Direct Indemnity Clauses – Supreme Court Of Canada Grants Leave In Resolute FP Canada Inc. v. Her Majesty The Queen

The Supreme Court of Canada has granted leave to appeal in Resolute FP Canada Inc. v. Her Majesty the Queen, signaling a desire by the top court to bring clarity to indemnity clauses between contracting parties in environmental disputes.

Mercury Release

In 1960, a pulp and paper company released mercury into a river. The release impacted a First Nation located downstream. In 1977, the First Nation sued and in 1985 the litigation settled. As part of the settlement, the original owners of the pulp and paper operation released the Province of Ontario from two indemnities and paid the First Nation $11.75 million. In return, the Province gave an indemnity to the subsequent owners of the pulp and paper mill assets (the assets having been divided and sold between 1960 and 1977). The subsequent owners were Reed Ltd. and Great Lakes Forest Products Limited. In turn, these owners were each succeeded by Resolute FP Canada Inc. and Weyerhaeuser Company Ltd.

Director's Order

In 2011, the Ontario Ministry of the Environment issued a Director's Order requiring that Resolute and Weyerhaeuser perform remedial work at the site. Weyerhaeuser and Resolute sought to have all costs of complying with the Director's Order paid for by the Province on the basis of the 1985 indemnity.

Court Rulings

All parties brought applications seeking Summary Judgement on the indemnities issue.

The motions judge found that the Province was required to indemnify the two

companies. The Court of Appeal reversed the lower court in part, finding that Resolute was not entitled to the indemnity and directing that whether or not Weyerhaeuser was entitled to indemnity required further adjudication. Of note was the dissenting opinion of Justice Laskin who would have granted the Province's appeal in full on the basis that Weyerhaeuser could not have enforced the indemnity. Justice Laskin was of the view that Weyerhaeuser's indemnity only related to pollution claims by third parties and not by the Province.

Supreme Court of Canada

The Supreme Court of Canada has granted leave to each of the parties, all of whom have appealed.

The Supreme Court's ruling will be of legal importance for its consideration of indemnity clauses in environmental disputes. Generally, such clauses are understood as allocating risk associated with third party claims as against one party to the contract. It is less common to see two contracting parties address indemnity as between them, so-called 'direct' indemnity clauses. There is relatively little law on the application of 'direct' indemnity clauses. The Supreme Court of Canada's decision to grant leave may signal a desire to bring clarity to these issues.

The Court's ruling will have significant implications both for contractual interpretation and drafting as well as the allocation of environmental liability, given that similar clauses are found in indemnification agreements between industry and government across the country.

About the author Michael Barbero:

Michael maintains an advocacy practice primarily focused on responding to the regulatory and litigation needs of Alberta's resource companies. Michael has acted for both large and mid-sized oil and gas companies, electrical generators, electrical distributors, national financial institutions, investors, and professionals in a host of disputes involving regulatory proceedings, commercial litigation, and commercial arbitrations. Michael's recent representative experience includes project approval of a large combined-cycle gas fired power generating facility, advising clients on indigenous and land-related matters and disputes, and acting for a major corporation in litigation involving damages to indigenous lands.

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