SCC File No.:

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

APPLICANT
(Appellant)

WEYERHAEUSER COMPANY LIMITED

RESPONDENT
(Respondent)

- and -

RESOLUTE FP CANADA INC.

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANT, HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL
(Pursuant to Subsection 40(1) of the *Supreme Court Act*, and Rule 25 of the Rules of the *Supreme Court of Canada)*

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. The future exercise of legislative discretion may not be fettered by contract, and any agreement purporting to do so is void for reasons of public policy.[1] The rule against fettering reflects the fact that the executive branch of government cannot lawfully enter into any contract that would "disable the Legislature from [its] entire freedom of action at any future time when it might be needful … to legislate for the public welfare."[2]

2. In *Pacific National Investments Ltd. v Victoria (City*) this Court found that the rule against fettering applies with equal force to an agreement that seeks to impose an implied obligation on the Crown to compensate a contracting party for losses caused by the enactment of legislation. The Court concluded that attaching financial consequences to a legislative decision may operate as a significant practical disincentive and, therefore, this kind of *indirect* fetter "is no more acceptable than an outright restriction on the legislative power."[3]

3. This Court recognized a limited exception to the rule against fettering in the case of "business contracts." It concluded that governments should be required to honour their "business" and "proprietary" contracts, even in cases where the financial consequences of those commitments might be seen as potentially influencing legislative decision-making. The Court accepted that such contracts do not rise to the level of an unlawful fetter because they do not "inject the same kind of outstanding consideration into the legislative process."[4] It distinguished

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[1] *Rederiaktiebolaget Amphitrite v The King*, [1921] 3 KB 500 (Eng), Application Record ("AR"), Tab 5B; *Attorney General of British Columbia v Esquimalt & Nanaimo Ry Co*, [1950] 1 DLR 305 at 312 (PC). See also: SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Canada Law Book, 2017) at §648 [Waddams], AR, Tab 5G, pp 340-41; Peter W Hogg, et al, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 324 [Hogg], AR, Tab 5E, p 312.

[2] AR Blackshield, "Constitutional Issues Affecting Public Private Partnerships" (2006) UNSW Law JI 53 at 53, AR, Tab 5C, p 301, quoting Alpheus Todd, *Parliamentary Government in the British Colonies*, 1st ed, (London: Longmans, Green, and Co, 1880) at 192 and AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 67-68.

[3] 2000 SCC 64 at para 63, [2000] 2 SCR 919 [*PN 1*].

[4] *Ibid* at para 65.

its earlier decision in *Wells v Newfoundland*[5] explaining that *Wells* involved a "business" contract and in any event, *PN 1* concerned *municipal* legislative powers.

4. *PN 1*, however, contains a significant dissenting judgment and has also been the object of academic criticism.[6] Indeed, four years later in *Pacific National Investments Ltd. v Victoria (City)*, the plaintiff made partial recovery based on unjust enrichment.[7] This recovery is arguably inconsistent with the "no indirect fettering" rule as the compensation awarded may be viewed as a financial disincentive to legislate.

5. Since *PN 1* the operation of the business contracts exception to the no indirect fettering rule has given rise to confusion and warrants further examination by this Court.[8]

6. From a public policy perspective it would also be beneficial for this Court to clarify that *PN 1* applies to provincial governments and is not confined to contracts involving municipalities.

7. The proposed appeal affords this Court an opportunity to address these issues of national importance in the context of the public interest in environmental regulation and a contract of indemnity ("Indemnity") given by Ontario in 1985 as part of a settlement.

8. The settlement addressed the health and welfare of two First Nations Bands following the mercury contamination of the English and Wabigoon Rivers ("Rivers") in the 1960s and 1970s and resulted in the establishment of the Mercury Disability Board, the Mercury Disability Fund, the resolution of a lawsuit brought by the First Nations several years earlier, and the enactment of related federal and provincial legislation.[9]

9. The Ontario Court of Appeal implied terms into the Indemnity which were unnecessary and were in fact contrary to its express terms. The Court ought to have enforced the no indirect

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[5] [1999] 3 SCR 199 [*Wells*].
[6] See Hogg, *supra* note 1, at 327-28, AR, Tab 5E, pp 313-14.
[7] 2004 SCC 75 at para 1, [2004] 3 SCR 575 [*PN 2*].
[8] See Hogg, *supra* note 1, at 327, AR, Tab 5E, p 313.
[9] Reasons for Judgement of the Court of Appeal, December 20, 2017, reported at 2017 ONCA 1007 at para 219, [2017] OJ No 6654 (QL), Laskin JA, dissenting, [Appeal Decision], AR, Tab 2C, p 102. Two smaller lawsuits related to the mercury pollution were also resolved.

fettering rule. As a result of its failure to do so, Ontario taxpayers will be required to reimburse the holder of the Indemnity for costs incurred to comply with the terms of a regulatory order which could not have been made under the environmental legislation in place when the Indemnity was given.

10. The Court of Appeal also failed to correct the Motions Judge's erroneous application of this Court's decision in *Sattva Capital Corp. v Creston Molly Corp.*,[10] thereby endorsing a two-step contractual interpretation process and excluding the environmental legislative framework of the day from the interpretative factual matrix. Given the number of non-standard form contracts in Canada, this issue is equally one of national importance and requires further examination.

