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

RESPONDENT
(Appellant)

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

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PART I: CONCISE OVERVIEW OF POSITION

1. The courts below held that a 1985 indemnity entered into by the Crown in right of Ontario ("Ontario") created liability for expenses incurred as a result of a 2011 environmental regulatory order issued under the authority of a 1990 statute. This raises two fundamental issues:

2. *Capacity*: Can the Crown make a contractual promise to pay damages arising from acts taken under as-yet-unenacted legislation (a "Future Legislation Indemnity")?

3. *Interpretation:* If so, when should a court find that a contract entered into on behalf of the Crown ("Crown Contract") includes a Future Legislation Indemnity?

4. The position of the Attorney General of British Columbia ("AGBC") is that the Crown *can* include a Future Legislation Indemnity in a contract, but in the absence of clear contractual language, there is a presumption that it *did not*.

5. The AGBC accepts the facts as stated in Ontario's factum.

PART II: POSITION ON QUESTIONS IN ISSUE

6. The AGBC intervenes only on the fourth question raised by Ontario's appeal,[1] "Did the Court of Appeal err in failing to correct the motions judge's decision that the 1985 Indemnity was a business agreement to which the indirect fettering rule did not apply and otherwise in the manner in which they applied *Pacific National Investments*?"[2]

7. The AGBC's position on this question is as follows:

   a. Although sometimes used to refer to a (mandatory or presumptive) rule against a Future Legislation Indemnity in contracts of public bodies, the phrase "indirect fettering" is better understood as an implied statutory limit on the capacity of a public body to offer an indemnity in relation to a decision for which its constituent statute imposes a duty of procedural fairness. In this sense, "indirect fettering"

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[1] Factum of Appellant, Her Majesty the Queen as represented by the Ministry of the Attorney General, para. 65.
[2] *Pacific National Investments v. Victoria (City)*, [2002] SCR 919, 2000 SCC 64 [*PNI #1*].

does not apply to the Crown in relation to a Future Legislation Indemnity.

b. However, there is a rule that Crown Contracts are presumed not to provide for a Future Legislation Indemnity and it is an error of law not to consider this presumption.

c. Unlike in the case where there is a rule against indirect fettering narrowly understood, this rule is a presumption, not a restriction on capacity. A Crown Contract can provide for a Future Legislation Indemnity if the Crown uses clear language.

d. The distinction between "business agreements" and other contracts entered into by the Crown is unhelpful and should be abandoned. *Wells v. Newfoundland*, [1999] 3 SCR 199 [*Wells*] and *PNI #1* can be reconciled without this concept.

PART III: ARGUMENT

Basic Constitutional Principles

8. The executive branch of government is embodied in the Sovereign or the "Crown." The Crown is a person and, unless restricted by the Constitution or by statute, has the same inherent powers to contract as any other person.[3] If an individual or private corporation has the capacity to make a contractual promise, then, in the absence of a constitutional or statutory rule to the contrary, so does the Crown.

9. In a Constitution "similar in principle to that of the United Kingdom", the Legislature (the "Crown-in-Parliament") is legally supreme, subject only to the provisions of the Constitution itself.[4] The executive branch is legally subordinate to the legislative branch and under the conventions of responsible government must maintain its confidence. There are three relevant implications of this principle.

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[3] *Verreault (J.E.) & Fils Ltée v. Québec*, [1977] 1 SCR 41, p. 47; *Bank of Montreal v. Québec* , [1979] 1 SCR 565, p. 574; *Québec v. Labrecque*, [1980] 2 SCR 1057, p. 1082.

[4] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 53ff.

10. First, the Legislature can, if it wishes, limit the capacity of the Crown to contract through legislation.[5] Whether it has done so is an ordinary matter of statutory interpretation.

11. Second, the Crown cannot prevent the Legislature from enacting legislation. As there is no constitutional guarantee against breach of a Crown Contract,[6] this would include legislation that would abrogate a commitment found in a Crown Contract without compensation.[7]

12. Third, the Crown cannot be presumed responsible for future acts of the Legislature, since the Crown is only one part of, and legally subordinate to, the Legislature.

