entitled to those benefits.

23. The motions judge dismissed Ontario's summary judgment motion and granted judgment to Weyerhaeuser and Resolute. His Honour found that the 1985 Indemnity covered regulatory matters as well as third party claims. He also found that Resolute was entitled to the benefits of the 1985 Indemnity as a corporate successor to Great Lakes and that Weyerhaeuser was entitled both as an assignee pursuant to the 1998 APA and as a successor in title to the WDS per the decision in *Brown*.[16]

b) The Court of Appeal

24. Ontario appealed from the motions judge's decision. Despite the finding that Bowater had assigned the full benefits of the 1985 Indemnity to Weyerhaeuser, Resolute did not appeal.

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[15] Douthwaite Affidavit, *supra* note 11 at Exhibit G, AR, Vol VI, Tab 28G.

[16] *Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2016 ONSC 4652 [SCJ Decision] at paras 55, 59, 63-64, [2016] OJ No 3900, AR, Vol I, Tab 1, pp 13-15.

25. The majority of the Court of Appeal upheld the motions judge's finding that the 1985 Indemnity covers the costs of complying with the Director's Order.[17] Justice Laskin dissented on this issue.[18]

26. Respecting who could benefit from the 1985 Indemnity, the Court allowed Ontario's appeal against Resolute and partially allowed it against Weyerhaeuser. The Court upheld the motions judge's decision that the 1998 APA transferred the full benefits of the 1985 Indemnity to Weyerhaeuser.[19] It further concluded that although Resolute was a corporate successor of Great Lakes, it could not claim the benefits as Bowater had assigned them to Weyerhaeuser.[20]

27. The Court remitted back the issue of whether Weyerhaeuser subsequently assigned the 1985 Indemnity as part of an asset sale to Domtar in 2007.[21]

PART II – QUESTIONS IN ISSUE

28. This appeal raises the following issues:

a. What is the appropriate standard of review applicable to the Court of Appeal's decision that Resolute cannot rely on the benefits to the 1985 Indemnity?

b. Did the Court of Appeal err in finding that Resolute is not entitled to the benefits of the 1985 Indemnity as a successor regardless of Bowater's assignment of it to Weyerhaeuser?

c. Did the Court of Appeal err in its application of the principles of assignment law and in concluding that, because Bowater absolutely assigned the full benefits of the 1985 Indemnity to Weyerhaeuser, Resolute could no longer rely on them?

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[17] *Weyerhaeuser Co v Ontario (AG)*, 2017 ONCA 1007 at para 128, [2017] OJ No 6654 [COA Decision], Brown JA, AR, Vol I, Tab 5, p 71.

[18] Justice Laskin made no findings on any of the other issues. See COA Decision, *supra* note 17 at paras 263-69, Laskin JA, dissenting, AR, Vol I, Tab 5, pp 124-26.

[19] *Ibid* at para 161, Brown JA, AR, Vol I, Tab 5, p 81.

[20] *Ibid* at para 198, Brown JA, AR, Vol I, Tab 5, p 97

[21] *Ibid* at para 185, Brown JA, AR, Vol I, Tab 5, pp 92-93.

PART III - ARGUMENT

A. Standard of Review

29. Decisions concerning the interpretation of negotiated contracts are generally taken to involve questions of mixed fact and law and may be overturned where the court below has made a palpable and overriding error.[22] The appellate process will engage a consideration of the circumstances in which the contract was made. Extricable errors of law, such as 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 are reviewable on a correctness standard.[23]

30. A lower court's findings of fact may be reversed where it is established that they amount to a palpable and overriding error.[24]

B. Succession: Resolute is Not Entitled to the Benefits of the 1985 Indemnity "For All Time"

31. Resolute's position is that Bowater "would not have given up, and did not give up, its rights to indemnification, even if it transferred or assigned the [1985] Indemnity."[25] It argues that Great Lakes and its successors were meant to be protected by the 1985 Indemnity in perpetuity regardless of how the company subsequently dealt with it.

32. Resolute makes three primary arguments in support of its position. The arguments are organized under the following headings in its factum:

i) Contracts may benefit persons other than their owners;
ii) Environmental indemnities require a broader conception of benefit; and
iii) [The 1985] Indemnity [was] intended to protect Resolute and all successors of Great Lakes.

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[22] *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para 21, [2016] 2 SCR 23.
[23] *Ibid* at paras 21, 36; *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 53, [2014] 2 SCR 633 [*Sattva*].
[24] *Hryniak v Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87; *Housen v Nikolaisen*, 2002 SCC 33 at paras 5-6, 10, 23, 36, [2002] 2 SCR 235; *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 4, 53-57, 70, 110, [2005] 1 SCR 401; *Peart v Peel (Regional Municipality) Police Services Board*, 217 OAC 269 at para 158, [2006] OJ No 4457.
[25] Factum of the Appellant, Resolute FP Canada Inc. (Supreme Court of Canada) at para 61 [Resolute's appeal factum].

33. Resolute's arguments are not supported in law, by the language of the 1985 Indemnity itself or by the factual matrix. Each of these points is addressed below.

(i) "Contracts may benefit persons other than their owners"

34. In the courts below Resolute did not argue that it was entitled to the benefits of the 1985 Indemnity on the basis of an expansion of the privity doctrine. It now relies on *London Drugs*,[26] *Fraser River*[27] and *Brown*[28] to support its argument that it is still entitled to the benefits even though Bowater fully assigned them to Weyerhaeuser.

35. These decisions represent a principled and incremental modification to the privity doctrine. They do not assist Resolute. They reflect very different circumstances than those in this case where Bowater sold the 1985 Indemnity, presumably for value, and now wants to rely on it in addition to Weyerhaeuser.

36. In *London Drugs* the issue was whether employees of the defendant company, who had damaged a customer's property while acting within the scope of their employment, could rely on a clause in the contract between the company and the customer which limited the company's liability to $40.00.[29] This Court held that, in the circumstances of that case, it was appropriate to "call for a relaxation of the doctrine of privity" and held that the employees could rely upon the contractual limitation clause as a defence.[30]

37. In *Fraser River* a barge owned by the Fraser River company was chartered to Can-Dive. The barge sank as a result of Can-Dive's negligence.[31] The barge's owner was reimbursed by its insurer for its loss. The insurer then brought a subrogated claim against Can-Dive to recover the payment it had made to the owner. As a defence, Can-Dive raised the waiver of subrogation clause contained in the insurance policy between Fraser River and the insurer. The clause provided that the insurer waived any rights of subrogation against any charterer of the barge.[32]

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[26] *London Drugs, supra* note 5.
[27] *Fraser River, supra* note 6.
[28] *Brown, supra* note 7.
[29] *London Drugs, supra* note 5 at paras 156-159.
[30] *Ibid* at paras 254, 269.
[31] *Fraser River, supra* note 6 at para 2.
[32] *Ibid* at para 22.

38. The insurance policy in question did not have an enurement clause. At issue was whether Can-Dive could rely on the waiver of subrogation clause based on a principled exception to the privity doctrine.[33]

39. The Supreme Court held that, although Can-Dive was not a party to the insurance contract between the owner and the insurer, it could nevertheless rely on the waiver of subrogation clause as a defence to the action instituted against it by the insurer.[34]

40. In both *London Drugs* and *Fraser River* this Court held that a strict application of the doctrine of privity would not be in accord either with commercial reality or justice.[35] In light of this, in *London Drugs* the Court formulated a two-step test for determining when the doctrine of privity can be "relaxed" in favour of a third party beneficiary:

> a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and
>
> b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intention of the parties?[36]

41. Resolute effectively argues that because this Court relaxed the requirement of privity in the past it should do so in this case, and to a far greater extent.

42. Significantly, this Court has insisted that the exception to the doctrine of privity was only intended to be an "incremental change" to the common law. Thus, in *Fraser River* the Court made the following comment about the innovation it had first outlined in *London Drugs*:

> The Court concluded [in *London Drugs*] that the departure from the traditional doctrine of privity was well within its jurisdiction representing, as it did, an incremental change to the common law rather than a wholesale abdication of existing principles. Given that the exception was dependent on the intention stipulated in the contract, *relaxing the doctrine of privity in the given circumstances* did not frustrate the expectations of the parties.[37] [Emphasis added]

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[33] *Ibid* at para 24.
[34] *Ibid* at para 45.
[35] *London Drugs, supra* note 5 at para 213.
[36] *Fraser River, supra* note 6 at para 32.
[37] *Ibid* at para 30.

43. Unlike in this case, *Fraser River* and *London Drugs* are not situations in which the third party had any control over the contractual benefit on which it sought to rely. Resolute should not be treated as a third party in this case. In substance, it *is* the contracting party who voluntarily sold the asset on which it now seeks to rely. In the circumstances of this case, it does not meet part one of the *London Drugs* test.

44. With respect to the second part of the test, it is again incorrect to think of Resolute as a third party. Resolute should not be permitted to be both a party and third party to its own contract. It is not reasonable to conclude that Ontario agreed to continue to cover the costs of parties after they assign their benefits to someone else.

