SCC File No. 37985

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

B E T W E E N:

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)

MEMORANDUM OF ARGUMENT
(RESOLUTE FP CANADA INC., RESPONDENT)
(Pursuant to Rule 27(2) of the *Rules Of The Supreme Court Of Canada*, S.O.R./2002-156)

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

Crawford Smith
Tel: 416.865.8209 / csmith@torys.com

Jeremy R. Opolsky
Tel: 416.865.8117 / jopolsky@torys.com

Counsel for the Respondent,
Resolute FP Canada Inc.

Borden Ladner Gervais LLP
World Exchange Plaza
Suite 1300, 100 Queen Street
Ottawa, ON K1P 1J9
Fax: 613.230.8842

Nadia Effendi
Tel: 613.787.3562
neffendi@blg.com

Agent for the Respondent,
Resolute FP Canada Inc.

TO: **MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Fax: 416.326.4181

Leonard F. Marcello
Tel: 416.326.4939
leonard.marsello@ontario.ca

Tamara D. Barclay
Tel: 416.326.4103
tamara.barclay@ontario.ca

Nansy Ghobrial
Tel: 416.326.7246
nansy.ghobrial@ontario.ca

Counsel for the Applicant,
Her Majesty the Queen as Represented
by the Ministry of the Attorney General

SUPREME COURT ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Fax: 613.695.8580

Marie-France Major
mfmajor@supremeadvocacy.ca

Agent for the Applicant, Her Majesty the Queen as represented by the Ministry of the Attorney General

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
Bay Adelaide Centre
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3
Fax: 416.367.6749

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

Markus Kremer
Tel: 416.367.6658
mkremer@blg.com

Alannah Fotheringham
Tel: 416.367.6394
afotheringham@blg.com

Counsel for the Respondent,
Weyerhaeuser Company Limited

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
Suite 1300
100 Queen Street
Ottawa, ON K1P 1J9
Fax: 613.230.8842

Nadia Effendi
Tel: 613.237.5160
Email: neffendi@blg.com

Agent for the Respondent,
Weyerhaeuser Company Limited

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Crown in Right of Ontario ("Ontario") made two contracts for environmental indemnification, one in 1979 and one in 1985. Ontario did so for important reasons: to ensure the viability of industry in a small, northern Ontario region. It got what it bargained for: Resolute's predecessor bought an environmentally contaminated site, invested in it, and successfully preserved a one-industry town. Ontario now seeks to resile from its side of the indemnities.

2. Each of the three parties to this action have sought leave to appeal to this Court on different legal issues. The theme underlying each application is the same: does the law allow the Crown to escape the terms of its bargain or must it keep its promises?

3. In this application, Ontario highlights the issue of fettering as one that calls out for clarification from this Court. The precedents from this Court have been found by lower courts and academics alike to be conflicting and have been applied inconsistently. Resolute agrees with Ontario that the issue needs resolution by this Court, even as it disagrees with Ontario on the purpose and interpretation of the fettering doctrine itself.

4. The background to this case is detailed in Resolute's memorandum of law, dated February 16, 2018, filed in support of its application for leave to appeal (case number 37985, application #1).

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

5. In effect, Ontario raises two issues that it claims are of national importance :

(1) the proper interpretation and applicability of the indirect fettering rule and the business contracts exception to the indirect fettering rule; and,

(2) whether the contractual interpretation in this case was consistent with this Court's jurisprudence.

6. Resolute agrees that the indirect fettering issue is of national importance. It takes no position with respect to the second issue.

PART III – CONCISE STATEMENT OF ARGUMENT

7. Ontario seeks leave to appeal to this Court on the basis that the doctrine of fettering — specifically, indirect fettering — is plagued by "uncertainty" and "considerable confusion" and thus warrants further examination by this Court. Resolute agrees. The scope of the Crown's contractual obligations with its citizens is a fundamental part of our democracy, yet the jurisprudence is currently split on the applicability and scope of the doctrine. This same issue, whether the Crown is obligated to fulfil its obligations, is at the heart of Resolute's own application for leave to appeal. Both parties' concerns should be heard by this Court, together.