B. Facts

i. The Director's Order Underlying this Dispute

11. In August 2011, the Ontario Ministry of the Environment ("MOE") issued a preventative measures regulatory order against Resolute and Weyerhaeuser as former owners and/or persons in management or control of a mercury waste disposal site ("WDS") located near Dryden, Ontario ("Director's Order"). The Director's Order was made pursuant to section 18(1) of the *Environmental Protection Act*.[11]

12. The *EPA* was significantly amended in 1990 specifically to enable the regulator to reach back to *former* owners or those who previously had management or control of an undertaking or property to prevent, reduce or ameliorate the discharge of a contaminant into the natural environment.[12] The Director's Order could not have been made under the *EPA* as it existed at the time of the settlement in 1985.

13. Resolute and Weyerhaeuser have appealed the Director's Order to the Environmental Review Tribunal.[13] The appeals are presently in abeyance.

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[10] 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].
[11] RSO 1990, c E-19 [*EPA*]; Loi sur la protection de l'environnement, LRO 1990, c E-19 [*LPE*].
[12] This statutory amendment is discussed further under "Part III – Statement of Argument".
[13] Appeal Decision, *supra* note 9, at paras 52-53, Brown JA, AR, Tab 2C, p 41.

14. Weyerhaeuser commenced this action in May 2013 claiming that the Indemnity requires Ontario to compensate it for costs associated with the Director's Order.[14] Resolute was added, on consent, as an interested party.

ii. The Reed Era Pollution at Dryden

15. In the 1960s and 1970s, Dryden Paper Company Ltd. and Dryden Pulp Ltd. (both acquired by Reed Ltd. in 1976)[15] owned and operated a chemical plant and pulp and paper mill near Dryden. The operations produced various pollutants including untreated mercury waste which were released into the Rivers ("Reed Era Pollution").[16]

16. In order to address the pollution, Ontario required Reed to modernize the Dryden operations, cease dumping the mercury waste, and create the WDS.[17] The modernization requirements were contained in a Control Order made against Reed under the 1971 *EPA*.[18]

17. The WDS was established in 1971 and has since been subject to regular monitoring, maintenance, testing and reporting as prescribed by MOE certificates of approval.[19] This work will be required for the remaining 35 year lifespan of the WDS.[20]

18. In 1977, the Grassy Narrows and Islington First Nations[21] (collectively, "First Nations") sued Dryden Chemicals, Dryden Paper and Reed seeking damages for personal injury, loss of jobs, and loss of way of life due to the contamination of the Rivers ("First Nations Litigation").[22]

iii. The Ownership of the Contaminated Land: 1979 - present

19. In 1979, against the background of the MOE Control Order and the ongoing First Nations Litigation, Reed sought to sell its Dryden operations to Great Lakes Forest Products Limited.[23]

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[14] *Ibid* at para 53, Brown JA, AR, Tab 2C, p 41.
[15] *Ibid* at para 13, Brown JA, AR, Tab 2C, p 28.
[16] *Ibid* at paras 9-10, Brown JA, AR, Tab 2C, p 27.
[17] *Ibid* at para 11, Brown JA, and at para 215, Laskin JA, dissenting, AR, Tab 2C, pp 27-28, 100.
[18] *Ibid* at para 215, Laskin JA, dissenting, AR, Tab 2C, p 100.
[19] *Ibid* at paras 11-12, 14, 16, 21, 23, Brown JA, AR, Tab 2C, pp 27-28, 31.
[20] *Ibid* at para 48, Brown JA, AR, Tab 2C, p 40.
[21] Islington First Nation is now known as Wabaseemoong Independent Nations.
[22] Appeal Decision, *supra* note 9, at para 15, Brown JA, AR, Tab 2C, p 28.

20. When negotiations between Great Lakes and Reed stalled due to concerns about future Reed Era Pollution claims, Ontario offered to cap Great Lakes' exposure for damages at $15 million.[24] Great Lakes correspondingly committed to spending approximately $200 million to modernize and expand the Dryden operations.[25]

21. Ontario's commitment to Great Lakes was commemorated in a letter from the Treasurer of Ontario dated November 6, 1979 ("1979 Indemnity").[26]

22. An asset purchase agreement was then finalized ("Dryden Agreement") and the sale of the Dryden assets was completed in December of 1979.[27]

23. In the Dryden Agreement Great Lakes undertook to indemnify Reed for damages from pollution claims and to share the cost of any settlement or judgment to a maximum of $15 million. Above the $15 million limit, Reed could look to Great Lakes for full indemnification. In turn, Great Lakes could recover from Ontario under the 1979 Indemnity.[28]

24. Specifically, Clause 5.3 of the Dryden Agreement committed Great Lakes to:

> … indemnify [Reed] … harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the Closing Date as a result of any claims, actions or proceedings existing at the Closing Date or which may arise or be asserted thereafter, whether by individuals, firms, companies, government (including the federal government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damages, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in party, the discharge or escape or presence of any pollutant, including mercury or any other substance, from or in the plant or plants or lands or premised forming part of the Dryden assets sold by [Reed] to [Great Lakes] **(**hereinafter referred to as "Pollution Claims")…[29]

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[23] *Ibid* at para 17, Brown JA, AR, Tab 2C, p 29.
[24] *Ibid* at para 18, Brown JA, AR, Tab 2C, p 29.
[25] *Ibid*.
[26] *Ibid* at para 19, Brown JA, AR, Tab 2C, pp 29-30.
[27] *Ibid* at para 22, Brown JA, AR, Tab 2C, p 31.
[28] *Ibid* at para 218, Laskin JA, dissenting, AR, Tab 2C, p 101.
[29] Memorandum of Agreement between Great Lakes Forest Products Limited and Reed Ltd. dated December 7, 1979 at clause 5.3, AR, Tab 4A, pp 166-71.

25. Clause 5.3 was an important consideration in the dissenting judgment of Laskin J.A. and is significant in determining whether the parties to the Indemnity intended it to cover costs associated with provincial regulatory orders.

