

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)

and

WEYERHAEUSER COMPANY LIMITED

RESPONDENT
(Respondent)

and

RESOLUTE FP CANADA INC.

RESPONDENT
(Respondent)

RESPONSE OF WEYERHAEUSER COMPANY LIMITED
TO APPLICATION FOR LEAVE BY HER MAJESTY THE QUEEN AS
REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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TAB 1

**RESPONSE OF WEYERHAEUSER COMPANY LIMITED
TO APPLICATION FOR LEAVE BY HER MAJESTY THE QUEEN**

PART I - OVERVIEW

1. The Respondent Weyerhaeuser Company Limited (“Weyerhaeuser”) agrees with Her Majesty the Queen as Represented by the Ministry of the Attorney General (“the Province”) that the decision of the Court of Appeal for Ontario (the “Decision”) raises issues of public importance that require the guidance of this Honourable Court.

2. Specifically, Weyerhaeuser agrees with the Province that:
 - (a) There is a need for clarification as to how different principles of contractual interpretation apply to different types of contracts, including with respect to the relative weight that a court should apply to the wording of a contract and to the surrounding circumstances.

 - (b) There is a strong public interest in how indemnities operate in the context of environmental regulation.

 - (c) The decision of the Newfoundland Court of Appeal in *Andrews v. Canada (Attorney General)* is inconsistent with other jurisprudence on the “fettering doctrine”, which may affect the ability of governments to enter into binding agreements and settle litigation.

3. While Weyerhaeuser disagrees with the Province in respect of the merits of its proposed appeal, Weyerhaeuser concedes the public importance of the issues it raises.

PART II - QUESTIONS IN ISSUE

4. Weyerhaeuser submits that the Province's proposed appeal raises the following issues of public importance:
- (a) The proper approach to interpreting contracts;
 - (b) The enforceability of indemnities in the environmental context; and
 - (c) The ability of governments to enter into binding agreements and settlements.

PART III - STATEMENT OF ARGUMENT

A. The Proper Approach to Interpreting Contracts

5. Weyerhaeuser agrees with the Province that this case raises issues of public importance concerning the correct application of this Honourable Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*¹ The Province argues, correctly, that the case raises issues about the relative roles played in contractual interpretation by: (i) the plain and ordinary meaning of a contract; and (ii) its surrounding circumstances.²

6. These issues are inextricably linked with the issue of whether ordinary principles of contractual interpretation apply to indemnities, or whether different interpretive principles and standards of appellate review apply to different types of contracts. The latter issue is raised in the leave application that Weyerhaeuser has filed in respect of the Decision, under Court File No. 37985 (the "Weyerhaeuser Leave Application").

¹ 2014 SCC 53.

² Province's Memorandum of Argument, paras. 66 to 72.

B. The Operation of Indemnities in the Environmental Context

7. Weyerhaeuser agrees with the Province that the Decision results in “any holder of the Indemnity” being entitled to reimbursement “for costs incurred in complying with any regulatory orders in respect of both the WDS and the surrounding property”.

8. Weyerhaeuser does not agree that this is: (i) “detrimental to the domestic affairs of the province”; or (ii) “contrary to public policy”.³ However, Weyerhaeuser accepts that the question of when environmental indemnities apply and who may rely upon them are matters that are: (i) important to the domestic affairs of the province (and other provinces); and (ii) important issues of public policy.

9. This Honourable Court’s assistance is required with respect to both the question of whether environmental indemnities apply to government action (which the Province raises in its leave application) and the question of whether “successors and assigns” can rely upon environmental indemnities, which is raised in the Weyerhaeuser Leave Application.

C. The Fettering Doctrine and the Government’s Ability to Enter Into Agreements / Settle Disputes

10. Weyerhaeuser agrees with the Province that the decision of the Court of Appeal for Newfoundland in *Andrews v. Canada (Attorney General)*⁴ conflicts with other appellate level decisions regarding the applicability of the “fettering doctrine” and that this results in uncertainty that it is important for this Honourable Court to resolve.⁵

11. While it is Weyerhaeuser’s position that the Decision correctly applied the fettering doctrine (and that the Court of Appeal for Newfoundland in *Andrews* did not), Weyerhaeuser also accepts that this issue is of public importance.

³ Province’s Memorandum of Argument, para. 64.

⁴ 2009 NLCA 70 (“*Andrews*”).

⁵ Province’s Memorandum of Argument, para. 64.

12. This issue relates directly to the ability of provinces to enter into binding agreements and to settle disputes (including those relating to environmental liabilities) with private parties, which is raised in the Weyerhaeuser Leave Application.

PART IV - SUBMISSIONS IN SUPPORT OF COSTS

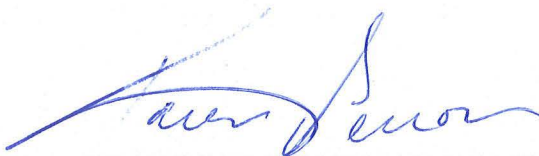
13. Weyerhaeuser agrees with the Province that there should be no costs of this Application.

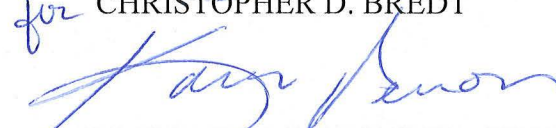
PART V - ORDER REQUESTED

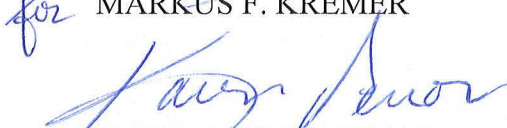
14. Weyerhaeuser submits that this Honourable Court should grant leave to appeal from the decision of the Court of Appeal for Ontario, dated December 20, 2017 to the Province, and that the appeal should be heard together with Weyerhaeuser's appeal from the Decision and Resolute's appeal from the Decision, if the Weyerhaeuser Leave Application, and Resolute's application for leave to appeal, are granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 9, 2018


for CHRISTOPHER D. BREDT


for MARKUS F. KREMER


for ALANNAH FOTHERINGHAM

Counsel for the Respondent,
Weyerhaeuser Company Limited

PART VI - TABLE OF AUTHORITIES

CASE	Paragraph number where cited in factum
<i>Sattva Capital Corp. v. Creston Moly Corp.</i> 2014 SCC 53.	5
<i>Andrews v. Canada (Attorney General)</i> 2009 NLCA 70.	10, 11