45. The decision in *Brown* also does not support Resolute. It is distinguishable on a number of bases. These are addressed as well in Ontario's response to Weyerhaeuser's appeal and Ontario repeats and relies on those submissions.[38]

46. In *Brown*, the Township of Thurlow, which later amalgamated with the City of Belleville, entered into an agreement in 1953 with a local farmer. The agreement required the Township to maintain and repair a storm sewer drainage system that it had constructed on and near the farmer's lands. Some years after entering into the agreement, the Township subsequently ceased all maintenance and repair work.[39]

47. The agreement contained an enurement clause which indicated that it enured to the benefit of the parties and their respective heirs, administrators, successors and assigns. The agreement was never registered on title.[40] After the farmer's death, the property was conveyed several times. No express assignment of the agreement formed part of these sale transactions.[41]

48. The plaintiffs received a copy of the agreement when they purchased the lands. They sued Belleville for specific performance of the agreement or in the alternative, damages. Belleville took the position that the plaintiffs had no standing to enforce the agreement.

49. The Court of Appeal concluded that the broad and unqualified language of the enurement clause was an express stipulation by the contracting parties that they intended the benefit of the

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[38] Ontario's responding factum on Weyerhaeuser's appeal at paras 74-87.
[39] *Brown, supra* note 7 at paras 1-3.
[40] *Ibid* at paras 13-14.
[41] *Ibid* at para 15.

agreement to be shared by future owners.[42] As successor landowners, the plaintiffs stepped into the shoes of the farmer and had standing to enforce the agreement as if they were the original convenantee.[43] The Court found that relaxing the privity doctrine did not frustrate the reasonable expectations of the original parties but rather gave those expectations effect.

50. Unlike Resolute, the parties seeking the benefits of the agreement in *London Drugs*, *Fraser River* and *Brown* were strangers to the original agreement. None were a party that originally had the benefits and chose to transfer them.

51. Further, it is important that the judgment of the Court in *Brown* was provided in the context of a Special Case. In response to one of the questions the City acknowledged, for the record, that the relevant agreement imposed a perpetual corresponding obligation on whomever the property owner happened to be from time to time.[44]

52. In *Brown* the City also could not discharge its obligation without the assistance of the landowner. The parties understood that the continuing access required by the City to the lands in order for it to perform its obligations could only be provided by the landowner at the particular time. This was a significant factor in the Court of Appeal's decision that relaxing the privity doctrine did not frustrate the reasonable expectations of the original parties. *Brown* does not stand for the general proposition that multiple landowners, current and former, may rely on a benefit clause simultaneously.

(ii) "Environmental indemnities require a broader conception of benefit"

53. Amendments to the *EPA* in 1990 enabled the Director to make a regulatory order against the former owners of the now abandoned WDS. Resolute now asks this Court to interpret the contractual intentions of the parties in 1985 in a manner that protects it from the effect of those amendments. No reasonable principle of contractual interpretation supports doing so.

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[42] *Ibid* at para 84.
[43] *Ibid*.
[44] *Ibid* at paras 39, 86.

54. Resolute assumes that the 1985 Indemnity was intended to compensate the indemnitees for all "environmental liability" including regulatory costs.[45] It suggests that the nature of "environmental indemnities" requires a broad beneficiary class.

55. Resolute argues that both Great Lakes and its successors would have been exposed to significant environmental liabilities in perpetuity because they owned the WDS. It submits, therefore, that the parties to the 1985 Indemnity would have intended Great Lakes and its successors to also be protected in perpetuity despite any subsequent assignment.

56. Finally, Resolute submits that any interpretation of the enurement clause that does not provide benefit to *all* successors and *all* assigns forever "defeats the parties' reasonable expectations at the time of contracting."[46]

57. Resolute cites no authority in support of its position. The factual matrix also does not support a finding that the 1985 Indemnity was intended to protect a broader group of beneficiaries than those provided for by its terms.

58. The allocation of risk between Great Lakes and any future owners of the Dryden Property was a matter of negotiation between Great Lakes and any potential buyer. Corporations frequently make business decisions that include an assessment of risk and conduct their business affairs accordingly. Such assessments are accounted for in the purchase price paid for the assets and through private vendor-purchaser indemnities. This is what happened in 1979, as provided for in section 5.3 of the Dryden Agreement.[47]

59. Such risk-sharing arrangements were made again in 1998 when Bowater and Weyerhaeuser contracted to share certain environmental costs respecting the portion of the Dryden land that surrounded the WDS and through the Lease Indemnity under which Bowater agreed to fully indemnify Weyerhaeuser.[48] It is a reasonable interpretation of the objective intention of the parties in 1985 that these types of arrangements would be made, if necessary, at the point of any subsequent sales.

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[45] Resolute's appeal factum, *supra* note 25 at paras 70-75.
[46] *Ibid* at para 72.
[47] Memorandum of Agreement between Great Lakes Forest Products Limited and Reed Ltd. dated December 7, 1979 [Dryden Agreement] at Clause 5.3, AR, Vol III, Tab 17, pp 19-24.
[48] Rawn Affidavit, *supra* note 8 at Exhibit N, Article 10, AR, Vol V, Tab 27N, p 66; Rawn Affidavit, *supra* note 8 at Exhibits O-P, AR, Vol V, Tabs 27O-P.

60. Resolute's argument that nobody would buy the Dryden Property without the 1985 Indemnity also does not accord with the factual matrix and its corporate predecessor's actions.

61. In 1979 Great Lakes purchased the Dryden Property without a promise being made to a class of beneficiaries. The 1979 Indemnity was time limited to 2010. It also did not contain an enurement clause of any kind.

62. The promise of indemnification set out in the 1979 Indemnity depended on Great Lakes first meeting three conditions precedent: (a) purchase the assets; (b) spend up to $200M to modernize the facilities; and (c) jointly with Reed Ltd. ("Reed Canada") contribute up to $15M to environmental damages claims or settlements.[49] The 1979 Indemnity was not intended to provide protection just because Great Lakes would own the Dryden Property.

63. Great Lakes did not expect a free pass from regulation. After purchasing the Dryden Property, Great Lakes continued to bury mercury in the WDS until it was closed in 1981.[50] It understood that the modernization of the plant involved changing the bleaching processes through which the mercury was created.[51] As evidenced in its own financial statements, Great Lakes understood that this process would take several years to complete.[52]

64. Ontario never yielded its role as environmental regulator. The promise of indemnification made by Ontario was to a profitable company which, by buying the Dryden Property, had assumed the ordinary expenses and obligations relating to the regulation of a pulp and paper business in Ontario. Ontario was not a business partner with Great Lakes nor did it intend to be with any and all future owners of the Dryden Property. It does not make sense to conclude that Ontario would agree to assume the cost of complying with ongoing obligations under its own legislation, effectively waiving its right to regulate. Yet including regulatory orders within the ambit of the 1985 Indemnity has this effect.

65. Resolute's submissions concerning the expansiveness of the 1985 Indemnity also ignore the fact that government actors discharging a regulatory function owe duties to the public at

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[49] *Ibid* at Exhibit I, AR, Vol IV, Tab 27I.
[50] *Ibid* at Exhibit A, Clauses 1.14-1.15, AR, Vol IV, Tab 27A, p 20.
[51] Great Lakes Forest Products Limited, Annual Report for 1979 [1979 GL Annual Report] at p 13, AR, Vol III, Tab 19A, p 70.
[52] *Ibid*.

large[53] and that those duties inform the obligations they would undertake on behalf of Ontario in a contract.

66. Finally, and contrary to its assertion, Resolute was not exposed to statutory claims and environmental orders in 1979 under *The Environmental Protection Amendment Act, 1979*.[54] These amendments were not in force in 1979 and in any event the Act was repealed in 1981.[55] Only on November 29, 1985 was the "Spills Bill" amendment to the *EPA* finally proclaimed in force.[56] The Spills Bill is discussed in Ontario's appeal factum and Ontario repeats and relies on those submissions.

(iii) "[The 1985] Indemnity [was] intended to protect Resolute and all successors of Great Lakes for all time"

67. Resolute argues that the wording of the 1985 Indemnity provides evidence of Ontario's intention that Great Lakes and all of its successors were meant to be protected for all time and regardless of whether they later chose to assign it.[57] Resolute relies on the enurement clause, the perpetual nature of the 1985 Indemnity, the number of named indemnitees, the so called "single burden" on Ontario, and the overall purpose of the 1985 Indemnity.

a) Enurement clause

68. Clause 6 of the 1985 Indemnity provides: "The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed [Canada], [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."[58]

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[53] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at paras 122, 128, 130, 135, 2019 CarswellAlta 141.
[54] SO 1979, c91, s2 [68g(1), 68i(2)]; See also Resolute's appeal factum, *supra* note 25 at para 28.
[55] Resolute's appeal factum, *supra* note 25 at paras 76-84.
[56] See Proclamation, (1985) O Gaz, Vol 118-33, 3539, (*Environmental Protection Act*) BOA, Tab 10; Statutes of Ontario, 1980, Table of Proclamations, Acts and Parts of Acts not Proclaimed as of February 1st, 1981, BOA, Tab 9; Revised Statutes of Ontario, 1980, Schedule A, BOA, Tab 7; Revised Statutes of Ontario, 1980, proclaimed in force August 1, 1981, BOA, Tab 6; Revised Statutes of Ontario, 1980, Schedule B, BOA, Tab 8.
[57] Resolute's appeal factum, *supra* note 25 at para 76.
[58] Rawn Affidavit, *supra* note 8 at Exhibit J, Schedule F, Clause 6, AR, Vol IV, Tab 27J, pp 191-92.