8. The doctrine of fettering, the public policy against a contract restricting the legislative authority of a public body, was most recently addressed by this Court in a trilogy of decisions: *Wells v Newfoundland*,[1] *Pacific National No. 1*[2] and *Pacific National No. 2*.[3] The cases have left significant uncertainty, including as to whether an agreement can include financial consequences, for example for breach of contract, for Crown or legislative actions *i.e.* indirect fettering.

9. The more than a decade since these decisions has provided little clarity in the law. Courts across the country have attempted to interpret this Court's fettering jurisprudence, but have produced conflicting results. Academics have not fared any better. One trial court went so far as to write that "there is a very strong argument that *Pacific National No. 1* is wrong and inconsistent with other equally binding and authoritative Supreme Court of Canada's decisions; namely *Wells v. Newfoundland*."[4] Such inconsistency must be finally resolved by this Court.

10. Trial courts have been particularly troubled by the potentially broad conception of fettering proposed in *Pacific National 1* because it appears inconsistent with a fundamental premise of Canadian law: the Crown, like any person who agrees to a contract, must be held to

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[1] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.
[2] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64.
[3] *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75.
[4] *Rio Algom Limited v. The Attorney General of Canada,* 2012 ONSC 550, para. 153.

its promises or provide compensation when it breaks them.[5] Another trial court wrote that "it should not be a common or simple matter for the Crown to breach its agreements with impunity. We should be able to expect more than that."[6]

11. In essence, fettering should not be interpreted in a manner to allow the Crown to avoid the consequence of a bargain it itself made.

12. This issue is fundamentally the same as the issues raised in Resolute's own application for leave to appeal. When can the Crown escape its contractual obligations?

13. In this case, Ontario granted environmental indemnities to Resolute's predecessor in 1979 and 1985 protecting it from any liability for the mercury contamination on the Dryden undertaking. Resolute's predecessor relied on these indemnities to purchase, upgrade, and operate the Dryden undertaking and contribute millions to a settlement with First Nations.[7] And as a result, Ontario got what it wanted: investments into the Dryden mill and a revitalized industry in a one-firm town.[8]

14. Yet the majority of the Court of Appeal held that Ontario was not obligated to indemnify Resolute for the very mercury contamination for which it had agreed to indemnify Resolute's predecessor. The Crown escaped the substance of its contractual commitment because the Court of Appeal adopted an antiquated and outdated conception of the common law of assignment that is inconsistent with modern environmental regulation. Ontario now stands to benefit from a windfall: it will not have to address the environmental liability that it had agreed to indemnify,

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[5] *Rio Algom Limited v. The Attorney General of Canada,* 2012 ONSC 550, paras. 148-155; *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, para. 59.

[6] *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, para. 59.

[7] *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2016 ONSC 4652, Motion Judge Reasons, paras. 9-10, Her Majesty the Queen's Leave Application ("CLA"), Tab 2A, p. 6.

[8] *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, Court of Appeal Reasons, paras. 17-19, CLA, Tab 2C, pp. 30-31; Ontario, Legislative Assembly, Official Report of Debates (Hansard), 31st Parl., 3rd Sess., (8 November 1979) Statement of the Honourable Frank S. Miller.

even though it profited in the 1970s and 1980s from the reliance that it induced from these indemnities.

15. Granting leave in this case appeal would provide an opportunity for the Court to provide clarity on each of these critical issues.

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

16. In light of the issues of national and public importance at stake in this application, the respondent does not seek the costs of this application.

PART V – ORDER SOUGHT

17. Resolute does not oppose this Court granting Ontario's application for leave to appeal to this Honourable Court from the decision of the Court of Appeal.

April 11, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Crawford Smith

Jeremy Opolsky

Counsel for the Respondent
Resolute Canada Inc.

PART VI – TABLE OF AUTHORITIES

CASES	
Name	**Cited in paras.**
Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario), 2013 ONSC 7141	10
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SECONDARY SOURCES	
Ontario, Legislative Assembly, Official Report of Debates (Hansard), 31st Parl., 3rd Sess., (8 November 1979) Statement of the Honourable Frank S. Miller, online: <http://hansardindex.ontla.on.ca/hansardeissue/31-3/l103.htm>.	13