SCC File No.: 37985

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

BETWEEN:

WEYERHAEUSER COMPANY LIMITED

APPLICANT
(Respondent)

and

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

RESPONDENT
(Appellant)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(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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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Court of Appeal found that Bowater assigned the full benefits of the Indemnity to Weyerhaeuser in 1998 and in doing so forfeited its rights under it.[1]

2. The Court of Appeal remitted back the issue of whether Weyerhaeuser had subsequently assigned the Indemnity to Domtar in 2007. The possibility of a finding by the lower court of a further absolute assignment is thus a concern to Weyerhaeuser.

3. Of further concern to Weyerhaeuser is that the Indemnity was not actually given "to property owners," as Weyerhaeuser suggests at paragraph 2, but rather to specific corporations, their respective successors, and assigns.[2] The Court of Appeal applied established case law in concluding that, as it was used in a corporate context, "successor" meant "corporate successor". The Court did not invoke any "presumption" as Weyerhaeuser repeatedly submits it did.

4. Weyerhaeuser was also unsuccessful in its attempt at bringing itself within the scope of the Court of Appeal's decision in *Brown v Belleville (City).*[3]

5. All of these concerns motivate Weyerhaeuser to find other means to shelter under the Indemnity. It attempts to do so by conflating principles of real property law with long-established contract principles related to the assignment of personal property. It also introduces irrelevant concepts of insurance law in its effort to create an area of national importance which does not, in fact, exist.

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[1] Capitalized terms are used in the same manner as in Ontario's Application for Leave to Appeal. Resolute, Bowater and Great Lakes are used interchangeably according to context.

[2] Reasons for Judgment of the Court of Appeal, December 20, 2017, reported at 2017 ONCA 1007 at para 34, [2017] OJ No 6654 (QL) [Appeal Decision], Weyerhaeuser's Leave to Appeal Record [WR], Vol I, Tab B2, p 34. After the sale to Great Lakes regulatory Orders could not be made against Reed as the EPA did not then permit Orders against former owners. Reed dissolved in 1993.

[3] 2013 ONCA 148, [2013] OJ No 1071 (QL) [*Brown*]; *Ibid* at para 184, WR, Vol I, Tab B2, p. 86.

6. Insofar as government indemnities are concerned, there is no basis whatsoever from which to conclude that even *one* other instance such as the one in this case has ever occurred or will ever occur again, let alone that it is commonplace.

7. Weyerhaeuser also fails to create any reasonable basis for concern that the Court of Appeal's decision raises an issue of national importance in relation to private sector environmental indemnities.

8. Weyerhaeuser would now eschew all of its past transactional decisions in favour of a failsafe position in which it, as an "insured", may forever call upon the "policy" for any claim, action or proceeding that arises post policy termination or forfeiture so long as the claim pertains to the time period in which it had the Indemnity. It effectively attempts to make Ontario's obligations under the Indemnity positive covenants that run with the land, contrary to well-established authority.[4]

9. Weyerhaeuser's proposed "claims occurred" versus "claims made" distinction is irrelevant to whether the Court of Appeal's decision raises an issue of national importance. Imposing a "claims occurred" model would add a layer of obligations to contractual terms already negotiated. This would amount to making new contracts. Apart from being contrary to well-known authority that says that it is not the role of the courts to make new or even better contracts for parties, the effect of doing so would create massive uncertainty and potential for conflict nationwide, including in the insurance industry.

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[4] Weyerhaeuser's Memorandum of Argument for Leave to Appeal to the Supreme Court of Canada, dated February 16, 2018, at para 3(a) [Weyerhaeuser MOA], WR, Vol I, Tab C, p 126. It is beyond any reasonable dispute that positive covenants cannot run with the land: *Nortel Networks Corp (Re)*, 2012 ONSC 1213 at para 131, 88 CBR (5th) 111; varied on other grounds, 2013 ONCA 599, [2013] OJ No 4458 (QL); *Durham Condominium Corp No 123 v Amberwood Investments Ltd* (2002), 58 OR (3d) 481 at para 18 (Ont CA); *Equitable Trust Co v Lougheed Block Inc*, 2013ABQB 209 at paras 38, 41, [2013] AJ No 362 (QL). This was also not argued in the courts below.

10. The Court of Appeal found no reason to overturn the Motions Judge's finding that the Indemnity had been assigned to Weyerhaeuser. It correctly applied well established principles of assignment law and judicial authority addressing the meaning of "successor". There is no basis to interfere with its decision in these areas.