69. Resolute argues that the use of the word "and" rather than "or" in Clause 6 means that the indemnitees and their successors could continue to call on the 1985 Indemnity even if they later assigned it.[59] This is incorrect.

70. "Successors and assigns" rather than "successors or assigns" contemplates a scenario in which the 1985 Indemnity might first succeed to a corporate successor to Great Lakes and subsequently be assigned. This is exactly what happened as Bowater was a corporate successor to Great Lakes and then assigned the benefits of the 1985 Indemnity to Weyerhaeuser. It is also consistent with the fact that the 1985 Indemnity was given to Reed Canada, Reed International P.L.C. ("Reed International") and Great Lakes, each of whom might have one or more corporate successors and each of whom might have an assign. The use of "successors and assigns" also accommodates a scenario in which a corporate assignee subsequently undergoes a succession.

71. Neither the factual matrix nor the language of the 1985 Indemnity supports an argument that "successors" was intended to include all past and future owners of the Dryden Property.[60] The proper interpretation of "successors" in the context of this case is the *corporate* successors of Great Lakes or Reed Canada or Reed International, the corporations to whom the 1985 Indemnity was given.[61] As the Court of Appeal noted, citing this Court's decision in *National Trust v Mead*:

> "the term "successor", when used in reference to a corporation, "generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation."[62]

Nothing in the factual matrix justifies departing from this general principle of law.[63]

72. Further, the language in the enurement clause of the 1985 Indemnity is substantively mirrored in the enurement clause in the Schedule D Indemnity. Clause 8 of that document

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[59] Resolute's appeal factum, *supra* note 25 at para 80.

[60] The factual matrix is addressed in detail in Ontario's appeal factum.

[61] *Heritage Capital Corp. v Equitable Trust Co.*, 2016 SCC 19 at para 47, [2016] 1 SCR 306; *Montreal Trust Co. of Canada v Birmingham Lodge Ltd.,* 82 OAC 25, 1995 CarswellOnt 541 at paras 12-13 (Ont CA).

[62] COA Decision, *supra* note 17 at para 170, Brown JA, quoting from *National Trust Co v Mead*, [1990] 2 SCR 410 at 423, 71 DLR (4th) 488, AR, Vol I, Tab 5, p 85.

[63] COA Decision, *supra* note 17 at para 178, Brown JA, AR, Vol I, Tab 5, pp 89-90.

provides: "This agreement shall be binding upon and enure to the benefit of the respective successors and assigns of Reed [Canada], [Reed] International and Great Lakes."[64]

73. As set out in Ontario's appeal factum, the Schedule D Indemnity and the 1985 Indemnity were each schedules to the Escrow Agreement of the MOA respecting the Settlement. Any analysis of the meaning of the 1985 Indemnity cannot be undertaken without consideration of the other Settlement documents. The full collection of these documents informs the intentions of the parties and the meaning of particular provisions in each document.[65]

74. At the time the Schedule D Indemnity was given to Reed Canada and Reed International, Reed Canada could have no "successors in title" to the Dryden Property. Reed Canada had sold the property six years earlier and in 1985 there was no reasonable basis to think it or any entity related to it was ever going to own the Dryden Property again. Further, Reed International had never owned the Dryden Property.[66]

75. While a corporate successor to either Reed Canada or Reed International might have need of the benefits conferred by the 1985 Indemnity in the event of future third party law suits,[67] there was no realistic possibility that there would ever be a future Reed Canada-related landowner who needed this protection. "Successors" could only reasonably be interpreted to be corporate successors.

76. Given the parallel language provisions between Schedule D and the 1985 Indemnity, the meaning of "successors" in Schedule D should also be applied to "successors" in Clause 6 of the 1985 Indemnity. The intention in each contract was to benefit corporate successors.

b) The Perpetual Nature of the 1985 Indemnity

77. Resolute submits that the parties would not have intended Great Lakes to keep the "landfill forever".[68] It submits that it must have been the intention of the parties that Great Lakes

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[64] Rawn Affidavit, *supra* note 8 at Exhibit J, Schedule D, Clause 8, AR, Vol IV, Tab 27J, p 185.
[65] *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para 16, 74 BLR (4th) 161.
[66] Dryden Agreement, *supra* note 47 at Clauses 1.14, 3, AR, Vol III, Tab 17, pp 11-16.
[67] It will be recalled from Ontario's appeal factum that after the sale to Great Lakes in 1979 the *EPA* did not permit Ontario to issue a regulatory order against Reed Canada as a former owner.
[68] Resolute's appeal factum, *supra* note 25 at para 81.

would be able to sell or transfer the WDS in a way that both it and the purchaser would keep the protection afforded by the 1985 Indemnity.

78. Resolute suggests that Clause 4 of the 1985 Indemnity provides support for its position. Clause 4 states: "The foregoing indemnity shall be valid without limitation as to time."[69]

79. Resolute conflates Clauses 4 and 6. It points to the fact that the 1985 Indemnity's protections do not expire and argues that this is evidence that the indemnitees' ability to call on it can *never* expire.[70] However, Clause 4 does not indicate that the parties intended the original indemnitees to have the protection of the 1985 Indemnity in perpetuity without limitation, such as following a subsequent decision to assign the full benefits to another party.

80. The 1985 Indemnity is personal property. There is a difference between having its benefits and being an owner of the Dryden Property. The two concepts are not indivisible. The benefits of the 1985 Indemnity are not attendant on real property ownership. The fact that the 1985 Indemnity does not contain a time limitation means nothing more than that it will always cover who owns the rights to the benefits from time to time. This is not the same as saying it covers each and every person who ever owned the Dryden Property.

81. Further, the importance of the WDS in 1985 is overstated by Resolute. In 1985 any projected saleability of the Dryden Property depended on much more than the fact that it contained the WDS.

82. In 1985 there was no ability "to sell or transfer the landfill."[71] The WDS would not exist as a separate and conveyable parcel of land until August 2000.[72] Decisions in 1985 about who would be covered by the 1985 Indemnity would have to be based on an anticipated sale of the *entirety* of the Dryden Property. Such a sale would engage considerations well beyond the WDS.

83. From the perspective of the parties in 1985, the manner in which Great Lakes might choose to protect itself within the circumstances of any future sale of the Dryden Property, either

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[69] Rawn Affidavit, *supra* note 8 at Exhibit J, Schedule F, Clause 4, AR, Vol IV, Tab 27J, p 191.
[70] Resolute's appeal factum, *supra* note 25 at para 81.
[71] Resolute's appeal factum, *supra* note 25 at para 81.
[72] Rawn Affidavit, *supra* note 8 at para 28, AR, Vol IV, Tab 27, p 8; Rawn Affidavit, *supra* note 8 at Exhibit R, AR, Vol V, Tab 27R.

by retaining the 1985 Indemnity or negotiating private indemnification terms with a new purchaser, would have been indeterminable.

84. There is no evidence to support Resolute's suggestion that there was an intention to extend the benefits of the 1985 Indemnity to whomever owned the Dryden Property.

85. *Brown* also does not assist Resolute. This is addressed above and in Ontario's factum filed in response to Weyerhaeuser's appeal.[73] Ontario repeats and relies on those submissions.

c) Multiple Beneficiaries

86. Resolute submits that the fact that the 1985 Indemnity was granted to more than one corporation is evidence of an intention by Ontario to benefit an ever increasing class of those corporations and any and all of their respective successors and assigns. It further argues that giving the 1985 Indemnity to both Reed Canada, as a former owner, and Great Lakes, as the current owner, is evidence that a former and current owner may simultaneously rely on it.

87. This has been addressed above by Ontario. The 1985 Indemnity was given to a finite group of beneficiaries. It was granted to the corporations that contributed to or guaranteed the Settlement funds.[74] Granting the 1985 Indemnity to Reed Canada and its parent does not reflect an intention to benefit the Reed companies as former owners. As stated, Reed International never owned the Dryden Property and Reed Canada was almost certainly never going to own it again.

88. The parties foresaw a scenario where third party claims might arise, *in the future respecting Reed Era Pollution*, either when the original indemnitees had undergone a corporate restructuring or where the Dryden Property was sold and a decision was taken to transfer the 1985 Indemnity along with it. In 1985 each scenario would have been in the contemplation of the parties given recent events, namely, the 1976 corporate amalgamation of the two Dryden companies with Reed[75] and the 1979 sale of the Dryden Property to Great Lakes.