Crown Contracts *Presumed* Not to Contain a Future Legislation Indemnity

13. Following from these basic constitutional principles, courts have long held that the Crown is, at minimum, presumed not to include a Future Legislation Indemnity in its contracts. The Privy Council in 1950 held that a tax concession to a railway to promote investment from a railway company could not easily be interpreted to be a contractual offer on the part of the executive that would be breached if the legislation implementing the concession were repealed:

> The whole arrangement would have broken down if the Provincial Legislature had refused to enact that section. But much more than this would be needed before the existence of a contractual obligation to procure its enactment could be inferred. Even more difficult to infer in their Lordships' opinion would be any intention of a contractual nature that the section when enacted should remain for all time upon the statute book.[8]

14. This presumption makes sense in light of the basic principle of contractual interpretation that terms are not to be implied unless there is a clear custom or known usage "in the trade" or they are necessary to give business efficacy to a contract.[9] But there are also specifically public law reasons for a presumption against a Future Legislation Indemnity. The advisors of the Crown are responsible to, and get their democratic legitimacy from, a specific parliament that must meet the electorate at least every five years, as required by s. 4 of the *Canadian Charter of Rights and*

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[5] *R. v. Woodbrun* (1898), 29 SCR 112.
[6] *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 WWR 51 (Sask CA).
[7] *Wells*, para. 42.
[8] *British Columbia v. Equimalt and Nanaimo Railway Co.* [1950] 1 DLR 305 (JCPC) [*ENR*], p. 312; *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665, para. 42.
[9] *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 SCR 711.

Freedoms. For the Crown's current advisors to create legal liability for the treasury if future parliaments enact laws should require clear language, so that such a decision can be transparent and subject to accountability.

15. There is also an argument based on the need for symmetry between the sort of language that can create a Future Legislation Indemnity in contract with that required to extinguish a Future Legislation Indemnity in a statute. As *Wells* holds, if the Crown creates a Future Legislation Indemnity, future statutes – even those that require the Crown to act contrary to the contract – can only extinguish the Indemnity with very clear language.[10] In the absence of a corresponding and symmetric presumption against the *creation* of a Future Legislation Indemnity in an ordinary Crown Contract, there is the potential for third parties to argue that "business necessity" or unclear language gives rise to a Future Legislation Indemnity, while then arguing that legislation clearly intended to impose an obligation on them has failed to be sufficiently clear about whether they can pass the cost of this obligation on to the taxpayer.

16. Without requirements of clarity at both ends, this one-way ratchet will be unfair to taxpayers, conducive to lack of transparency and regulatory capture, incentivize long-shot litigation and promote regulatory chill. Moreover, if it becomes too easy for businesses to argue that new legislation entitles them to compensation based on implicit transactions in the past, legislatures may react by routinely attaching "no liability" clauses to statutes. This will in turn defeat contractual expectations in the exceptional cases where a Future Legislation Indemnity was explicitly contemplated.

17. The AGBC submits that just as clear statutory language is necessary to defeat a breach of contract claim resulting from a change in legislation, clear contractual language is necessary to create a Future Legislation Indemnity. An example of such would be an express reference to "liabilities arising under future legislation."

18. To the extent the trial judge did not address the principle that the Crown is presumed not to offer a Future Legislation Indemnity, this would be an error of law.

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[10] *Wells*, para. 41.

Crown Contracts *Can* Contain Future Legislation Indemnity

19. To be sure, there are sometimes valid public policy reasons to grant a Future Legislation Indemnity. Governments inevitably limit the options of their successors to some extent. As long as it is transparent what the Crown is doing, the decision to offer a Future Legislation Indemnity is a choice for which a particular government can be held to account.

20. The *ENR* decision is sometimes taken as creating a "constitutional rule" not only that the Crown is *presumed* not to promise damages in the event of future legislation, but that it *cannot* do so. Read carefully, however, it says the opposite. In its review of the facts, the Judicial Committee pointed out that while there were contractual documents between the federal Crown and the investors who constituted the Esquimalt and Nanaimo Railway, the only communication from the province was in the form of the statutory language itself. The Judicial Committee noted that a section of an Act *could* be interpreted as an offer by the executive capable of being accepted by the subject, but required clear language before it would interpret the statute before it that way.[11] *ENR* stands for the principle that for "constitutional" (i.e., public law) reasons, the Crown is presumed not to offer to pay damages in the event of legislative change, but it does not say this is because the Crown is incapable of doing so.

21. The general principle is that the Crown has the contractual powers of other persons (the "subject"). Since a subject can offer to pay compensation in the event future legislation is enacted (for example, in the form of political risk insurance), so too can the Crown.[12]

22. Legislative supremacy as a constitutional principle is not negated by executive agreements committing to a particular legislative course of action. The Crown *cannot* fetter the Legislature, not in the sense that fettering is *forbidden* or *unlawful* but in the sense that it is *impossible*. One parliament can try to bind another: for example, by enacting that certain legislation cannot be repealed or amended except after the approval of the electorate or some other group. Although such laws are valid, they are ultimately ineffective, since the provisions which purport to dictate future legislative action can themselves be repealed by an ordinary

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[11] *ENR*, p. 314.
[12] *Wells*, para. 41.

majority of the legislature and royal assent.[13] Similarly, executive governments can enter into agreements with third parties about the content of future legislation, but these agreements will prove ineffective if future legislatures act contrary to them.[14] This does not render those agreements invalid, just dependent on a majority of the legislature continuing to consider it inexpedient to abrogate them.