26. Great Lakes continued the modernization of the Dryden operations until 1985.[30]

27. Since the completion of the sale, Great Lakes and its corporate successors, including Resolute, have fulfilled the ongoing regulatory requirements pertaining to the WDS.[31]

28. In 1998, Bowater entered into negotiations with Weyerhaeuser for the sale of the Dryden assets. Weyerhaeuser sought to exclude the WDS from the assets to be purchased. A severance of the WDS was contemplated before closing.

29. When the severance became impossible to obtain before closing, Weyerhaeuser agreed to take title to it on the condition that it would be leased back to Bowater and reconveyed to Bowater after the severance. To facilitate this arrangement the parties negotiated an access agreement and a lease. Under the lease Bowater gave Weyerhaeuser a broad indemnity which covered all obligations relating to the WDS and expressly survived termination of the lease ("Lease Indemnity").[32] The sale to Weyerhaeuser was then completed on September 30, 1998.[33]

30. The severance of the WDS was obtained approximately two years later and it was reconveyed to Bowater on August 25, 2000.[34]

31. Weyerhaeuser sold the Dryden paper plant to Domtar Inc. in 2007.[35]

32. In 2009 Bowater filed for protection under the *Companies' Creditors Arrangement Act*.[36] Following the issuance of the Director's Order, Weyerhaeuser filed a proof of claim in the *CCAA*

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[30] Appeal Decision, *supra* note 9, at para 86, Brown JA, and at para 217, Laskin JA, dissenting, AR, Tab 2C, pp 52-53, 101.
[31] *Ibid* at paras 23, 38, 46, Brown JA, AR, Tab 2C, pp 31, 37, 39. In 1998 Great Lakes became Bowater, which in 2010 became Abitibi-Consolidated Inc. and finally Resolute in 2012.
[32] *Ibid* at para 141, Brown JA, AR, Tab 2C, p 72.
[33] *Ibid* at paras 39-40, 135-42, Brown JA, AR, Tab 2C, pp 38, 70-72.
[34] *Ibid* at paras 41, 143, Brown JA, AR, Tab 2C, pp 38, 73.
[35] *Ibid* at para 42, Brown JA, AR, Tab 2C, p 38.

proceedings based on the Lease Indemnity. The claim was for the value of the work required by the Director's Order ($273,063) together with estimated legal costs ($100,000). The *CCAA* monitor accepted the claim and Weyerhaeuser received a distribution of shares in Resolute.[37]

33. Before emerging from *CCAA* protection, Bowater transferred the WDS to a related numbered company (4513541 Canada Inc. ("451")) already itself in receivership. In April 2011 the Receiver of 451 abandoned the WDS and was subsequently discharged.[38] The WDS was effectively orphaned and, as a result, the Director's Order was addressed to the existing previous owners including Resolute and Weyerhaeuser.[39]

iv. Resolution of the First Nations Litigation and the Indemnity

34. In the early 1980s the governments of Canada and Ontario engaged in mediation with the First Nations to address the problems caused to their communities by the mercury discharge.[40] The First Nations Litigation formed part of the discussions.

35. Great Lakes was reluctant to contribute to any settlement of the First Nations Litigation unless it obtained releases for future claims. In order to facilitate the negotiations the Provincial Secretary for Resources Development wrote to Great Lakes and reaffirmed Ontario's commitment under the 1979 Indemnity.[41]

36. The First Nations Litigation was finally settled on terms set out in a November 22, 1985 Memorandum of Agreement ("MOA") entered into by Canada, Ontario, the First Nations, Reed and Great Lakes.[42] In addition to the First Nations receiving settlement funds the MOA created a provincial and legislative program to address health and social issues in the two First Nations

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[36] RSC 1985, c C-36; Loi sur les arrangements avec les créanciers des compagnies, LRC 1985, c C-36.
[37] Appeal Decision, *supra* note 9, at paras 144-145, Brown JA, AR, Tab 2C, p 73.
[38] *Ibid* at paras 43-45, Brown JA, AR, Tab 2C, pp 38-39.
[39] By 1993 Reed no longer existed.
[40] Appeal Decision, *supra* note 9, at para 24, Brown JA, AR, Tab 2C, pp 31-32.
[41] *Ibid.*
[42] *Ibid* at para 25, Brown JA, AR, Tab 2C, p 33.

communities. The program included the creation of the Mercury Disability Fund and the Mercury Disability Board, both of which still exist.[43]

37. The MOA also required Ontario to grant an indemnity pertaining to the "issues" which the MOA defined as follows:

> The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise concerns in respect of the social and economic circumstances and the health of the present and future members of the Bands ("the issues").[44]

38. As complementary settlement documents to the MOA, in December 1985 the parties executed an Escrow Agreement and the Indemnity. It is the Indemnity which is central to the proposed appeal.[45]

39. Clause 1 of the Indemnity provides:

> Ontario hereby covenants and agree to indemnify Great Lakes, Reed … harmless from and against any obligations, liability, damages, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter … whether by individuals, firms, companies, government (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by any statutory or other authority) … because of or relating to any damage, loss, event or circumstances, caused [by] ... the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by [Reed] to [Great Lakes] under the Dryden Agreement (hereinafter referred to as "Pollution Claims"). …[46]

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[43] *Ibid* at para 28, Brown JA, and at para 219, Laskin JA, dissenting, AR, Tab 2C, pp 33-34, 102.
[44] Memorandum of Agreement between Great Lakes Forest Products Ltd, Reed Inc., Her Majesty the Queen in Right of the Province of Ontario, Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs, the Islington Indian Band and the Grassy Narrows Indian Band dated November 22, 1985, AR, Tab 4B; *Ibid*, at para 26, Brown JA, AR, Tab 2C, p 33.
[45] Appeal Decision, *ibid*, at para 30, Brown JA, AR, Tab 2C, p 34.
[46] *Ibid* at para 31, Brown JA, AR, Tab 2C, pp 34-36.