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[73] Ontario's responding factum on Weyerhaeuser's appeal at paras 78, 81-91.
[74] Dryden Agreement, *supra* note 47 at Clause 5.3(v), AR, Vol III, Tab 17, pp 11-12; 1979 GL Annual Report, *supra* note 51 at p 14, AR, Vol III, Tab 19A, p 71.
[75] COA Decision, *supra* note 17 at para 13, Brown JA, AR, Vol I, Tab 5, p 31.

d) "Single Burden" on Ontario

89. Resolute submits that increasing the number of beneficiaries of the 1985 Indemnity is acceptable as doing so would not increase Ontario's burden.[76] This analysis is not helpful in determining what, if any, benefits were retained by Resolute after Bowater made an assignment to Weyerhaeuser in 1998.

90. Even assuming that Ontario's obligations did not change,[77] this does not mean that Resolute retained any of the benefits after it assigned them to Weyerhaeuser. As discussed below, when the full benefits of a chose in action are absolutely assigned, the assignment results in the transfer of the entirety of the benefits moving *from* the assignor *to* the assignee.

91. While increasing Ontario's obligations without its consent would have provided Ontario with a defence to a lawsuit brought by an assignee, the absence of such an increase in obligations does not mean that Resolute retained any benefits.

e) Purpose of the Indemnity

92. Resolute asserts: "Even in 1979, Ontario had to indemnify both buyer and seller to consummate the sale."[78] This is incorrect. The 1979 Indemnity was given to Great Lakes alone, not to the vendor Reed Canada.[79]

93. Resolute confuses the purposes of the 1979 and the 1985 Indemnities. In 1979, Ontario committed to indemnifying Great Lakes, on certain terms, in order to ensure the Dryden mill would not close when Reed Canada ceased operations. In contrast, the 1985 Indemnity was granted as part of an effort to address health and welfare concerns of the First Nations and to resolve the First Nations Litigation in respect of which both Reed Canada and Great Lakes

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[76] Resolute's appeal factum, *supra* note 25 at para 83.

[77] Ontario has submitted that its burdens are increased if the 1985 Indemnity is interpreted to cover costs associated with regulatory orders. See Ontario's responding factum on Weyerhaeuser's appeal at paras 49, 56.

[78] Resolute's appeal factum, *supra* note 25 at para 84.

[79] Rawn Affidavit, *supra* note 8 at Exhibit I, AR, Vol IV, Tab 27I.

contributed several million dollars.[80] The protection given by both the 1979 and the 1985 Indemnity was not predicated on ownership of the Dryden Property.

94. Resolute argues: "*In 1985*, the indemnity was replaced and expanded. *The environmental liability would follow Great Lakes and its successors forever*; the purpose of the [1985] [I]ndemnity was equally to protect Great Lakes and its successors for the same period."[81] [Emphasis added] However, the "environmental liability" that would follow Great Lakes "forever" was the potential for new third party claims arising from Reed Era Pollution under the common law or under the Spills Bill.

C. Assignment: Bowater's Assignment of the 1985 Indemnity to Weyerhaeuser

95. Resolute submits that the Court of Appeal erred in finding that Bowater assigned the 1985 Indemnity to Weyerhaeuser through the 1998 APA. The Court made no such error. The full benefits were assigned to Weyerhaeuser.

(i) General Principles of Assignment Law

a) Overview

96. Choses in action are "personal rights of property which can only be enforced by action and not by taking physical possession."[82]

97. Historically, English law distinguished between legal and equitable choses:

> A legal chose in action is one which, before the Supreme Court of Judicature Act 1873 came into force, could be recovered or enforced in a common law court, such as a debt, a contractual right, a policy of insurance or a share in a company. An equitable chose is one which is created by equity and which was enforceable only by a suit in equity. Examples of an equitable chose are a beneficial interest under a trust, a legacy, a share of a residuary estate or under a will, an equitable

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[80] The two other actions for damages arising from pollution were commenced in 1970 by Ontario Central Airlines Limited and Barney's Ball Lake Lodge Company Limited against the same defendants named in the First Nations Litigation. See Final Release between Barney Lamm, *et al* and Reed Inc. dated July 29, 1986, AR, Vol III, Tab 23.

[81] Resolute's appeal factum, *supra* note 25 at para 84.

[82] Anthony Guest, *Guest on the Law of Assignment*, 1st ed (London, UK: Sweet & Maxwell, 2012) at §1-07, BOA, Tab 11.

> interest in stock or shares, an equitable interest as a joint tenant and a portion of an interest as a partner in a partnership.[83]

98. The common law did not recognize the assignment of a chose to a third party without the consent of the original parties. The only option was novation.[84] As noted in Chitty on Contracts:

> This rule seems to have been based initially on the difficulty of conceiving of the transfer of an intangible, at any rate one of such a personal nature, and later on the desire to avoid maintenance, viz officious intermeddling in litigation.[85]

b) Assignment of a Chose in Action was First Permitted in the Court of Chancery

99. Over time, the Courts of Chancery developed an equitable power of assignment to allow a third party to sue on a chose in action rather than requiring a new contract. Under the rules of equity where the subject matter was a legal chose, such as rights under a contract, equity "could compel the assignor to allow the assignee to use his name in a common law action. The assignor had to be a party to such an action in order to bind him at law."[86]

100. An assignment of an equitable chose in action, for instance a contract to share in a trust fund, permitted the assignee to sue in her own name but she was required to make the assignor a party to the suit if he retained an interest in the subject matter, for example where the assignment was not absolute but conditional.[87]

c) Assignments of Choses in Action are now Recognized in Modern Courts

101. On November 1, 1875, the English courts of law and equity merged. Significant for a number of reasons, it "also marked the first day of the statutorily imposed relaxation of the common law rule prohibiting assignment of the chose in action, under subsection 25(6) of the [*Supreme Court of Judicature Act, 1873*]".[88]

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[83] *Ibid* at §1-09.
[84] HG Beale, ed, *Chitty on Contracts*, 33rd ed (London, UK: Sweet & Maxwell, 2018) vol 1 at §19-001, BOA, Tab 13; Clayton Bangsund, "The Deposit Account & Chose in Action at Common Law & Under the PPSA: A Historical Review" (2014) 30 BFLR 1 at 21.
[85] Chitty, *supra* note 84 at §19-001.
[86] *Ibid* at §19-002.
[87] *Ibid* at §19-002.
[88] Bangsund, *supra* note 84 at 26; *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 [*Judicature Act 1873*].

102. Canadian common law jurisdictions have adopted parallel provisions. In Ontario, legal assignment was introduced in 1897 and since 1911 has been governed by section 53 of the *Conveyancing Law and Property Act*.[89]

103. Under section 53 of the *CLPA*, an assignment of a chose is effective as a legal assignment where: (1) the assignment is absolute and not by way of charge only; (2) the assignment is in writing; (3) the chose in action is identified; and (4) notice is given to the original obligor.[90]

104. Where any of the statutory requirements have not been satisfied, the assignment will be a defective legal assignment. However, in such an instance the assignment may still operate as an equitable one.[91] Where the defect is later removed, for instance where an assignee subsequently serves notice on the debtor, a legal assignment may still be effected subject to all equities that would have priority.[92]

105. "*An assignment is an actual or constructive transfer* of some species of property, or interest in property *with a clear intent at the time to part with all interest in the thing transferred*. This broad definition includes within its scope both legal and equitable assignments."[93] [Emphasis added]

106. Regardless of whether the property to be assigned is a legal chose in action or an equitable one, or whether the assignment is a legal or an equitable one, the substantive outcome is the same: the assignee stands in the shoes of the assignor with respect to any lawful claim.[94] Subject to clear evidence of which rights are intended to pass, an assignee who is assigned a

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[89] RSO 1990, c C34, s 53 [*CLPA*]; *Loi sur les actes translatifs de propriété et le droit des biens*, LRO 1990, c C35, art 53 [*ATPDB*]; see *DiGuilo v Boland*, [1958] OR 384, 1958 CarswellOnt 102 at para 7 (Ont CA) [*DiGuilo*].

[90] *CLPA, supra* note 89, s 53(1); *ATPDB, supra* note 89, art 53(1).

[91] *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454 at 462, BOA, Tab 5, [1904-7] All ER Rep 345 at 350; Chitty, *supra* note 84 at §19-004; Bangsund, *supra* note 84 at 27.

[92] *CLPA, supra* note 89, s 53(1); *ATPDB, supra* note 89, art 53(1).

[93] Harold E Collins, "Creation of an Equitable Assignment" (1947) 21:2 St John's L Rev 202 at 202; Black's Law Dictionary, 10th ed, *sub verbo* "assignment"; *Merchants Service Co. v Small Claims Court* 35 Cal (2d) 109 at 114 (Sup Ct 1950) [*Merchants Service*]; *National Reserve Co. of America v Metropolitan Trust Co. of California*, 17 Cal (2d) 827 at 832-33 (Sup Ct 1941) [*National Reserve*].

