

Does Your Indemnity Agreement Protect You?

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Resolute FP Canada Inc. v. Ontario (Attorney General)

On December 6, 2019 the Supreme Court of Canada released its decision in *Resolute FP Canada Inc. v. Ontario (Attorney General)*. The Court held that a 1985 indemnity granted by Ontario to Reed Ltd. and Great Lakes Forest Products Limited, and intended to apply to their successors and assigns did not protect Weyerhaeuser, a subsequent owner, from a director's remediation order issued by what is now the Ministry of Environment and Climate Change (MOECC) under the *Environmental Protection Act* (EPA).

As part of a 1985 settlement of the Grassy Narrows English and Wabigoon river mercury contamination litigation, the government of Ontario agreed to provide Great Lakes an indemnification from further liability related to its pulp and paper mill in Dryden, Ontario. Great Lakes in turn released Ontario from 1979 and 1982 indemnities, given at those times to encourage its acquisition, upgrading and continued operation of the mill.

The relevant parts of the indemnity provision read as follows:

Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any ... subsidiary or affiliate company ..., harmless from and against any obligation, liability, damage, 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, governments (including the Federal Government of Canada and any province...) ... because of or relating to any damage, loss, ... caused by or with respect to, either in whole

or in part, 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 Ltd. to Great Lakes under the Dryden Agreement (hereinafter referred to as “Pollution Claims”). ... “Pollution Claims” shall include any obligation, liability, damage, loss, costs or expense incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement ...

In August 2011 (twenty-six years after the agreement) MOECC issued a director’s order requiring Weyerhaeuser and Resolute to perform remedial work and monitoring on an abandoned mercury waste disposal site associated with the mill. Each of Resolute (as corporate successor to Great Lakes Forest) and Weyerhaeuser had owned the site for a time. (In the case of Weyerhaeuser, only a short time, pending subdivision approval.) Both objected to the order and pointed to the indemnity. Both took the position that Ontario was obligated to pay any costs of compliance with the director’s order. A judge of the Ontario Superior Court agreed.

On appeal, a majority of the Ontario Court of Appeal held that the indemnity did cover the director’s order. The majority also found that Resolute’s corporate predecessor, Bowater, had assigned the benefit of the indemnity agreement to Weyerhaeuser when the latter bought the mill. Once the benefit of the indemnity agreement was assigned (effectively, “transferred”) it was no longer held by Bowater (later Resolute). Resolute was therefore no longer protected by the indemnity agreement.

In a 4 – 3 split decision, the majority of the Supreme Court of Canada agreed with the dissenting judge of the Ontario Court of Appeal. They decided that neither Resolute nor Weyerhaeuser could rely upon the indemnity to place the cost of compliance with the director’s order in the lap of Ontario.

The majority looked at both the “factual matrix” under which the indemnity came about, as well as the language of the indemnity as a whole.

In terms of the facts, the majority thought that the lower courts had missed the boat on the reason for and scope of the indemnity. Unlike the earlier indemnities, there was no additional investment being proposed in 1985 that would require additional protection. Further, the 1979 and 1982 indemnities were given in response to ongoing litigation that had already been commenced by affected First Nations; the new mill owner at that time was looking for protection from those claims.

In terms of the language of the indemnity, the majority noted that there is a starting presumption that indemnities apply to claims made by third parties, not to claims made between the parties to the agreement themselves. They held that the indemnity should be read to apply to pollution claims that might be advanced by nearby First Nations and others

(even the federal government). That reading would be consistent with other provisions in the indemnity, such as the requirement to give prompt notice to Ontario of any claim (which would not make sense if Ontario was intended to be a potential claimant covered by the indemnity agreement).

The other three judges of the Supreme Court thought that Resolute should be allowed the protection of the indemnity, but not Weyerhaeuser. They excluded Weyerhaeuser, however, because Weyerhaeuser did not establish that it was entitled to the benefit of the indemnity, either as being a corporate successor of Great Lakes, or showing that the benefit of the indemnity agreement had been assigned to it. Being merely a “successor in interest” as a subsequent owner of the land was not enough to allow Weyerhaeuser to rely upon the indemnity agreement.

The majority of judges of the Supreme Court did not find it necessary to deal with the Court of Appeal majority’s finding that, once the indemnity agreement had been assigned to Weyerhaeuser, it no longer protected Bowater (and, therefore, neither did it protect its corporate successor, Resolute). The minority of judges agreed with the general principle put forward by the Court of Appeal, “the effect of an absolute assignment of contractual right is to extinguish the assignor’s right to call upon the obligation for him or herself”. However, the minority judges looked at the entire context of the Bowater sale to Weyerhaeuser, and found that the indemnity agreement was never assigned to Weyerhaeuser.

As for Resolute, the three dissenters emphasized that the intent of interpreting the contract was to ascertain the objective intentions and reasonable expectations of the contracting parties with respect to the meaning of the contractual provision. They said that the court needs to look at “language that the parties employed to express their agreement... objective evidence of the background facts... that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting... and the principle of commercial reasonableness and efficacy” when deciding what a contract means. According to the minority three, the factual matrix cannot govern over the other considerations, and the indemnity ought to apply to the director’s order -- cold comfort for Resolute.

So then, what are the takeaways? First off, if eleven judges cannot agree on the meaning of an indemnity, it should be a signal that enormous care must be taken in drafting these provisions to ensure that they achieve the desired intent. Second, facts matter; one needs to look at the surrounding facts that gave rise to the indemnity in the first place if it is intended to be relied upon -- not always an easy thing to do many years after the time of the agreement. Third, if you are a new party in town and intend to rely upon an existing indemnity, make sure you know what and whom it covers, and make sure that it is properly assigned to you or is otherwise enforceable by you (since you are not a party to the original agreement). Fourth, be sure to follow the terms of the indemnity strictly and in a timely manner if you intend on enforcing it in respect of a claim or potential claim; failing to do so may let the indemnifier off the hook. Fifth, remember that it is almost impossible to envision

all potential future sources of liability (like changing responsibility in contaminated sites law) and realize that there may still be risks. Finally, if you are being asked to assign an indemnity, realize that in doing so, you might be giving up its protection.

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