Goodmans LLP Update

Supreme Court of Canada Highlights Purpose Driven Contractual Interpretation of Environmental Claims in *R v Resolute Forest Products*

The Supreme Court of Canada (SCC) recently released its decision in *R v Resolute Forest Products Canada Inc.*, 2019 SCC 60. In a 4-3 decision, the SCC overturned an Ontario Court of Appeal ruling to find that an indemnity extended from the Government of Ontario ("**Ontario**") against claims relating to pollution did not cover a regulatory order to remediate contamination.

Businesses should appropriately tailor their environmental due diligence to effectively delineate the scope of an indemnity. Even if a business did not cause or contribute to an asset's contamination, regulators and third-parties may still turn to the business under environmental law as the party with "charge, management, or control" over the contaminant.

Background

This case originates from a 2011 Order from the Director of Ontario's Ministry of the Environment issued against Resolute Forest Products Limited and the Weyerhaeuser Company Limited. Among other things, the Director's Order required Resolute Forest Products and Weyerhaeuser to maintain, monitor and test an abandoned mercury waste disposal site in Dryden, Ontario (the "**WDS**") to prevent discharges of mercury from the site. Neither Resolute Forest Products nor Weyerhaeuser created the WDS, but inherited it from previous companies who operated at the site. The history is complex:

- **1960s:** Dryden Paper Company Limited ("**Dryden Paper**") owned and operated a pulp and paper mill in Dryden, Ontario. A related company ("**Dryden Chemicals**") owned a nearby plant which involved the use of mercury. As a result of these operations, untreated mercury was released into the nearby English and Wabigoon Rivers. The contamination harmed residents of the Asubpeeschoseewagong ("**Grassy Narrows**") and Wabaseemoong ("**Islington**") First Nations.
- **1971:** Dryden Paper constructed the WDS to store mercury waste.
- **1976:** Dryden Paper amalgamated with Dryden Chemicals to form Reed Ltd.
- **1977:** the Grassy Narrows and Islington First Nations sued Dryden Paper, Dryden Chemicals and Reed Ltd.
- **1979:** to facilitate the sale of Reed Ltd. to Great Lakes Forest Products, Ontario extended an indemnity to both Reed Ltd. and Great Lakes Forest Products that would address environmental liability up to $15 million.
- **1985:** Ontario replaced the initial indemnity after Great Lakes Forest Products, Reed Ltd, Ontario and other parties reached a settlement of the litigation with the Grassy Narrows and Islington First Nations. The 1985 Indemnity (the "**Indemnity**") was a condition of the settlement agreement.
- **1998:** Weyerhaeuser temporarily acquired title over the WDS when it purchased several assets from Great Lakes Forest Product's successor company until 2000.

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- **2007:** Weyerhaeuser ceased its paper plant operations in Dryden.

Great Lakes Forest Products subsequently became Resolute Forest Products.

The Director issued the Order against Resolute Forest Products and Weyerhaeuser pursuant to section 18(1) of the *Environmental Protection Act*, which permits the Director to issue regulatory orders against current and former property owners and persons with "charge, management, and control" over a contaminant. In *Hamilton Beach Brands Canada Inc. v Ministry of the Environment and Climate Change*, 2018 ONSC 5010, the Ontario Divisional Court affirmed that a Director may order persons to delineate and remediate contamination at a property or contamination that migrates offsite.

Resolute Forest Products and Weyerhaeuser sought indemnification from Ontario for the costs of complying with the Order.

The Companies Argued that the Indemnity Agreement included Regulatory Orders to Remediate Contamination

The courts considered the following two questions:

1. Does the Indemnity Agreement cover first-party regulatory claims for pollution?

2. Was the Order a "Pollution Claim" under the Indemnity that entitles Resolute Forest Products and Weyerhaeuser to claim for the costs of complying with the Order?