[94] *Griffiths v Zambosco*, 54 OR (3d) 397, 2001 CanLII 24097 at para 61 (Ont CA).

contract or chose receives all the rights and remedies incidental to that contract or chose.[95] The assignor extinguishes his or her rights to sue on the chose in action.[96]

107. As the editors of Chitty on Contracts note:

> **Statutory and equitable assignments.** Indeed, it appears that for the purpose of the substantive law, there is often little (if any) advantage in a statutory [legal] assignment over an equitable assignment. To a considerable extent the rules governing them are identical, e.g. the rules relating to the question whether a particular right is assignable, to priorities between successive assignees…and to the principle that assignments are "subject to equities.[97]

108. The only differences for the assignee are procedural ones relating to the steps that must be taken in the event she must commence a court action to *enforce* her rights to the benefits:

> **Difference between statutory and equitable assignments.** However, there is one very important procedural consequence which attaches to the distinction between statutory [legal] and equitable assignments. A statutory assignee can sue the debtor without joining the assignor as a party to the action, whereas an equitable assignee often cannot do this. Furthermore, it must be observed that whereas a statutory assignment passes a legal right to the assignee, an equitable assignment passes only an equitable right. In practice, as already observed, this usually makes little difference as a matter of substantive law to the efficacy of the assignment;…[98]

109. As a legal assignment is the immediate transfer of an existing proprietary right, vested or contingent from the assignor to the assignee,[99] the assignee can pursue the claim in her own name; she is regarded as being the sole owner of the property assigned.[100]

110. An equitable assignment of a legal chose in action, however, required the assignee to name the assignor in an action to enforce the assignee's beneficial interest in the chose.[101] Further, the assignee of an equitable chose by an equitable assignment was historically required

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[95] *National Reserve, supra* note 93 at 832-33.
[96] *Ibid; Merchants Service, supra* note 93 at 114; *Robert Lamb Hart Planners and Architects v Evergreen Ltd.*, 787 F Supp 753 (SD Ohio 1992) at 757.
[97] Chitty, *supra* note 84 at §19-004.
[98] *Ibid* at §19-005.
[99] *Norman v Federal Commissioner of Taxation*, [1963] HCA 21 at 26, 109 CLR 9.
[100] *Ibid*; *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 WLR 896 at 915, [1998] 1 All ER 98 at 117; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*, [2006] FCAFC 40 at paras 32, 188.
[101] Marcus Smith & Nico Leslie, *The Law of Assignment*, 3rd ed (Oxford, UK: Oxford University Press, 2018) at §11.24, BOA, Tab 15; *DiGuilo, supra* note 89 at para 6.

to sue in the name of the assignor unless the whole of the benefits were transferred to the assignee.[102] In each case, the rationale for the procedural requirement of joining the assignor was because the assignment did not pass the whole legal right or legal title of the chose and thus did not vest in the assignee any right to sue in her own name.[103]

111. In Ontario, the *Rules of Civil Procedure* have eliminated these procedural requirements in the case of an equitable assignment if certain conditions are met. Rule 5.03 permits an assignee to pursue a claim against an obligor without the need to join the assignor to the action if (a) the assignment is absolute and not by way of charge; and (b) written notice of the assignment is provided to the obligor.[104]

112. When a dispute arises between the assignor and the assignee respecting the assignment, courts must consider whether the particular right was assignable and if it was assigned.[105]

(ii) Weyerhaeuser is Assigned the "Full Benefits" to the 1985 Indemnity

113. The motions judge found that Bowater assigned Weyerhaeuser the full benefits of the 1985 Indemnity under sections 3.1(vii) and (xiv).[106] This was a finding of mixed fact and law.[107] The Court of Appeal found no palpable and overriding error in the motions judge's decision respecting the assignment and upheld the finding.[108]

114. Resolute did not appeal from the motions judge's decision. It does, however, appeal from the Court of Appeal's decision upholding the motions judge's conclusion. Resolute argues that the motions judge's finding ought not to have been given deference by the Court.

115. In support of its position Resolute suggests it was prejudiced by not being provided with an opportunity to respond to the argument that the effect of an absolute assignment of the full benefits was that Bowater was left with nothing. Resolute also argues that the motions judge and

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[102] *DiGuilo*, *supra* note 89 at para 6.
[103] Bram Thompson, "The Chose in Action: Assignability in Parts" (1922) 42 Can L Times 701 at 701.
[104] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 5.03(3) [*Rules*]; *Règles de procédure civile*, RRO 1990, Règl 194, r 5.03(3) [Règles].
[105] Chitty, *supra* note 84 at §19-001.
[106] SCJ Decision, *supra* note 16 at para 64, AR, Vol I, Tab 1, p 15.
[107] *Sattva*, *supra* note 23 at para 50.
[108] COA Decision, *supra* note 17 at para 161, Brown JA, AR, Vol I, Tab 5, p 81.

the Court of Appeal each committed errors of law by not engaging in a full contractual interpretation analysis and consideration of the factual matrix.

116. Resolute makes three further new arguments respecting assignment and the 1998 APA. First, it suggests that if there was an assignment of the 1985 Indemnity, it was not an absolute assignment but rather a "partial" one such that the benefits are shared. Second, it argues that the *CLPA*[109] was not complied with and thus a legal assignment was not effected. Finally, and related to its second argument, Resolute submits that, at best, any assignment was an equitable assignment and, in consequence, it continues to hold the legal title to the 1985 Indemnity and can shelter under it.

a) The Effect of the Assignment was Fully Argued

117. Contrary to Resolute's submission,[110] Ontario always maintained, in both its oral and written arguments, that as a corporate successor to Great Lakes, Resolute held the benefits *unless* Bowater assigned them to Weyerhaeuser in 1998.[111] Ontario's position reflects a fundamental principle of personal property law and contract law, namely, that one cannot fully assign a contractual right and retain it too.

118. On the motion for summary judgment Ontario's factum stated:

> [4] There is no tenable legal theory under which both companies can simultaneously claim the benefit of the [1985] Indemnity.[112]

119. Before the Court of Appeal Ontario's factum stated:

> **(b) Both respondents cannot simultaneously hold the "full benefits" to the 1985 Indemnity**
>
> [50] Clause 3.1 of the 1998 APA provides that the *full benefit* of all indemnities were to be assigned. The motions judge erred in law in finding both that Resolute continues to hold the benefits to the 1985 Indemnity *and* that Weyerhaeuser was also assigned its *full benefits*. [footnote excluded] If Bowater assigned the 1985 Indemnity to Weyerhaeuser then Resolute cannot rely on it today. There was no

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[109] *CLPA*, *supra* note 89, s 53(1); *ATPDB*, *supra* note 89, art 53(1).
[110] Resolute's appeal factum, *supra* note 25 at para 47.
[111] COA Decision, *supra* note 17 at paras 191, 193, Brown JA, AR, Vol I, Tab 5, p 95; Factum of Her Majesty the Queen in right of Ontario (Superior Court of Justice) at para 4, AR, Vol VII, Tab 36, p 4 [Ontario's SCJ factum].
[112] Ontario's SCJ factum, *supra* note 111 at para 4, AR, Vol VII, Tab 36, p 4.

> provision for the 1985 Indemnity to return to Bowater when the WDS was reconveyed. This is inconsistent with Weyerhaeuser ever having taking [*sic*] an assignment.[113] [Emphasis in original]

120. In fact, Resolute itself always knew that it could not benefit from the 1985 Indemnity if Bowater had fully assigned it. In its factum on the motion for summary judgment, it stated:

> [88] Moreover, the context of the APA as a whole does not support a conclusion that Bowater had intended to give up the benefit of the indemnity. Under section 10 of the APA, Bowater granted Weyerhaeuser environmental indemnities. It later granted Weyerhaeuser a separate indemnity for the WDS in Article X of the WDS lease. *If Bowater had exclusively assigned the Indemnity to Weyerhaeuser, it would have been left without recourse to Ontario for pre-1979 environmental liabilities, including any claims by Weyerhaueser* [*sic*] *against Bowater on these indemnities. Moreover, Bowater intended at all times to take back title to the WDS. Had Bowater exclusively assigned the Indemnity to Weyerhaeuser (without any provision for its return), it would have needlessly taken on the full environmental liability for the mercury buried in the WDS for the entirety of its future holdings.*[114] [Emphasis added]

121. Despite taking this position before the motions judge Resolute did not appeal His Honour's decision that Bowater had assigned the full benefits. Nowhere in its factum responding to Ontario's appeal did Resolute address the finding that the 1985 Indemnity had been assigned to Weyerhaeuser through the language of section 3.1 of the 1998 APA.

122. To the contrary, Resolute adopted, amongst other submissions, the arguments made by Weyerhaeuser at paragraphs 51-55 of its factum:

> [22] To avoid unnecessary duplication, Resolute relies on Weyerhaeuser's factum for its response on any issues not directly addressed below.[115]

In these paragraphs, Weyerhaeuser submitted that the motions judge made no error when he concluded that the 1998 APA clearly and unequivocally provided for an express assignment of the 1985 Indemnity.[116]

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[113] Factum of the Appellant, Her Majesty the Queen in right of Ontario (Court of Appeal) at para 50, AR, Vol VIII, Tab 42, p 25.
[114] Resolute's SCJ factum, *supra* note 2 at para 88 AR, Vol VII, Tab 38, p 119.
[115] Factum of the Respondent, Resolute FP Canada Inc. (Court of Appeal) at para 22, AR, Vol VIII, Tab 43, p 79 [Resolute's COA factum].
[116] Factum of the Respondent, Weyerhaeuser Company Limited (Court of Appeal) at paras 51-55, AR, Vol VIII, Tab 44, pp 120-22.