11. Weyerhaeuser's Application for Leave to Appeal should be dismissed.

PART II – QUESTIONS IN ISSUE

12. Weyerhaeuser proposes two issues of public importance:

(i) Whether entitlement under an indemnity should be determined in accordance with ordinary contractual interpretation principles or whether the words of the indemnity should, instead, be ignored in circumstances where an indemnity has been fully assigned; and

(ii) Whether there is a "presumption" that the word "successor", when used in respect of a corporation, refers only to corporate successors, notwithstanding the Court of Appeal's decision in *Brown v. Belleville (City)*, and this Honourable Court's *obiter dicta* in *Heritage Capital Corp. v. Equitable Trust Co.*,[5] which call for the application of ordinary principles of contractual interpretation, rather than any presumption, when interpreting the term.

13. The Court of Appeal's decision raises neither of these concerns and this Court has, in any event, recently and extensively addressed principles of contractual interpretation and related standards of review.[6]

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[5] *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19, 395 DLR (4th) 656 [*Heritage Capital*].

[6] See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, 373 DLR (4th) 393 [*Sattva*]; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, 404 DLR (4th) 258 [*Ledcor*].

PART III – STATEMENT OF ARGUMENT

Weyerhaeuser's Argument A - The Decision Will Affect the Way "Successors and Assigns" is Interpreted

(i) Weyerhaeuser's sub-issue (i) – The Majority's Interpretation of "Assigns"

14. Although the main focus of Weyerhaeuser's "presumption" argument is in relation to the Court of Appeal's conclusion that "successor" means "corporate successor"[7] it raises the same point on the assignment issue. In paragraph 30 Weyerhaeuser essentially submits that the Court of Appeal *presumed* that when a party assigns the benefit of an indemnity to another that first party loses those benefits. However, all the Court of Appeal did was apply a fundamental principle of personal property law recognizing that all benefits may not be assigned and kept at the same time.

15. Ontario has always maintained that the Indemnity should be interpreted in accordance with basic principles of contractual interpretation as enunciated by this Court in *Sattva*.[8] There is no reason not to do so. The enurement clause in the Indemnity is not a separate standard form contract or stand-alone boiler-plate clause to which the factual matrix is irrelevant.

16. Before the Court of Appeal all parties agreed on the applicable standard of review[9] and the Court of Appeal concluded that the Motions Judge erred in failing to appreciate the effect of Resolute having assigned the full benefits of the Indemnity to Weyerhaeuser. The Court stated:

> I will next consider the motion judge's finding that Resolute enjoyed the benefit of the Ontario Indemnity as a "successor". I conclude the motion judge erred in so finding. As a result of the 1998 assignment of the full benefit of the Ontario Indemnity from Resolute's corporate predecessor, Bowater, to Weyerhaeuser, Resolute has no legal interest in the Ontario Indemnity upon which it can assert a claim against Ontario.[10]

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[7] Weyerhaeuser MOA, *supra* note 4, at paras 35-41, WR, Vol I, Tab C, pp 137-39.
[8] *Sattva*, *supra* note 6.
[9] Resolute's Factum to the Ontario Court of Appeal, dated February 28, 2017 at para 23, Ontario's Responding Record [OR], Tab 2B, p 14; Weyerhaeuser's Factum to the Ontario Court of Appeal, dated March 1, 2017 at paras 33-37 [Weyerhaeuser COA Factum], OR, Tab 2C, p 42.
[10] Appeal Decision, *supra* note 2, at para 134, WR, Vol I, Tab B2, p 67.

17. Later in its decision the Court of Appeal said:

> Accordingly, I see no palpable and overriding error in the motion judge's conclusion that the 1998 APA operated to assign the full benefit of the Ontario Indemnity from Bowater to Weyerhaeuser.[11]

18. Notwithstanding that authority for such a fundamental proposition of personal property law is hardly necessary, the Court of Appeal correctly applied its earlier decision in *Milo Candy v Browns Ltd.*[12] *Milo* has been discussed in detail in Ontario's Response to Resolute's Application for Leave to Appeal and Ontario relies on those submissions.[13]

19. Clearly the Motions Judge was overturned on the more deferential of the two standards of review. Yet, at paragraph 38, Weyerhaeuser now submits that this Court's approach in *Ledcor*[14] might be applicable to the enurement clause. It essentially advocates that it is plausible to ignore the importance of the factual matrix in this case and, more broadly, cases involving assignments of indemnities generally. There is no basis for such a conclusion.