The companies and Ontario both brought motions for summary judgment. Resolute Forest Products and Weyerhaeuser argued that the Indemnity's wording was sufficiently broad to capture a first-party regulatory claim for pollution. In particular, section 1 of the Indemnity provides for an indemnity "from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them" . . . as a result of "any claim, action or proceeding, whether statutory or otherwise" resulting from "any damage, loss, event or circumstances, caused or alleged to [be] caused by or with respect to, either in whole or in part, the escape or presence of any pollutant by the [indemnitee] including mercury or any other substance, from or in the plant or plants or lands or premises".

Ontario argued that the Court must look to the broader context of the factual matrix giving rise to the Indemnity and its other provisions and that a purposive interpretation reveals that the provision only contemplates third-party claims for pollution. For example, Ontario argued that the reference to statutory claims was added in the Indemnity to refer to a person's statutory right to compensation for loss or damage incurred as a direct result of a spill of a pollutant causing an adverse effect from the owner/person having control of a pollutant set out in section 99(2) of the *Environmental Protection Act*.

The motion judge found that the Indemnity applies to first-party regulatory orders and that the Resolute Forest Products and Weyerhaeuser were entitled to benefit from the Indemnity. The judge found that the WDS gave rise to a "Pollution Claim" under the Indemnity on the basis that the WDS was continuing to discharge mercury into the environment and was an ongoing source of liability. The Ontario Court of Appeal and SCC later identified that the motion judge made a factual error on this point. The judge also found that the phrase "whether statutory or otherwise" meant that the Indemnity included first-party claims for pollution.

On appeal, a majority of the Ontario Court of Appeal substantially agreed with the motions judge and dismissed the appeal. The Court found that the Indemnity applies to the Order, remitted Weyerhaeuser's claim to the lower court for consideration, and held that Resolute Forest Product was not entitled to indemnification.

SCC Decision

A majority of the SCC found that the Indemnity does not cover first-party regulatory claims such as the Director's Order. It was therefore unnecessary for the majority to consider whether Resolute Forest Products and Weyerhaeuser could claim under the Indemnity for the costs of complying with the Director's Order.

The majority found that the motions judge made palpable and overriding factual errors that expanded the scope of the Indemnity in two ways:

- the majority found that the WDS was not discharging mercury and was not a source of pollution. The Director's Order required Resolute Forest Products and Weyerhaeuser to perform work on the WDS to *prevent* discharges from occurring in the future. The Indemnity "was intended to cover only proceedings arising from the discharge of mercury *in the related ecosystems*, not those related to the mere presence of mercury" in the WDS.

- the motions judge misinterpreted the meaning of the phrase "whether statutory or otherwise" to include first-party regulatory claims. The Majority found that the motions judge should have considered the reasons why Ontario entered into the Indemnity before holding the province responsible for the Resolute Forest Products and Weyerhaeuser's costs to comply with the Director's Order. The Majority found that the Indemnity arose from the previous litigation against the Grassy Narrows and Islington First Nations and potential third-party claims relating to contamination.

Implications

Businesses seeking to include environmental indemnities within a contract must understand the "factual matrix" underpinning the agreement. As the SCC demonstrates in *Resolute Forest Products*, environmental claims are sensitive to the facts in a given case. The motion judge's error regarding the source of pollution was fatal to the companies' appeal because the judge suggested that the WDS was causing mercury contamination. Furthermore, the Director's Order required measures to prevent contamination and did not relate to a discharge.

Following *Resolute Forest Products*, we would expect businesses to delineate the sources of contamination and environmental conditions of the business' property before drafting an indemnity for environmental claims. In Ontario specific consideration should be given to whether an indemnity addresses a "preventative" order, such as the Director's Order, which the Ministry is issuing with increased frequency.

Notably, neither Resolute Forest Products nor Weyerhaeuser escaped regulatory liability, notwithstanding that they inherited the site from the entities that caused or contributed to the contamination on site. Resolute Forest Products was a corporate successor and Weyerhaeuser was a successor in title having retained ownership over the WDS for a short period from 1998 to 2000.

For further information about *Resolute Forest Products* and its implications, please contact our Environmental Law Group.