Legislation Can Restrict Crown Capacity: Procedural Fairness and Indirect Fettering

23. Legislation can restrict the capacity of the Crown to contract either expressly – as with section 72 of British Columbia's *Financial Administration Act*,[15] which restricts the power to give an indemnity or guarantee except in accordance with the *Indemnities and Guarantees Regulation*[16] – or by implication. An important category of implied restriction on Crown capacity to contract is the line of "fettering" cases. The AGBC says these are best understood as cases where the statute creates a public-law duty on a public body that is incompatible with the kind of contractual promise alleged.

24. In many of these cases, the statute gives rise to a duty of procedural fairness that is incompatible with a contractual promise to compensate one party or interest in the event a decision is made in favour of the other. In other cases, the statute implicitly periodically opens up a government franchise or contractual opportunity to competitive bidding, a prospect incompatible with a perpetual renewal clause for example. This concept of "indirect fettering" is narrower than the canonical statements in *Rederiaktiebolaget Amphitrite*[17] and *Dominion of Canada Postage Stamp Vending Co*,[18] but together with a presumption against a Future Legislation Indemnity, it explains most of the cases and has the merit of being consistent with the basic constitutional principle that the Crown has the private rights of the subject except as restricted by statute. This conception is more closely aligned with contemporary practice.

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[13] *Canadian Taxpayers Federation v. Ontario* (2004) 73 OR (3d) 621 (SCJ); *Canada v. Friends of the Canadian Wheat Board*, 2012 FCA 183.
[14] *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, **AGBC BOA, Tab 3**; *Bacon*; *Pan-Canadian Securities Reference*, para. 67.
[15] RSBC 1986, c. 138.
[16] B.C. Reg. 153/2018.
[17] *Rederiaktiebolaget Amphitrite v. R.*, [1921] 3 K.B. 500, p. 503, **AGBC BOA, Tab 2**.
[18] *The King v. Dominion of Canada Postage Stamp Vending Co. Ltd.*, [1930] SCR 500, p. 506.

25. The presumption against a Future Legislation Indemnity can be distinguished from this version of the "indirect fettering rule" in that it is a presumption, rather than a lack of authority.

No Need for "Business Contract" Exception: Reconciling *Wells* and *Pacific National Investments #1*

26. A number of lower courts have said that the relationship between *Wells* and *PNI* #1 is unclear,[19] or even that they are incompatible.[20] The AGBC respectfully submits that both cases were rightly decided, but that this would be an appropriate occasion for this Court to refine what was said by the majority in *PNI #1* about the relationship between the two decisions.

27. *Wells* established that the Crown has the capacity to make itself liable in contract for damages resulting from future legislation, that the Legislature can extinguish that obligation in subsequent legislation, and that to do so it must use clear language. Finally, *Wells* provided a limited exception to the presumption against such a Future Legislation Indemnity in the case of individuals whose public employment is terminated without cause before the expiry of its term.

28. *PNI #1* concerned the contractual capacity of a municipality without the inherent right to contract as a person. This Court declined to imply into the statute giving the City of Victoria its authority to contract the power to indemnify a party for a zoning decision. Although the facts of *PNI #1* involved a "down zoning", any rule allowing for a contractual indemnity would apply equally in the case of a contractual promise to alter zoning for the benefit of an owner. Since such decisions give rise to duties of procedural fairness to persons on both sides of the issue,[21] the presumption that statutory regimes are consistent with procedural fairness was sufficient for the majority to come to the conclusion that an ability to make this kind of promise had to be expressly laid out in the municipality's statutory grant of powers.

29. The problem is caused by paragraph 61 of *PNI #1*, which sets out the basis for the distinction between the two cases in two ways. One basis is between the levels of government,

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[19] *Andrews v. Canada (Attorney General)*, 2014 NLCA 32; *Levy v. British Columbia*, 2018 BCCA 36, paras. 37-38.
[20] *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550, para. 153.
[21] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170.

since *Wells* dealt with the Crown in right of the Province and the provincial legislature, while *PNI #1* dealt with a local government and a zoning bylaw. The other was the nature of the contract, where the employment contract in *Wells* was taken to be a "business contract", while the arrangement to encourage improvement of Victoria's Inner Harbour by a private developer was apparently considered to be a different sort of contract:

> The *Wells* case did not deal with a contract governing the exercise of municipal legislative powers. The agreement in dispute remained a business contract in relation to the hiring of senior civil servants.[22]

30. The distinction based between municipal legislative powers and those of a sovereign legislature can be understood on the basis of the foregoing analysis. Municipalities do not have inherent authority to contract as persons, but only the authority granted by statute. Moreover, in exercising certain legislative powers around zoning, municipalities have procedural duties of fairness that could realistically be compromised by an indemnity that would be triggered depending on the decision of the municipality. By contrast, a sovereign legislature has no procedural duty of fairness[23] and has the constitutional authority to decide what it will do with possible Crown liabilities arising from the legislation before it.