123. Resolute argued only that "[i]t enjoys the benefit of indemnity irrespective of whether Weyerhaeuser is a proper assignee under the indemnity or whether the term "successor" can also apply to a successor in title."[117]

124. The Court of Appeal upheld the motions judge's decision that Bowater assigned the full benefits of the 1985 Indemnity to Weyerhaeuser and agreed with Ontario on the effect of that assignment noting:

> [194] As a general principle, an absolute assignment of a chose in action, which leaves no interest in the assignor, extinguishes the assignor's rights to later call on the obligor to perform the contract as the assignee has acquired the right to such performance: *Milo Candy Co. v. Browns Ltd.* (1915), 8 O.W.N. 99 (Ont. C.A.) at para 10; *Conveyancing and Law of Property Act,* R.S.O. 1990, c.C.34, s.53(1); *Restatement (Second) of Contracts* §317 (1981); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat. Ass'n*, 731 F.2d 112, 125 (2d Cir. 1984). The assignee steps into the shoes of the assignor and has standing to enforce the contract as against the obligor as if it was the original convenantee: *Brown*, at para. 84.[118]

The Court recognized that the same concept is relevant to the issue it remitted back for determination, namely, whether Weyerhaeuser assigned the 1985 Indemnity to Domtar.[119]

125. Coupled with its additional finding that the 1985 Indemnity does not benefit each land owner forever, the Court's decision was catastrophic for Resolute. It thus attempts to wind back the assignment by arguing that it was unfair for the Court to hear "new" argument from Ontario.

126. In fact, Resolute suffered no prejudice. As the Court stated:

> [191] First, Resolute candidly acknowledged in oral argument that before the motion judge Ontario did not formally concede that the company, as the corporate successor of Great Lakes, had the benefit of the [1985] Indemnity. Resolute puts the matter no higher than that the point Ontario now advances was not argued below.
>
> [192] Second, I am satisfied that all the facts necessary to address the issue are before this court as fully as if the matter had been raised before the motion judge. The appeal record contains the [1985] Indemnity, the 1998 APA transaction documents, and the evidence Resolute filed below, including its corporate history.

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[117] Resolute's COA factum, *supra* note 115 at para 27.
[118] COA Decision, *supra* note 17 at para 194, Brown JA, AR, Vol I, Tab 5, pp 95-96.
[119] *Ibid* at paras 162-166, 185, Brown JA, AR, Vol I, Tab 5, pp 81-84, 92-93.

> Resolute does not suggest that any additional evidence is required to consider the issue Ontario now raises.
>
> [193] Third, the facts and the law support Ontario's submission that in light of the motion judge's finding that Bowater assigned the full benefit of the [1985] Indemnity to Weyerhaeuser, Bowater had no remaining legal interest in the indemnity that could be transmitted to a corporate successor.[120]

127. Resolute further submits that it was not offered an opportunity to address the assignment issue when the Court of Appeal requested supplementary written submissions from Weyerhaeuser and Ontario.[121] However, that request was not in respect of the effects of the assignment of the 1985 Indemnity but instead was a request for clarification with regard to what Weyerhaeuser and Ontario agreed was a typographical error.[122] In any event it was open to Resolute, who was copied on the Court's correspondence as well as on the supplementary submissions made by Ontario and Weyerhaeuser, to request an opportunity to make submissions. It did not do so.

b) The Decision that the 1985 Indemnity was Assigned is a Finding of Mixed Fact and Law

128. Resolute argues that the motions judge did not engage in a proper contract interpretation analysis and failed to apply this Court's decision in *Sattva*.[123] It submits that the Court of Appeal similarly erred.[124] Resolute mischaracterizes this proposed error as an error of law.[125]

129. There is no support for Resolute's submissions respecting the motions judge's decision. His Honour clearly considered the history of the Dryden Property and the WDS, the 1998 APA and Weyerhaeuser's reluctance to own the WDS in his reasons for judgment.[126] In this context,

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[120] *Ibid* at paras 191-193, Brown JA, AR, Vol I, Tab 5, p 95.
[121] Resolute's appeal factum, *supra* note 25 at para 89; Letter from Court of Appeal for Ontario requesting further written submissions dated October 4, 2017, AR, Vol VIII, Tab 48.
[122] COA Decision, *supra* note 17 at para 140, Brown JA, AR, Vol I, Tab 5, pp 74-75; Additional Written Submissions of the Respondent, Weyerhaeuser Company Limited (Court of Appeal for Ontario), AR, Vol VIII, Tab 49; Additional Written Submissions of the Appellant, Her Majesty the Queen (Court of Appeal for Ontario), AR, Vol VIII, Tab 50.
[123] Resolute's appeal factum, *supra* note 25 at para 91; *Sattva*, *supra* note 23.
[124] Resolute's appeal factum, *supra* note 25 at para 91.
[125] *Ibid* at para 94.
[126] SCJ Decision, *supra* note 16 at paras 20-22, 48, AR, Vol I, Tab 1, pp 5-6, 10-11.

the motions judge reviewed the language in the 1998 APA and directed his mind to the words used by Bowater and Weyerhaeuser in sections 3.1(vii) and (xiv).[127]

130. Like the motions judge, the Court of Appeal reviewed the relevant provisions of the 1998 APA in the context of the factual matrix. It concluded that the motions judge's finding respecting Bowater's assignment of the benefits of the 1985 Indemnity did not amount to a palpable and overriding error. In reaching this decision the Court of Appeal made no error.

131. As noted by the Court of Appeal, the motions judge relied on sections 3.1(vii) and (xiv) to reach his conclusion that

> …Bowater expressly assigned to Weyerhaeuser "the full benefit of all representations, warranties, guarantees, indemnities" relating to the Dryden property. There was no restriction on Great Lakes' ability to assign the benefit of the [1985] Indemnity. I find that the [1985] Indemnity was assigned by Bowater to Weyerhaeuser under the 1998 [APA].[128]

c) There was no "Partial" Assignment

132. Resolute has "assignor's remorse". It wants this Court to treat it as if Bowater had never assigned the 1985 Indemnity.

133. Bowater was fully aware of its exposure under the reach-back provisions of the *EPA* for several years prior to making the assignment to Weyerhaeuser. Despite this, Resolute now seeks to have this Court make a better contract for Bowater than it made for itself. This is to be avoided in the exercise of contractual interpretation.[129]

134. Resolute submits that any assignment was only a "partial" one from the point of the "Effective Time" (defined in the 1998 APA as 12:01 am on the Closing Date)[130]. In essence, Resolute's argument is: (a) the Director's Order relates, in part, to its predecessors' ownership of the WDS from December 1979 to September 30, 1998; (b) Great Lakes and Bowater owned the 1985 Indemnity from December 22, 1985 until its assignment on September 30, 1998; thus (c)

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[127] *Ibid* at para 20, AR, Vol I, Tab 1, p 5.
[128] COA Decision, *supra* note 17 at para 152, Brown JA, quoting from SCJ Decision at para 64, AR, Vol I, Tab 5, pp 78-79.
[129] *Rio Algom Ltd v Canada (AG)*, 2012 ONSC 550 at para 42, [2012] OJ No 100; *Attorney General of Belize & Ors v Belize Telecom Ltd v Amor*, [2009] UKPC 10, [2009] 2 All ER 1127 at paras 15-16.
[130] Rawn Affidavit, *supra* note 8 at Exhibit N, AR, Vol V, Tab 27N, p 33.

Resolute, as the corporate successor to Great Lakes, can call on the benefits because for a portion of the time it owned the WDS it also owned the 1985 Indemnity.

135. The language of the 1998 APA does not support Resolute's argument. The Effective Time for the transfer of assets under the 1998 APA is irrelevant to whether Resolute may use the benefits of the 1985 Indemnity to shelter against the Director's Order. The Effective Time speaks to when the assets were transferred. It says nothing about what, if anything, was retained. The latter is governed by the terms of the 1998 APA.

136. As stated earlier, section 3.1 of the 1998 APA stipulates which assets are to be "purchased and sold". In particular, sections 3.1(vii) and (xiv) set out respectively that "the full benefit of all…contracts" and the "full benefit of all indemnities" were to be sold.[131]

137. There is little doubt as to what was being assigned. In short, "all" means all.[132] The transfer of "all right, title and interest of [Bowater]" under section 3.1 conveyed everything that Bowater owned in the things assigned as of the Effective Time.

138. The Court made no error in finding that there was an assignment of the full benefits and that Bowater retained none of them.

139. Resolute's argument also conflates the statutory jurisdiction of the Director to name it as a prior owner or person in management or control of the WDS with the *prospective* obligations created by the Director's Order.[133] Only the jurisdiction created by the *EPA* amendments is retroactive. The obligations under the Director's Order are not.