40. Clause 2 requires Great Lakes and Reed to notify Ontario if either receives a Pollution Claim and entitles Ontario to take control of the defence of any action.[47] Clause 3 requires the companies to cooperate in the investigation, defence, and settlement of any Pollution Claim.[48]

41. Seven days after the signing of the MOA, but 17 days before the Escrow Agreement and Indemnity were signed, the Ontario "Spills Bill" was proclaimed in force.[49] This legislation contained a provision creating a broad, new statutory cause of action against polluters and is available to governments as well as to individuals. It is contained in section 99 of the *EPA* and remains in force today.[50]

PART II – QUESTIONS IN ISSUE

42. The proposed appeal raises issues of public importance and important issues of law or mixed fact and law. These are:

(i) the applicability of the no indirect fettering rule in a provincial environmental regulatory context;

(ii) the potential impact of the business contracts exception to the no indirect fettering rule, as articulated by this Court in *PN 1*, and its applicability to provincial contracts generally as well as to the facts of this case; and

(iii) the appropriate use of this Court's decision in *Sattva*.

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[47] *Ibid* at para 266, Laskin JA, dissenting, AR, Tab 2C, p 122.
[48] *Ibid* at para 268, Laskin JA, dissenting, AR, Tab 2C, p 123.
[49] The MOA was signed on November 22, 1985. The Spills Bill was proclaimed in force on November 29, 1985. The Escrow Agreement and Indemnity were executed on December 16, 1985.

[50] Appeal Decision, *supra* note 9, at para 247, Laskin JA, dissenting, AR, Tab 2C, p 115; *EPA, supra* note 11, s 99; *LPE, supra* note 11, art 99.

PART III – STATEMENT OF ARGUMENT

A. Indirect Fettering of Legislative Power

43. The Indemnity contains no express language purporting to encumber future legislative action. As a matter of contractual interpretation, there is no basis to imply such terms. Moreover, doing so violates the anti-fettering doctrine set out by this Court in *PN 1*.

44. In *PN 1*, the City of Victoria passed a down-zoning bylaw that negatively impacted a developer's ability to complete a harbour project, thereby reducing profitability. The developer argued that its agreement with the City included an implied term that it would keep the zoning in place for a number of years and pay damages if it changed the zoning early. This Court dismissed the developer's appeal on the basis that the municipality lacked the statutory authority to make commitments about the future exercise of its delegated legislative power and, in any event, such an agreement would have been void as against public policy.[51]

45. In reaching its decision this Court distinguished *Wells*[52] in two ways: (1) *Wells* involved a business contract; and (2) *PN 1* concerned municipal, not provincial, legislative powers.[53]

46. In *Wells*, the provincial government had appointed Mr. Wells commissioner of the Newfoundland utilities board until age 70, subject to good behaviour. The legislature subsequently abolished the board and Mr. Wells lost his job. When he sued for breach of contract, Newfoundland defended arguing that an implied promise to maintain the board was invalid as a fetter on legislative power.[54]

47. This Court found that while Mr. Wells' employment contract could not be permitted to fetter the province's power to abolish the board, he was nonetheless entitled to damages for breach of contract. In doing so, this Court made clear that a statute that causes a breach of

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[51] *PN 1, supra* note 3, at para 66.
[52] *Wells, supra* note 5.
[53] *PN 1, supra* note 3, at para 61.
[54] See *R v Dominion of Canada Postage Stamp Vending Co.*, [1930] SCR 500 at 505-06; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at para 6.

contract should be construed as permitting an action in damages in the absence of clear evidence of a contrary legislative intent.[55]

48. The rule of statutory interpretation established in *Wells* would not be challenged in the proposed appeal as it is acknowledged that legislation cancelling or avoiding Crown contracts should be interpreted as preserving the private law right of affected parties to claim damages for breach. This finding is consistent with the established principle that legislation expropriating private property should be construed as intending the Crown to pay fair compensation.[56]

49. Despite the very different legal and factual contexts in which *PN 1* and *Wells* were decided, some lower courts and academics have tended to treat the decisions in a way that suggests that they are not fully consistent.[57] The proposed appeal offers this Court an opportunity to correct this confusion.

B. The Implied Contractual Term

50. The proposed appeal concerns regulatory enforcement action taken under a provincial statutory provision that was not enacted until five years after the Indemnity was executed.

51. While the Indemnity contemplates both known and future claims based on Reed Era Pollution, insofar as the word "statutory" is concerned these claims had to have been possible under statutes *in existence at the time the Indemnity was signed*.

52. Ontario would thus indemnify Great Lakes in respect of any claim brought against it in tort (such as in the First Nations Litigation) or under statutes of the day such as the Spills Bill.[58]

53. Ontario could also be called upon to indemnify Great Lakes for costs, including defence costs, for tort claims brought by other provinces such as that brought by Manitoba against Dryden Chemicals in the early 1970s.[59]

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[55] *Wells, supra* note 5, at para 49.
[56] *Toronto Area Transit Operating Authority v Dell Holdings Ltd.*, [1997] 1 SCR 32 at paras 20, 22.
[57] *Rio Algom Ltd v Canada (Attorney General)*, 2012 ONSC 550 at paras 153-155, [2012] OJ No 100 [*Rio Algom*]; Hogg, *supra* note 1, at 331, AR, Tab 5E, p 315.
[58] Ontario would indemnify Great Lakes' corporate successors or assigns in the same manner.