(ii) Weyerhaeuser's sub-issue (ii) – The Majority's Application of a Presumption that "Successors" are Limited to "Corporate Successors"

20. Weyerhaeuser resumes its discussion of *Ledcor* in this section of its argument. It suggests that the Court of Appeal used a presumption in determining the "successor" issue.[15] It did not. A "general principle" of law and a presumption are not the same thing. The former is a principle to be considered by a court in making its decision. The latter shifts either a general or evidentiary burden of proof. Even the sections of the decision Weyerhaeuser reproduces in paragraph 38 do not support its submission.

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[11] *Ibid* at para 161, WR, Vol I, Tab B2, p 75.
[12] *Milo Candy Co v Browns Ltd* (1915), 8 OWN 99 (Ont CA) [*Milo*].
[13] Ontario's Response to Resolute's Leave to Appeal to the Supreme Court of Canada, dated March 16, 2018, at paras 24-27.
[14] *Ledcor, supra* note 6.
[15] Weyerhaeuser MOA, *supra* note 4, at paras 5(b), 7(b), 24(b), 27(b), 28(b), 30, 35, 38-41, WR, Vol I, Tab C, pp 127-28, 132, 134-35, 137-140.

21. Weyerhaeuser's argument before the Court of Appeal was never that it was a corporate successor but rather that it was entitled to be treated as a successor pursuant to the Court of Appeal's decision in *Brown*.[16]

22. The Court of Appeal disagreed with Weyerhaeuser and the Motions Judge that it could bring itself within the parameters of *Brown*.[17] The Court of Appeal found that the Motions Judge had made a palpable and overriding error in his treatment of *Brown*. This is clear from paragraph 184 of the decision:

> I conclude the motion judge erred in his application of this court's decision in *Brown* to the interpretation of the enurement clause in the Ontario Indemnity. With respect, he failed to explain how the facts in this case, which differ so materially from those in *Brown*, could support an interpretation of the word "successor" in reference to a corporation as meaning something other than a corporate successor. I see nothing in the language of the Ontario Indemnity or in the circumstances surrounding the formation of the contract that could support such an interpretation. Accordingly, I conclude the motion judge made a palpable and overriding error in interpreting the word "successor" in s. 6 of the Ontario Indemnity to include Weyerhaeuser.[18]

23. *Ledcor* concerned the interpretation of an exclusion clause in an insurance contract. This Court took the opportunity to discuss how, if at all, *Sattva* applies to the interpretation of standard form contracts.[19]

24. In determining that the appropriate standard of review for the interpretation of standard form contracts is correctness, this Court commented that as the "interpretation at issue is of precedential value and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review."[20]

25. While a correctness standard may be appropriate where the factual matrix is not relevant to the interpretative process, it is not appropriate in the circumstance of this case. It is well

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[16] Weyerhaeuser COA Factum, *supra* note 8, at paras 60-61, 64, OR, Tab 2A, pp 38-40.
[17] Appeal Decision, *supra* note 2, at para 184, WR, Vol I, Tab B2, p 86.
[18] *Ibid.*
[19] *Ledcor, supra* note 6, at para 20.
[20] *Ibid* at paras 4, 24.

established that contractual interpretation requires a court to consider the contract as a whole.[21] Where the entire document raises matters requiring an examination of the factual matrix, a *Sattva* analysis must govern.

26. In reaching the conclusion that the Motions Judge had erred and that the use of the term "successor" in the Indemnity's enurement clause ought to be interpreted to mean "corporate successors" the Court of Appeal read the Indemnity in light of the factual matrix. The Court recognized that Bowater was, in context, the only successor to the benefits of the Indemnity but that it later assigned those benefits to Weyerhaeuser. The use of the words "successors and assigns" rather than "successors or assigns" in the enurement clause contemplates a scenario in which the Indemnity first succeeded to a Great Lakes successor, Bowater, and was then subsequently assigned. This is exactly what happened.