140. The Director's Order is not focused on anything Great Lakes did or did not do while owning the Dryden Property. The obligations created by the Director's Order require the posting of financial assurance and monitoring, maintenance, testing and the continuation of reporting that Resolute and its predecessors carried out for years without objection.[134]

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[131] *Ibid* at Exhibit N, sections 3.1 (vii) and (xiv), AR, Vol V, Tab 27N, pp 45, 47.
[132] *Knott v McDonald's Corp.*, 147 F (3d) 1065 (9th Cir 1997) at 1067.
[133] *Environmental Protection Act,* RSO 1990, c E-19, ss 18, 44 [*EPA*]; *Loi sur la protection de l'environnement*, LRO 1990, c E-19, art 18, 44 [*LPE*].
[134] Rawn Affidavit, *supra* note 8 at Exhibit A, paras 1.33-1.34, Part 2: Work Orders, Item No 12, AR, Vol IV, Tab 27A, pp 22-23, 27.

d) The Compliance with the *Conveyancing Law and Property Act*

141. Resolute argues that any purported legal assignment of the 1985 Indemnity was invalid due to noncompliance with the *CLPA*. This is inaccurate.

142. In order to effect a legal assignment, the four conditions that must be met under the *CLPA* are: (1) the assignment is absolute; (2) the assignment is in writing; (3) the chose in action is identified; and (4) notice is given to the original obligor.[135]

143. As discussed below, subject to the resolution of the Domtar issue the assignment to Weyerhaeuser under section 3.1 of the 1998 APA was a legal assignment.

Absolute

144. In law, assignment of a chose in action must be absolute, irrevocable and with no reversionary rights to the assignor. The language of the 1998 APA indicates that the assignment of the 1985 Indemnity was both an absolute and full one; the parties included no language retaining any rights for Bowater or creating any reversion of rights following the severance of the WDS. Nor did Resolute make any submissions to the contrary in the Courts below.[136]

In writing

145. There is no dispute that the assignment of the 1985 Indemnity was done "in writing".

Identification

146. In regard to the requirement that the 1985 Indemnity be identified, the Court of Appeal and the motions judge each concluded that it was sufficiently identified in sections 3.1(vii) and (xiv) of the 1998 APA. The Court of Appeal held that a specific reference was not required:

> The degree of specificity used by parties to identify assigned assets is a matter of negotiation and choice. Here, the parties chose to use general language to describe the "purchased assets' [*sic*], including assigned contracts. The wording of ss. 3.1(vii) and (xiv) of the…1998 APA was sufficient to capture the [1985] Indemnity without specifying that contract by name."[137]

147. The Court of Appeal made no palpable and overriding error in so holding. Its decision respecting identification is entitled to deference.

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[135] *CLPA*, *supra* note 89, s 53(1); *ATPDB*, *supra* note 89, art 53(1).
[136] COA Decision, *supra* note 17 at para 198, Brown JA, AR, Vol I, Tab 5, p 97.
[137] *Ibid* at para 154, Brown JA, AR, Vol I, Tab 5, p 79.

Notice

148. There is no prescribed time within which notice must be given. However, the assignment only operates from the date notice is given.[138] Until that time, the assignment is an equitable assignment, but it is "an assignment which requires nothing more from the assignor to become a legal assignment".[139]

149. Notice may be provided in a wide manner of ways and by either the assignor or the assignee.[140] There are no formal requirements so long as notice brings to the attention of the original debtor that the chose in action has been transferred so as to prevent the debtor from paying the debt to the original creditor.[141]

150. Resolute submits that the notice requirement was not met.[142]

151. In fact, notice of the assignment was provided to Ontario by Weyerhaeuser prior to the issuance of the Director's Order. On September 16, 2011, prior to the commencement of this action, Weyerhaeuser's solicitors of record wrote to Ontario respecting the assignment of the 1985 Indemnity and requesting indemnification for current and future costs relating to the Director's Order.[143] Weyerhaeuser's counsel also indicated that the Ministry of the Environment had previously been advised of the assignment, but had issued the Director's Order against Weyerhaeuser notwithstanding Weyerhaeuser's assertion that it had the 1985 Indemnity.[144]

152. Having determined that the 1985 Indemnity was adequately identified as a purchased asset in the 1998 APA, it was open to the motions judge and the Court of Appeal to find that an

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[138] *CLPA*, *supra* note 89, s 53(1); *ATPDB*, *supra* note 89, art 53(1); *Diguilo*, *supra* note 89 at para 10; *Holt v Heatherfield Trust Ltd,* [1942] 2 KB 1, [1942] 1 All ER 404 at 407 [*Holt*].

[139] *Holt*, *supra* note 138 at 407.

[140] *Walker v Bradford Old Bank* (1884) 12 QBD 511 at 517, BOA, Tab 4; *Holt*, *supra* note 138 at 407; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216, BOA, Tab 1.

[141] *Bank of Nova Scotia v Royal Bank*, 59 DLR (3d) 107, 1975 CarswellAlta 60 at para 37; *Van Lynn Developments Limited v Pelias Construction Company Limited*, [1969] 1 QB 607 at 613, [3] All ER 824 at 826.

[142] Resolute appeal factum, *supra* note 25 at paras 100, 119.

[143] Douthwaite Affidavit, *supra* note 11 at Exhibit D, AR, Vol VI, Tab 28D; Weyerhaeuser had done none of the work required by the Director's Order.

[144] *Ibid*.

absolute full assignment had been made, subject to the Domtar issue.[145] That is, if in 2007 and prior to effecting a legal assignment, Weyerhaeuser had assigned the 1985 Indemnity to Domtar, Weyerhaeuser has no right to now call on its benefits. This was the point with which the Court was concerned when it remitted back the issue of whether Weyerhaeuser continued to hold the benefits of the 1985 Indemnity at the time the Director's Order was made.

e) An Equitable Assignment Does Not Result in Resolute Retaining Any Beneficial Interest to the 1985 Indemnity

153. Resolute also argues in the alternative that if there was an assignment it was an equitable assignment through which Bowater retained legal title.[146] Under such a scenario, Resolute submits that the Court of Appeal erred in finding that "Resolute has no legal interest in the [1985] Indemnity upon which it can assert a claim against Ontario."[147] Resolute effectively argues that if it continues to have legal title to the 1985 Indemnity it has an interest in it which it may enforce on behalf of Weyerhaeuser and in consequence, shelter under its protection.

154. Resolute's argument presupposes that the ERT finds both it and Weyerhaeuser jointly and severally liable. It submits that calling on Ontario to pay the financial obligations associated with the Director's Order is in keeping with Resolute's responsibilities as the legal title holder and that "any dollar that Resolute collects from Ontario on the 1985 Indemnity to contribute towards clean-up costs is a dollar that Weyerhaeuser is relieved from paying."[148] The upshot for Resolute is that there would be no obligation left for it to perform.

155. However, Resolute is not entitled to put Ontario into a position where it is out of pocket by claiming the benefits on behalf of Weyerhaeuser and then asserting that there is no further obligation to be discharged by Resolute itself. Such a result is inconsistent with the law of joint

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[145] See *CLPA*, *supra* note 89, s 53(1); *ATPDB*, *supra* note 89, art 53(1).
[146] Resolute's appeal factum, *supra* note 25 at paras 114-25.
[147] COA decision, *supra* note 17 at para 198, Brown JA, AR, Vol 1, Tab 5, p 97.
[148] Resolute's appeal factum, *supra* note 25 at para 125. The Director's Order does not require "clean-up".

liability.[149] If the ERT finds Resolute and Weyerhaeuser jointly responsible for carrying out the Director's Order, Ontario is entitled to look to both or *either* to discharge the obligations.

156. Essentially, Resolute's submissions confuse legal title with beneficial interest. Even if Bowater retained the legal title to the 1985 Indemnity it did not retain any beneficial interest in it. As noted above, regardless of the type of assignment the effect remains the same. After its assignment, Bowater no longer had the protection afforded by the 1985 Indemnity.[150]

157. Resolute also submits that under an equitable assignment the obligor remains liable to fulfill its obligations. Ontario does not contest this as a general proposition of law. However, as matters stand those obligations would not be owed to Resolute. Resolute cannot shelter under benefits that Bowater assigned to Weyerhaeuser in 1998.

158. Resolute relies on the British Columbia Court of Appeal's decision in *Weyerhaeuser Company Limited v Hayes Forest Services Limited*.[151] That decision concerned a much different situation that what existed in this case. Unlike in *Hayes Forest*, in the present appeal Ontario, as obligor, has not purported to assign any obligations.