54. The Indemnity requires no importation of terms in order to give it meaning or utility.[60] It is fully functional on its face. There is no legal justification for implying terms, let alone ones which are contrary to this Court's decision in *PN 1* and which undermine the function of the provincial regulator.[61]

55. In effect, the majority of the Court of Appeal has unnecessarily implied a term into the Indemnity that requires Ontario to indemnify the holder from costs incurred to comply with regulatory orders that the Director did not have any statutory power to issue at the time the Indemnity was signed. The effect of this implied term is to alter what was agreed to by creating financial immunity against future legislative policy decisions of the Ontario Legislature concerning environmental liability.

56. The Court of Appeal's decision results in Ontario taxpayers assuming responsibility for reimbursing any holder of the Indemnity for costs incurred in complying with any regulatory orders in respect of both the WDS and the surrounding property purchased by Great Lakes in 1979. Such an interpretation is detrimental to the domestic affairs of the province and is contrary to public policy.

C. The Business Contracts Exception to the No Indirect Fettering Rule

57. This Court's decision in *PN 1* has not provided lower courts with adequate guidelines within which to apply the "business contracts" exception to the rule against indirect fettering. There is considerable confusion about the scope and operation of this concept.

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[59] *Manitoba v Interprovincial Co-Operatives Ltd.* (1972), 30 DLR (3d) 166 (Man QB); *Interprovincial Co-Operatives Ltd v Dryden Chemicals Ltd*, [1976] 1 SCR 477. The statutory claim by Manitoba was dismissed by the SCC as *ultra vires* the province's jurisdiction. The tort claims by Manitoba were allowed to proceed.

[60] Hogg, *supra* note 1, at 324, 331, AR, Tab 5E, pp 312, 315.

[61] There is overwhelming authority to support this proposition. See *Rio Algom*, *supra* note 57 at paras 36, 38, 40, 42; Waddams, *supra* note 1, at §503, AR, Tab 5G, pp 337-39; See also, *Attorney General of Belize & Ors v Belize Telecom Ltd*, [2009] UKPC 10, AR, Tab 5A.

58. In *Rio Algom Ltd. v Canada*, the court rejected the decision in *PN 1* stating that it was likely wrong:

> For present purposes, I am left with the situation that there is a very strong argument that [*PN 1*] is wrong and inconsistent with other equally binding and authoritative Supreme Court of Canada's [sic] decisions; namely [*Wells*], and perhaps the return visit decision of [*PN 2*].
>
> It is also *arguable* that in the present case, the Cold War Contracts are "business contracts" for which it can be said that [the] indirect fettering rule does not apply under the authority of [*PN 1*] …[62] [Emphasis added]

59. The Court of Appeal's decision in *Weyerhaeuser* is a further illustration of the confusion. Despite the clear reference to the health and welfare of the First Nations in the MOA and the related provincial and federal Acts, the majority of the Court of Appeal refused to correct the Motions Judge's finding that the Indemnity was a "business agreement".[63]

60. In a strongly worded dissent Laskin, J.A. concluded that it was "plain" from the nature of the MOA and the Indemnity that Ontario was engaged in a policy initiative when it resolved the First Nations Litigation.[64]

D. Is the No Indirect Fettering Rule Limited to Municipal Legislative Actions?

61. Whether the no indirect fettering rule is limited to municipalities and thus may require the payment of damages for breach of contract based on provincial legislative acts also remains unclear.[65] As Hogg highlights, if such a limitation exists, the business contracts explanation for the result in *Wells* was unnecessary.[66]

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[62] *Rio Algom, supra* note 57, at paras 153-155. See also *Ontario First Nations (2008) Limited Partnership v Aboriginal Affairs (Ontario)*, 2013 ONSC 7141 at para 58, 118 OR (3d) 356; Hogg, *supra* note 1, at p 327, AR, Tab 5E, p 313.

[63] Appeal Decision, *supra* note 9, at paras 118-121, Brown JA, AR, Tab 2C, pp 64-65.

[64] *Ibid*, at para 219, Laskin JA, dissenting, AR, Tab 2C, p 102.

[65] Such a limited application is implied by Binnie J. in *PN 2*.

[66] See Hogg, *supra* note 1, at 328, AR, Tab 5E, p 314.

62. While viewing *PN 1* as wrongly decided, Hogg would at least limit the no indirect fettering rule to municipal legislative actions.[67] This was an important element of the Court of Appeal's finding as well.[68]

63. A contrary view is expressed by J. Gareth Morley who, in considering *Wells* and *PN 1*, notes that "[i]t is not enough of an answer to say the Crown could still do whatever the public law requires so long as it compensates, if the prospect of damages would itself interfere with public law values."[69]

64. Uncertainty regarding the proper scope of *PN 1* also appears in the conflicting views expressed by the Justices in two Newfoundland Court of Appeal cases. In *Andrews v Canada (Attorney General)*,[70] the majority of the Court would have allowed the appeal from a decision striking the plaintiffs' claim on the basis of the academic criticism of *PN 1*. In a different "*Andrews*" decision the opposite result was reached.[71]

65. In *PN 1* this Court said that municipal councils should be free to govern "based on the best interests of their residents".[72] As a matter of policy why should this be any less so in the case of a provincial legislature?