27. Weyerhaeuser also relies on *Heritage Capital Corp.*[22] to argue that the Court of Appeal erred in confining "successor" to "corporate successor". The natural conclusion from *Heritage Capital* is that unless specified otherwise, successor is meant to be interpreted in its ordinary form and in keeping with the factual matrix. However the agreement in *Heritage Capital* specifically addressed other forms of successors, such as successors in title. This Court noted that where the parties meant "successor" to refer to anything other than a corporate successor, the agreement specifically provided for it.[23]

Weyerhaeuser's Argument B – The Phrase "Successors and Assigns" Is Widely Used

28. Weyerhaeuser argues that the phrase "successors and assigns" is common place in statutes, regulations and contracts across Canada.[24] It suggests that the issue of what these words mean in light of the Court of Appeal's decision is thus a matter of national importance.[25]

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[21] *Sattva, supra* note 6, at para 47.
[22] *Heritage Capital, supra* note 5.
[23] *Ibid* at para 47.
[24] Affidavit of Taha Hassan sworn February 15, 2018 at paras 2-5 [Hassan Affidavit], WR, Vol II, Tab D, pp 1-2.
[25] Weyerhaeuser MOA, *supra* note 4, at paras 5(a), 29, 44, WR, Vol I, Tab C, pp 127, 135, 140; Hassan Affidavit, WR, Vol II, Tab D.

29. However, while it points to apparently numerous instances in which the phrase "successors and assigns" or similar language has been used, it makes no substantial connection between that fact and how the Court of Appeal's decision generates any issue of national importance.

30. Weyerhaeuser fails to identify even a single instance in which an indemnity in the nature of the Indemnity exists.

31. Nor has Weyerhaeuser addressed how its proposed issues on appeal would be of assistance in relation to private sector indemnities.

32. Far from promoting clarity and predictability, the "claims occurred" position would impose a new liability starting point for indemnitors everywhere, including insurance companies, notwithstanding the actual terms of their contracts or other transactions.

Weyerhaeuser's Argument C – The Decision Will Have a Significant Impact in the Area of Environmental Law

33. At paragraph 45, Weyerhaeuser asserts that the Court of Appeal's decision will "make it more difficult for provinces to settle litigation and implement environmental policy, and leaves parties who have received environmental indemnities from the province unable to ever sell their properties."[26] This is conjecture and is also inconsistent with what happened in this case as Great Lakes purchased the property despite the fact that the 1979 Indemnity expressly expired in 2010.[27]

34. There is no question that environmental legislation in Ontario creates broad potential liability and provides wide-ranging regulatory powers to the Director. Nor is it in dispute that other provinces have similarly broad powers under their respective environmental legislation. However, nothing in the Court of Appeal's decision intersects with such legislation in a manner

[26] Weyerhaeuser MOA, *ibid* at para 45, WR, Vol I, Tab C, p 141. See also Weyerhaeuser MOA, *ibid* at paras 29(d), 49(a), WR, Vol I, Tab C, pp 135, 143-44.
[27] Letter to Great Lakes Forest Products Ltd from the Ministry of Treasury and Economics, dated November 6, 1979 at pp 1-2, OR, Tab 2A, pp 12-13.

that creates an issue of national importance. As noted, the Indemnity was a one-off contract through which Ontario, Great Lakes and Reed addressed a unique set of circumstances.

35. At paragraph 49 Weyerhaeuser addresses what it terms "presumably unintended consequences" of the Court of Appeal's decision. It does this to undermine what it calls the "claims made" approach. In paragraph 49(c) it conflates concepts of real and personal property law and assumes that the Indemnity automatically passes with title to the land.

36. However, the real property rights to land and the personal property rights arising from an Indemnity are distinct. They may or may not travel together in any given case. There can be business reasons why in some situations they will move together and in others they will not. There is nothing necessarily "absurd" in the latter scenario. All the Court of Appeal said was that in this particular case as the full benefits of the Indemnity were assigned they were no longer available to the assignor.[28]

37. The Court of Appeal decision is grounded on solid legal principles.

PART IV – SUBMISSIONS ON COSTS

38. Ontario seeks its costs of opposing Weyerhaeuser's Application for Leave to Appeal.

[28] Appeal Decision, *supra* note 2, at para 134, WR, Vol I, Tab B2, p 67.

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PART V – ORDER SOUGHT

39. Weyerhaeuser's Application for Leave to Appeal should be dismissed, with costs.

Dated at the City of Toronto, in the Province of Ontario, this 15th day of March, 2018.

SIGNED BY:

Leonard F. Marsello

Tamara D. Barclay

Nansy Ghobrial

PART VI – TABLE OF AUTHORITIES