SCC File No.: 39122

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

THE CITY OF CORNER BROOK

APPLICANT
(Respondent)

- and –

MARY BAILEY

RESPONDENT
(Appellant)

APPLICANT'S REPLY
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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Reply to the Response to the Application for Leave to Appeal

PART I – OVERVIEW

1. The Applicant, the City, submits this reply to show how the appeal raises issues of national importance. The Applicant makes four points:

   1) The Respondent, in its response, relies on the dissent in *Resolute*, thereby highlighting the need for clarity in this area of the law.

   2) The Respondent cites the Ontario Court of Appeal in *Biancaniello* favourably but fails to address the Newfoundland and Labrador Court of Appeal's failure to find that litigation releases should be interpreted with a view to finality and to wipe the slate clean between litigants. This reveals a jurisdictional disparity that this Court has an opportunity to address.

   3) The Respondent argues that the distinction between first and third party claims is meaningful. The City agrees that it was meaningful in *Resolute* where first and third party claims were brought by different claimants. However, this is distinguishable from the case at hand where the first and third party claims were both brought by the same party, the Respondent, against the City in regards to the same motor vehicle accident. This provides a further opportunity for this court to clarify *Resolute*.

   4) Lastly, by failing to consider the text of the indemnity, separately from the release, the Court of Appeal below has raised questions about the proper interpretation of an indemnity when it is coupled with a release, whether it is subject to the *Blackmore Rule* and if not, whether it can be overwhelmed by the factual matrix.

2. The City reiterates the importance of these issues, and respectfully requests that this Court take advantage of the straightforward facts of this case to provide guidance as to the appropriate principles applicable to the interpretation of releases and indemnities.

PART II – ARGUMENT

The Respondent's reliance on the *Resolute* dissent and the need for national clarity

3. The Respondent argues that the City's approach to the interpretation of the release and indemnity agreement at issue "runs counter to this Honourable Court's guidance in *Resolute*," however, the Respondent cites the dissenting reasons of Côté, Brown and Rowe JJ. at paragraphs 76 and 77 of *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 ("*Resolute*") in support of its position.

4. In these paragraphs, the dissenting Justices stated that contractual interpretation should begin with and not stray too far from the words of the contract, though the interpretation should not ignore the context in which the contract was executed. At paragraph 78, the dissenting Justices stressed that the factual matrix cannot overwhelm, deviate from, or change the words of the contract.[1]

5. These paragraphs were central to the dissent's disagreement with the majority as to the scope of the indemnity in issue. Building on the analysis cited by the Respondent at paragraphs 76 and 77, the dissenting Justices ultimately would have found that the factual matrix could not deviate from the reference to the "presence of any pollutant" in the indemnity, which should have captured Ontario's remediation order directed at the storage of mercury on Weyerhaeuser's property.[2]

6. The Respondent's reliance on the dissenting reasons from *Resolute* highlights the need for clarity in this area. Do the dissenting reasons cited by the Respondent accurately reflect the current law? Or have those principles been supplanted by the approach taken by the Newfoundland and Labrador Court of Appeal? This case gives this Honourable Court the opportunity to clarify this issue nationally, particularly given the conflicting tests articulated by courts in British Columbia, Alberta, and Ontario.

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[1] *Resolute* at paras 76-78.
[2] *Ibid* at para 97.

The Respondent's distinction between first party and third party claims

7. It should be clarified that the Respondent refers to "first party" and "third party" claims in a different manner than this Honourable Court in *Resolute.* In *Resolute*, first party claims refer to claims brought by parties to the indemnity and third party claims refer to claims brought by non-parties to the indemnity. In the case at hand, there is no dispute that both of the Respondent's actions against the City (the first party claim and the third party claim) were brought by her as a party to the release and indemnity agreement.

8. The Court of Appeal below held that the release and indemnity agreement only captures "first party" claims in negligence advanced in the Statement of Claim, rather than the same cause of action advanced through a Third Party Claim. The City submits that the Court of Appeal erred in this regard.

9. The Respondent defends the merits of the Court of Appeal's approach, underscoring the need for this Court to provide clarity. Under the Court of Appeal's approach, courts interpreting a release and indemnity agreement must carefully parse first party and third party claims, which, without express language in the agreement acknowledging this artificial distinction, cannot be settled together. Under this approach, litigation releases may not be interpreted to wipe the slate clean between the settling parties. Instead, litigation releases shall be interpreted in favour of partial settlements.

10. This conflicts with the Ontario approach, where, according to *Biancaniello*, litigation releases should be interpreted with a view to finality and to wipe the slate clean between litigants.[3]

11. Further, the Court of Appeal's additional separation of "unknown third party claims" from the scope of a release, meaning third party claims known to one party and not the other, also conflicts with the Alberta approach, where the scope of releases in relation to "unknown claims" is limited by the discoverability rule.

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[3] *Biancaniello v. DMCT LLP*, 2017 ONCA 386 at para 42 ("*Biancaniello*").

The Court of Appeal's failure to address the indemnity

12. The Respondent has failed to address the City's argument in relation to the indemnity contained in the release and indemnity agreement.

13. The indemnity applies to all claims brought "on behalf of or in the name of" the Respondent. The only things that this phrase can refer to are third party claims brought by the Respondent's insurer or subrogated claims brought in the name of the Respondent. While the Respondent repeats her assertion that the release and indemnity agreement applies only to "a claim for recovery of the Respondent's own [personal injury and property] damages," this bald assertion does not explain or justify nullifying the reference in the indemnity to claims brought on behalf of or in the name of the Respondent.

14. The Court of Appeal's failure to consider the indemnity, its contextual background, or the above-referenced text raises nationally important issues in relation to the interpretation of indemnities.

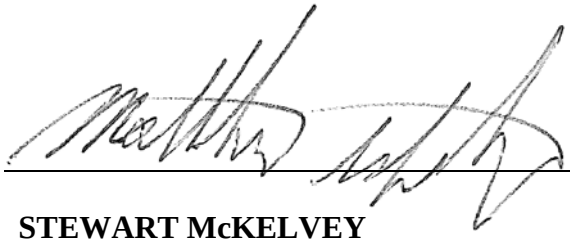
15. First, the Court of Appeal's failure to consider the text of the indemnity calls into question the continued relevance of the *Sattva* approach, which directs the interpreter of an agreement to begin with the text of the agreement. The Court of Appeal's failure to consider the text and enforceability of the indemnity indicates that the factual matrix surrounding an indemnity trumps the text of the indemnity.

16. Second, while releases and indemnities are different types of agreements, the Court of Appeal's failure to consider the indemnity raises questions about the interpretive principles applicable to each. Do the same interpretive principles apply to both releases and indemnities? And are those the principles articulated in *Resolute*, which involved an indemnity rather than a release?

17. Finally, the Court of Appeal's failure to enforce the indemnity provokes the question of whether the *Blackmore Rule* applies to indemnities, as opposed to releases. As the *Blackmore Rule* was not discussed in *Resolute*, the Court of Appeal's failure to address this issue, in regards to indemnities, gives this Honourable Court the opportunity to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed: May 20, 2020



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PART VI – TABLE OF AUTHORITIES

	Jurisprudence	Para cited
1	*Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 OR (3d) 210	11
2	*Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60	3, 4, 5, 6, 8