31. On the other hand, the use of the concept of a "business contract" by the majority in *PNI #1* to distinguish the result in that case and the one in *Wells* has created unnecessary difficulties. As this Court implicitly recognized in *Ferme Vi-Ber*, governments almost inevitably have a mix of pecuniary and public policy reasons for entering into contracts.[24] The distinction between business contracts and other contracts is illusory in the public sector. Even if it were possible to make it, it is hard to see why the appointment of an administrative tribunal member is a "business contract", while obtaining public amenities in return for development opportunities is not. The distinction has not been of assistance to the lower courts.

32. Understood as a presumption, the rule that a Crown Contract does not contain a Future Legislation Indemnity without clear language applies to the most straightforward of goods,

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[22] *PNI #1*, para. 61.
[23] *Authorson v. Canada (Attorney General)*, [2003] 2 SCR 40, 2003 SCC 39.
[24] *Ferme Vi-Ber inc. v. Financière agricole du Québec*, [2016] 1 SCR 1032, 2016 SCC 34, para. 48.

services or construction contracts. For example, in *Continental Asphalte*, the argument of an asphalt contractor that it was entitled to sue for changes to public policy in relation to the price of petroleum was dismissed.[25] There is no reason to think of the arrangement to build the Esquimalt & Nanaimo Railway as more or less "business-like" than the hiring of Andrew Wells to be Public Utilities Commissioner.

33. The thrust of the distinction the majority in *PNI #1* was making was between situations in which there is a public law duty at odds with a private indemnity. The examples it gave of "business contracts" (for example, contracting out a bus service or hiring) are really examples where such a duty did not exist. In the municipal or administrative law context, that is the real distinction: if a duty of procedural fairness exists, then the party that owes that public duty cannot, without clear statutory authority, create a private-law obligation that would give rise to a reasonable apprehension of bias in the performance of the public duty.

34. Viewed this way, *Wells* and *PNI #1* can be reconciled without need to resort to an artificial distinction between "business" contracts and other contracts public authorities might enter into. Mr. Wells's appointment for a term that continued until retirement created a contractual obligation to pay damages in case his position was abolished that overcame the presumption against a Future Legislation Indemnity. There was no limit on the capacity of the Crown in right of Newfoundland to offer what was in effect a Future Legislation Indemnity. *PNI #1* was ultimately decided on an interpretation of the provisions of British Columbia's *Municipal Act* that gave local governments contractual powers. The majority decided that the implied right to an economically unbiased decision maker in zoning decisions limited this contractual capacity. None of these distinctions require engaging in the quixotic task of distinguishing public-sector "business" contracts from other public contracts.

Conclusion

35. The issue of whether and when a Crown Contract can provide for money damages in the event of future legislative change has been a difficult one. But *ENR*, *Wells* and *PNI #1* can be reconciled with each other and with fundamental constitutional principles.

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[25] *Continental Asphalte Inc. v. Canada* (1986), 4 FTR 289 (TD), **AGBC BOA, Tab 1**

36. The first principle is that in the absence of clear language in the contract a Crown Contract is presumed not to include a Future Legislation Indemnity. The second principle is that this presumption can be rebutted by clear language. This is because, in the absence of statutory limits, the Crown has full capacity to make any contracts a private party could. These two principles explain *ENR* and *Wells*.

37. *PNI #1* can be understood as holding that statutes that impose a duty of fairness on a public body implicitly prohibit indemnities that would be triggered if the body decides a particular way. This principle does not apply to the Crown in relation to the enactment of statutes by the Legislature, since the Legislature owes no duties of procedural fairness. There is no need to make a distinction between "business contracts" and others, since all public contracts bring with them a presumption against the payment of damages in the event of acts under future legislation which – in the absence of explicit or implicit statutory restrictions on the capacity of the public body – clear language can displace.

38. This approach, grounded in precedent and principle, provides a practical balance between giving public bodies, including the Crown, the tool of a Future Legislation Indemnity in appropriate circumstances, while requiring them to be explicit in choosing this tool, thereby vindicating transparency.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2019.

J. Gareth Morley and Elizabeth J. Rowbotham
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PART IV: TABLE OF AUTHORITIES

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