159. *Hayes Forest* concerned the legal effect of an assignment by Weyerhaeuser of a timber supply contract between it and Hayes Forest Services Limited to a third party. The terms of the contract between Weyerhaeuser and Hayes detailed the ongoing mutual obligations of each party. When Weyerhaeuser sought Hayes' consent to the assignment of its obligations under the contract, Hayes refused. It took the position that Weyerhaeuser remained obligated to it.[152]

160. In its analysis, the BCCA noted:

> It is fundamental to contract law that *a contracting party can unilaterally assign benefits that flow to it from the contract to a third party but not that party's obligations under the contract*. The assignment notwithstanding, the *assignor is required to perform its obligations under the contract* absent a provision to the

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[149] See *Courts of Justice Act*, RSO 1990, c C-43, s 139(1); *tribunaux judiciaires (lois sur les)*, LRO 1990, chap C-43, s 139(1); *Taylor Made Advertising ltd. v Atlific Inc.*, 2012 ONCA 459 at para 34, 111 OR (3d) 221; *Ryan Estate v Canada (Attorney General)*, 2015 NLTD(G) 90, 2015 CanLII 35487 at para 41 (NL SC).
[150] See Smith, *supra* note 101 at §11.11.
[151] 2008 BCCA 69; 78 BCLR (4th) 236 [*Hayes Forest*].
[152] *Ibid* at paras 1-5.

> contrary in the contract (and absent a novation that creates a new contract).[153] [Emphasis added]

161. Finally, Resolute relies on an article entitled: "Two Conceptions of Equitable Assignment". The authors consider the concept of an equitable assignment and whether such an assignment results in a transfer or, instead, creates a trust.[154]

162. The authors acknowledge that the transfer theory remains the modern view.[155] They, however, prefer the older view that an "equitable assignment essentially involves the creation of a trust" and thus creates new rights in the assignee which it can use to enforce the assignment.[156]

163. In any event, the trust argument does not benefit Resolute. Being a trustee for Weyerhaeuser cannot resurrect for Resolute the benefits which Bowater sold years ago.

PART IV – COSTS

164. The motions judge awarded full indemnity costs to Weyerhaeuser and Resolute ($275,000 and $223,000, respectively) based on the 1985 Indemnity.[157] This Order was significantly altered by the Court of Appeal.

165. The award of costs in favour of Resolute was set aside and an award of costs to Ontario was substituted.[158]

166. As between Ontario and Weyerhaeuser, costs of the motions were left to be determined by the court hearing the Domtar issue. Costs of the appeal were ordered payable in the cause.[159]

167. Resolute seeks to have the motions judge's full indemnity costs ordered reinstated if it is successful in this appeal.

168. In September 2011, Weyerhaeuser wrote to Ontario seeking indemnification under the 1985 Indemnity for the costs associated with responding to the Director's Order.[160] Ontario

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[153] *Ibid* at para 35.
[154] James Edelman & Steven Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 Law Q Rev 228, BOA, Tab 14.
[155] *Ibid* at 228.
[156] *Ibid* at 228.
[157] COA Decision, *supra* note 17 at para 199, AR, Vol I, Tab 5, p 98.
[158] Court of Appeal Order, issued March 8, 2018 at para 6, AR, Vol I, Tab 6, p 129.
[159] *Ibid* at paras 7-8, AR, Vol I, Tab 6, pp 129-130.

replied that the 1985 Indemnity does not cover the costs of regulatory proceedings.[161] As a result, Weyerhaeuser initiated this action against Ontario. As the determination of the issues in this action would have directly impacted Resolute as a party to the 1985 Indemnity, at Ontario's suggestion, the parties notified Resolute of the litigation. Resolute sought leave to intervene, which it did, on consent.

169. The motions judge erred in failing to take the relevant principles set out in Rule 20.06 of the *Rules of Civil Procedure*[162] into account when deciding the issue of costs on the summary judgment motions.

170. The motions raised legitimate questions of fact and law. In similar circumstances, the Court in *Coventree Inc. v Lloyds Syndicate 1221 (Millenium Syndicate)* found that parties should be permitted to raise such questions without the risk of full or substantial indemnity costs.[163]

171. In *Coventree*, the parties sought direction as to the interpretation of an insurance policy. Justice Lederer found that costs on a full indemnity or substantial indemnity basis were not justified and ordered costs on a partial indemnity scale. His Honour noted that the claim was a "claim", a "loss" or "cost of defence" as the terms were used in the relevant policy but that the insurer had raised a legitimate question as to the interpretation of the policy which it should be able to raise without the risk of full or substantial indemnity costs.[164]

172. As the motions raised legitimate questions as to the proper interpretation of the 1985 Indemnity and who is able to rely on it, the motions judge erred in ordering Ontario to pay each of Weyerhaeuser and Resolute's costs on a full indemnity scale. The motions judge ought to have exercised his discretion and awarded Weyerhaeuser and Resolute their costs in accordance with the tariffs to Rule 57 of the *Rules of Civil Procedure.*[165]

173. On a motion for summary judgment, Rule 20.06 provides that the court "may" order substantial indemnity costs where (a) a party has acted unreasonably in bringing or responding to

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[160] Douthwaite Affidavit, *supra* note 11 at Exhibit D, AR, Vol VI, Tab 28D.
[161] *Ibid* at Exhibit G, AR, Vol VI, Tab 28G.
[162] *Rules*, *supra* note 104, r 20.06; Règles, *supra* note 104, r 20.06.
[163] 2011 ONSC 6660; 2011 CarswellOnt 15442 [*Coventree*], aff'd 2012 ONCA 341, 291 OAC 178 [*Coventree* CA].
[164] *Coventree*, *supra* note 163 at paras 4-5; *Coventree* CA, *supra* note 163 at paras 48-49.
[165] *Rules*, *supra* note 104, Tarrif A; Règles, *supra* note 104, Tarif A.

the motion, or (b) the party acted in bad faith.[166] Such an award is generally reserved for circumstances where a court intends to express its disapproval of a party's conduct throughout the proceedings. Such circumstances are not present and Ontario has acted reasonably throughout the proceedings.

174. Ontario submits that in all the circumstances the appropriate scale of costs ought to be partial indemnity.

PART V – ORDER SOUGHT

175. Ontario asks that this appeal be dismissed with costs here and below.

Dated at the City of Toronto, in the Province of Ontario, this 22nd day of February, 2019.

SIGNED BY:

Leonard F. Marsello

Tamara D. Barclay

Nansy Ghobrial

[166] *Ibid*, r 20.06; *Ibid*, r 20.06.

PART VI – IMPACT ON COURT'S REASONS

176. Ontario submits that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access information that could impact the Court's reasons in this appeal.

PART VII – TABLE OF AUTHORITIES

	JURISPRUDENCE	PARAGRAPH(S)
1.	*Attorney General of Belize & Ors v Belize Telecom Ltd v Amor*, [2009] UKPC 10, [2009] 2 All ER 1127	133
2.	*Bank of Nova Scotia v Royal Bank*, 59 DLR (3d) 107, 1975 CarswellAlta 60	149
3.	*Brown v Belleville (City)*, 2013 ONCA 148, 114 OR (3d) 561	9, 34, 46, 47, 49, 50, 51, 52
4.	*Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216	149
5.	*Coventree Inc. v Lloyds Syndicate 1221 (Millenium Syndicate)*, 2011 ONSC 6660; 2011 CarswellOnt 15442 (WL), aff'd 2012 ONCA 341, 291 OAC 178	170, 171
6.	*DiGuilo v Boland*, [1958] OR 384, 1958 CarswellOnt 102 (Ont CA)	102, 110, 148
7.	*Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.*, [1999] 3 SCR 108, 176 DLR (4th) 257 (SCC)	9, 34, 37, 38, 39, 40, 42, 43, 50
8.	*Griffiths v Zambosco*, 54 OR (3d) 397, 2001 CanLII 24097 (Ont CA)	106
9.	*Heritage Capital Corp. v Equitable Trust Co.*, 2016 SCC 19, [2016] 1 SCR 306	71
10.	*HL v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401	30
11.	*Holt v Heatherfield Trust Ltd,* [1942] 2 KB 1, [1942] 1 All ER 404	148, 149
12.	*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235	30
13.	*Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87	30
14.	*Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 WLR 896 at 915, [1998] 1 All ER 98 at 117	109

15.	*Knott v McDonald's Corp.*, 147 F (3d) 1065 (9th Cir 1997)	137
16.	*Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 SCR 23.	29
17.	*London Drugs Ltd. v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299, 97 DLR (4th) 261 (SCC)	9, 34, 36, 40, 42, 43, 50
18.	*Merchants Service Co. v Small Claims Court* 35 Cal (2d) 109 (Sup Ct 1950).	105-06
19.	*National Trust Co. v Mead*, [1990] 2 SCR 410, 1990 CarswellSask 165 (WL Can) (SCC)	71
20.	*National Reserve Co. of America v Metropolitan Trust Co. of California*, 17 Cal (2d) 827 (Sup Ct 1941)	105-06
21.	*Norman v Federal Commissioner of Taxation* (1963), [1963] HCA 21	109
22.	*Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5, 2019 CarswellAlta 141	65
23.	*Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*, [2006] FCAFC 40	109
24.	*Peart v Peel (Regional Municipality) Police Services Board*, 217 OAC 269, [2006] OJ No 4457 (Ont CA)	30
25.	*Rio Algom Ltd v Canada (AG)*, 2012 ONSC 550, [2012] OJ No 100	133
26.	*Robert Lamb Hart Planners and Architects v Evergreen Ltd.*, 787 F Supp 753 (SD Ohio 1992).	106
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