E. The Appropriate use of this Court's Decision in *Sattva*

i. Textualist vs Contextual Analysis

66. While the Motions Judge acknowledged the *Sattva* decision, he applied *Eli Lilly & Co v Novopharm Ltd*[73] instead. His Honour concluded that the correct approach to interpreting the scope of the Indemnity was to review the plain words of the indemnification clause and

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[67] *Ibid* at 328, 331, AR, Tab 5E, pp 314-15.
[68] Appeal Decision, *supra* note 9, at para 124, Brown JA, AR, Tab 2C, p 66.
[69] J Gareth Morley, "Sovereign Promises: Does Canada Have a Law of Administrative Contracts?" (2012) 23 Can J Admin L & Prac 17 at 30, AR, Tab 5F, p 324.
[70] 2014 NLCA 32, 376 DLR (4th) 719.
[71] 2009 NLCA 70, 314 DLR (4th) 577; leave to appeal denied 2010 CanLII 27731 (SCC).
[72] *PN 1*, *supra* note 3, at para 71.
[73] [1998] 2 SCR 129 [*Eli Lilly*].

determine their meaning *before* examining the "extrinsic evidence" of the factual matrix to "test" whether his interpretation accorded with the background events.[74]

67. By upholding the Motions Judge's findings on the approach to the factual matrix, the majority of the Court of Appeal permitted his two-part analysis to stand.

68. *Sattva*, however, moves away from the textualist approach and two-part analysis set out in *Eli Lilly*. It instructs lower courts to read and interpret the words of the contract not only within the context of the document as a whole but consistent with the surrounding circumstances.[75]

69. Laskin J.A. appropriately noted:

> [The Motions Judge's] two-stage approach to the interpretation of the … Indemnity is not the proper approach. Context controls meaning. Rarely can the words of an agreement be understood without knowledge of their context. Thus, as Doherty J.A. stated in *Starrcoll Inc. v. 2281927 Ontario Ltd.*[citation omitted]: "The words of an agreement, and the context in which those words are used, cannot be separated and approached at different stages of the interpretative process."[76]

ii. Content of the Factual Matrix

70. Further guidance from this Court is also necessary on whether the statutes of the day are properly part of the factual matrix as distinct from subjective evidence of contractual intention.

71. It is trite to say that everyone is presumed to know the law. Yet the majority of the Court of Appeal did not consider the Spills Bill to be part of the factual matrix concluding instead that it was inadmissible as evidence of the parties' specific negotiations.[77] In consequence, the Court

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[74]Reasons for Judgement of the Ontario Superior Court of Justice – Commercial List by Justice Hainey, July 19, 2016, reported at 2016 ONSC 4652 at paras 39-40, 47, [2016] OJ No 3900 (QL), AR, Tab 2A, pp 11, 13.

[75] *Sattva, supra* note 10, at para 47; *Eli Lilly, supra* note 73; Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016) at 25, AR, Tab 5D, p 309.

[76] Appeal Decision, *supra* note 9, at para 237, Laskin JA, dissenting, AR, Tab 2C, pp 109-10, citing *Starrcoll Inc. v 2281927 Ontario Ltd.*, 2016 ONCA 275 at para 17, [2016] OJ No 2029.

[77] Appeal Decision, *ibid*, at para 112, Brown JA, AR, Tab 2C, pp 62-63.

failed to appreciate the reason why the words "statutory or otherwise" were included in the Indemnity and what they meant.

72. Consistent with this Court's decision in *Sattva*, Laskin J.A. concluded that the near simultaneous enactment of the Spills Bills and the statutory right of action it created is an objective fact that would have or reasonably ought to have been known to the parties around the time the Indemnity was entered into.[78] It is submitted that His Honour was correct when he said:

> The language used in s. 5.3 of the Dryden Agreement is virtually identical to language used in s. 1 of the 1985 Indemnity, save for the addition of the phrase "statutory or otherwise". As the two parties to the Dryden Agreement – Great Lakes and Reed – were also two of the three parties to the 1985 Indemnity, it is likely that the language of s. 1 of the 1985 Indemnity was intended to track that of s. 5.3 of the Agreement. But the Dryden Agreement, unlike the 1985 Indemnity, preceded the Spills Bill, explaining why the phrase "statutory or otherwise" was omitted from the Agreement, but included in the Indemnity.[79]

PART IV – SUBMISSIONS ON COSTS

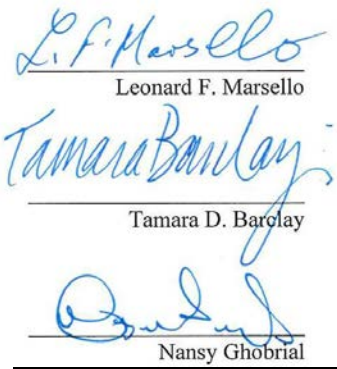
73. Ontario does not seek costs of this Application.

PART V – ORDER SOUGHT

74. Ontario requests an order granting leave to appeal from the decision of the Court of Appeal for Ontario dated December 20, 2017.

Dated at the City of Toronto, in the Province of Ontario, this 14th day of February, 2018.

SIGNED BY:



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[78] *Ibid*, at para 248, Laskin JA, dissenting, AR, Tab 2C, p 115.
[79] *Ibid* at para 251, Laskin JA, dissenting, AR, Tab 2C, p 116.

PART VI - TABLE OF AUTHORITIES

Secondary Sources **Paras**

PART VII – STATUTORY PROVISIONS

***Environmental Protection Act*, RSO 1990, c E-19**

Compensation, spills

99 (1) In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. R.S.O. 1990, c. E.19, s. 99 (1).

Right to compensation

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant. R.S.O. 1990, c. E.19, s. 99 (2).

Exception

(3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or

(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof. R.S.O. 1990, c. E.19, s. 99 (3).

Qualification

(4) Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,

(a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or

(b) from liability, under clause (2) (a), for cost and expense incurred or, under clause (2) (b), for all reasonable cost and expense incurred,

(i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or

(ii) to do everything practicable to restore the natural environment,

or both. R.S.O. 1990, c. E.19, s. 99 (4).

Enforcement of right

(5) The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction. R.S.O. 1990, c. E.19, s. 99 (5).

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence. R.S.O. 1990, c. E.19, s. 99 (6).

Contribution

(7) In an action under this section,

(a) where the plaintiff is an owner of the pollutant or a person having control of the pollutant, the court shall determine the degree, if any, in which the plaintiff would be liable to make contribution or indemnification under subsection (8) if the plaintiff were a defendant; and

(b) where the plaintiff is not an owner or a person having control referred to in clause (a), the court shall determine the degree, if any, in which the plaintiff caused or contributed to the loss, damage, cost or expense by fault or negligence,

and the court shall reduce the compensation by the degree, if any, so determined. R.S.O. 1990, c. E.19, s. 99 (7).

Extent of liability

(8) Where two or more persons are liable to pay compensation under this section, they are jointly and severally liable to the person suffering the loss, damage, cost or expense but as between

themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify the other in accordance with the following principles:

1. Where two or more persons are liable to pay compensation under this section and one or more of them caused or contributed to the loss, damage, cost or expense by fault or negligence, such one or more of them shall make contribution to and indemnify,

i. where one person is found at fault or negligent, any other person liable to pay compensation under this section, and

ii. where two or more persons are found at fault or negligent, each other and any other person liable to pay compensation under this section in the degree in which each of such two or more persons caused or contributed to the loss, damage, cost or expense by fault or negligence.

2. For the purpose of subparagraph ii of paragraph 1, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense, such two or more persons shall be deemed to be equally at fault or negligent.

3. Where no person liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense by fault or negligence, each of the persons liable to pay compensation is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances. R.S.O. 1990, c. E.19, s. 99 (8).

Enforcement of contribution

(9) The right to contribution or indemnification under subsection (8) may be enforced by action in a court of competent jurisdiction. R.S.O. 1990, c. E.19, s. 99 (9).

Adding parties

(10) Wherever it appears that a person not already a party to an action under this section may be liable in respect of the loss, damage, cost or expense for which compensation is claimed, the person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties. R.S.O. 1990, c. E.19, s. 99 (10).

Settlement and recovery between persons liable

(11) A person liable to pay compensation under this section may recover contribution or indemnity from any other person liable to pay compensation under this section in respect of the loss, damage, cost or expense for which the compensation is claimed by settling with the person suffering the loss, damage, cost or expense and continuing the action or commencing an action against such other person. R.S.O. 1990, c. E.19, s. 99 (11).

Amount of settlement

(12) A person who has settled a claim and continued or commenced an action as mentioned in subsection (11) must satisfy the court that the amount of the settlement was reasonable, and, if the court finds the amount was excessive, the court may fix the amount at which the claim should have been settled. R.S.O. 1990, c. E.19, s. 99 (12).

(13), (14) REPEALED: 2002, c. 24, Sched. B, s. 25.

***Loi sur la protection de l'environnement*, LRO 1990, c E 19**

Indemnisation en ce qui concerne un déversement

99 (1) La définition qui suit s'applique au présent article.

«perte ou dommage» S'entend d'une lésion corporelle, de la perte de la vie, de la perte de l'usage ou de la jouissance de biens ainsi que d'une perte pécuniaire, y compris celle du revenu. L.R.O. 1990, chap. E.19, par. 99 (1).

Droit à l'indemnisation

(2) Sa Majesté du chef de l'Ontario ou du chef du Canada ou toute autre personne a le droit d'obtenir une indemnisation du propriétaire du polluant et de la personne qui exerce un contrôle sur le polluant :

a) en ce qui concerne une perte ou un dommage subis directement à la suite :

(i) du déversement d'un polluant qui a ou aura vraisemblablement une conséquence préjudiciable,

(ii) de l'exercice de tout pouvoir en vertu du paragraphe 100 (1) ou de l'exécution d'une obligation imposée, de l'application d'un arrêté pris, ou d'une directive donnée dans le cadre de la présente partie, ou de la tentative qui est faite à cette fin,

(iii) du défaut, notamment par négligence, d'exécuter une obligation imposée ou d'appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie;

b) en ce qui concerne les frais et les dépenses raisonnables engagés en vue de faire appliquer ou de tenter de faire appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie. L.R.O. 1990, chap. E.19, par. 99 (2).

Exception

(3) Le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant n'engagent pas leur responsabilité en vertu du paragraphe (2) s'ils démontrent qu'ils ont pris toutes les

mesures raisonnables pour empêcher le déversement du polluant ou s'ils démontrent que ce déversement a été occasionné en totalité par l'une ou plusieurs des causes suivantes :

a) un fait de guerre, une guerre civile, une insurrection, un acte de terrorisme ou un acte d'hostilité de la part du gouvernement d'un pays étranger;

b) un phénomène naturel d'un caractère exceptionnel, inévitable et inéluctable;

c) un acte accompli ou une omission commise dans l'intention de nuire par une personne autre que celle dont le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant est responsable en droit à cet effet. L.R.O. 1990, chap. E.19, par. 99 (3).

Précisions

(4) Le paragraphe (3) ne dégage pas le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant :

a) de la responsabilité qui découle de la perte ou du dommage qui survient directement à la suite du défaut, notamment par négligence, du propriétaire du polluant ou de la personne qui exerce un contrôle sur le polluant d'exécuter une obligation imposée ou de faire appliquer un arrêté pris ou une directive donnée aux termes de la présente partie;

b) de la responsabilité encourue en vertu de l'alinéa (2) a) à l'égard des frais et des dépenses engagés ou, en vertu de l'alinéa (2) b), à l'égard des frais et des dépenses raisonnables qui sont engagés pour l'une ou l'autre des fins suivantes ou pour les deux à la fois :

(i) prendre toutes les mesures réalisables de façon à empêcher et à éliminer la conséquence préjudiciable et à en atténuer la portée,

(ii) prendre toutes les mesures réalisables de façon à reconstituer l'environnement naturel. L.R.O. 1990, chap. E.19, par. 99 (4).

Exercice du droit à l'indemnisation

(5) Le droit à l'indemnisation prévu au paragraphe (2) peut être exercé au moyen d'une action intentée devant un tribunal compétent. L.R.O. 1990, chap. E.19, par. 99 (5).

Responsabilité

(6) La responsabilité encourue aux termes du paragraphe (2) n'est pas subordonnée à une faute ou à une négligence. L.R.O. 1990, chap. E.19, par. 99 (6).

Contribution

(7) Dans une action intentée en vertu du présent article :

a) si le demandeur est le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant, le tribunal décide dans quelle mesure, le cas échéant, le demandeur serait tenu

de verser une contribution ou une indemnité aux termes du paragraphe (8) s'il était le défendeur;

b) si le demandeur n'est pas le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant visés à l'alinéa a), le tribunal décide dans quelle mesure, le cas échéant, le demandeur a causé la perte, le dommage, les frais ou les dépenses ou y a contribué par sa faute ou par sa négligence.

Le tribunal réduit le montant de l'indemnisation dans la mesure, le cas échéant, fixée par la décision. L.R.O. 1990, chap. E.19, par. 99 (7).

Étendue de la responsabilité

(8) Deux ou plusieurs personnes qui sont tenues de verser une indemnisation aux termes du présent article sont solidairement responsables envers la personne qui a subi la perte, le dommage, les frais ou les dépenses; en ce qui concerne leur responsabilité mutuelle, à défaut de contrat entre elles, même implicite, chaque personne est tenue de verser une contribution aux autres et de les indemniser conformément aux principes suivants :

1. Si deux ou plusieurs personnes sont tenues de payer une indemnisation en vertu du présent article et que l'une ou plusieurs d'entre elles ont causé la perte, le dommage, les frais ou les dépenses ou y ont contribué par leur faute ou leur négligence, celles-ci versent des contributions et des indemnités de l'une des façons suivantes :

i. une personne dont la faute ou la négligence sont constatées indemnise toute autre personne tenue de payer une indemnisation aux termes du présent article,

ii. deux personnes ou plus dont la faute ou la négligence sont constatées s'indemnisent mutuellement et indemnisent toute autre personne tenue de payer une indemnisation aux termes du présent article dans la mesure où les deux personnes ou plus ont causé la perte, le dommage, les frais ou les dépenses par leur faute ou leur négligence, ou y ont contribué.

2. Pour l'application de la sous-disposition ii de la disposition 1, s'il s'avère trop difficile de déterminer la mesure dans laquelle la faute ou la négligence de deux ou plusieurs personnes tenues de payer une indemnité aux termes du présent article ont causé ou contribué à causer la perte, le dommage, les frais ou les dépenses, ces personnes sont réputées également responsables.

3. Si aucune des personnes tenues de verser une indemnisation aux termes du présent article n'a causé la perte, le dommage, les frais ou les dépenses ou n'y a contribué par sa faute ou sa négligence, chacune de ces personnes est tenue de verser aux autres une contribution et une indemnité dans la mesure jugée juste et équitable dans les circonstances. L.R.O. 1990, chap. E.19, par. 99 (8).

Exercice du droit à une contribution

(9) Le droit à une contribution ou à une indemnité aux termes du paragraphe (8) peut être exercé au moyen d'une action intentée devant un tribunal compétent. L.R.O. 1990, chap. E.19, par. 99 (9).

Jonction de parties

(10) S'il appert qu'une personne qui n'est pas déjà partie à une action intentée en vertu du présent article pourrait être responsable de la perte, du dommage, des frais ou des dépenses pour lesquels une indemnisation est réclamée, la personne peut être jointe à l'action comme défendeur, à des conditions qui sont estimées justes. Elle peut également être mise en cause conformément aux règles de procédure civile en matière de mise en cause. L.R.O. 1990, chap. E.19, par. 99 (10).

Transaction et recouvrement entre les personnes responsables

(11) La personne tenue de verser une indemnisation aux termes du présent article peut recouvrer une contribution ou une indemnité de toute autre personne tenue de verser une indemnisation aux termes du présent article à l'égard de la perte, du dommage, des frais ou des dépenses pour lesquels l'indemnisation est réclamée, de la façon suivante : elle transige avec la personne qui a subi la perte, le dommage, les frais ou les dépenses et poursuit l'action ou intente une nouvelle action contre cette autre personne. L.R.O. 1990, chap. E.19, par. 99 (11).

Montant de la transaction

(12) La personne qui a effectué une transaction et qui poursuit ou intente l'action visée au paragraphe (11) doit convaincre le tribunal que le montant de la transaction était raisonnable. Si le tribunal constate que le montant était excessif, il peut fixer le montant auquel la transaction aurait dû s'élever. L.R.O. 1990, chap. E.19, par. 99 (12).

(13) et (14) ABROGÉ : 2002, chap. 24, annexe B, art. 25.