In the Court of Appeal of Alberta

Citation: Strongco Corporation v Nordstrong Equipment Limited, 2026 ABCA 274

Date: 20260821
Docket: 2403-0200AC
Registry: Edmonton

Between:

Strongco Corporation/Corporation Strongco, Strongco GP Inc./Societe Strongco GP Inc., Strongco Limited Partnership, and Strongco Inc.

Appellants

\- and -

Nordstrong Equipment Limited/Equipment Nordstrong Limitee

Respondent

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Alice Woolley
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Chief Justice K.H. Davidson
Dated the 31st day of July, 2024
(2024 ABKB 475, Docket: 1703 21403)

Memorandum of Judgment

The Court:

Overview

[1] This appeal involves the interpretation of indemnity clauses in a contract for the purchase and sale of the assets in a going concern business.

[2] The appellant, Strongco Limited Partnership ("Strongco"), operated a business division known as Strongco Engineered Systems ("Engineered Systems"). Strongco entered into an Asset Purchase Agreement ("Agreement") with Nord-sen Metal Industries Ltd, which became the respondent, Nordstrong Equipment Limited, to sell Engineered Systems to it. The Agreement defined the assets and liabilities being assumed by Nord-sen and required each party to indemnify the other in specified circumstances.

[3] The central issue before the trial judge was whether Nord-sen (and Nordstrong as successor) agreed to indemnify Strongco for damages arising from the negligent acts of Engineered Systems that occurred before the closing date of the Agreement where the damages accrued after that date. The trial judge interpreted the indemnity clauses in the Agreement to mean that Strongco was not to be indemnified for its own negligence in those circumstances: ***Westlock Terminals (NGC) Ltd v Sheets Grain Farmco Ltd***, 2024 ABKB 475 ("Decision").

[4] On appeal, Strongco contends the trial judge applied the wrong test to interpret the indemnity clauses, and asserts the parties entered into a "clean break" contract in which both intended Nord-sen to indemnify Strongco for prior acts of negligence. Strongco asks this Court to confirm that the three principles identified by the Privy Council in ***Canada Steamship Lines Limited v R***, 1952 CanLII 260 (UK JCPC), 2 DLR 786 at 793-794 [***Canada Steamship***], on which the trial judge relied, do not govern the interpretation of indemnity clauses in Alberta, having been replaced by a deeper analysis of a contract's surrounding factual and commercial context in determining the common intention of the parties.

[5] We confirm that the three principles in ***Canada Steamship*** provide guidance and are not an exhaustive and strict test. However, the trial judge applied the correct principles in assessing the indemnity provisions in the Agreement. We find no error in his conclusion that the Agreement did not provide indemnification for Strongco's pre-closing negligence in these circumstances.

[6] The appeal is dismissed.

Background

[7] Engineered Systems operated a business that designed, manufactured, sold, installed, and serviced bulk material-handling equipment in the agricultural industry. On March 6, 2008, Engineered Systems provided a quotation to Sheets Grain Systems Ltd ("Sheets"), a company

specializing in the construction of grain elevators, for the cost of materials required by Sheets to build a grain elevator for Westlock Terminals (NGC) Ltd ("Westlock").

[8] On June 20, 2008, Sheets and Westlock entered into a contract under which Sheets agreed to build the grain elevator for $4,189,531.50. Engineered Systems then provided an updated quotation to Sheets. On July 25, 2008, Sheets entered into a contract with Engineered Systems (the "Sheets Contract") under which Engineered Systems agreed to design, engineer, manufacture, supply, and erect portions of the grain elevator.

[9] On May 14, 2009, Strongco and Nord-sen executed the Agreement by which Strongco agreed to sell "all of its right, title and interest in and to the assets of [Engineered Systems] . . . on a going concern basis" to 4517946 Canada Inc and Nord-Sen (collectively, the Purchasers). This included all of Engineered Systems' equipment, premises, assumed contracts, work in progress, accounts receivable and prepared expenses.

[10] Strongco and Nord-sen were represented by counsel, who exchanged numerous drafts of the proposed contract before execution. The Agreement's effective date was May 8, 2009, and the transaction closed on May 29, 2009. Nord-sen acquired, among other things, the Sheets Contract and the associated accounts receivable.

[11] Section 1.1.6 of the Agreement defined the liabilities to be assumed by Nord-sen:

> 1.1.6 "**Assumed Liabilities**" means (a) the liabilities and obligations under the Assumed Contracts and the Assumed Leases which accrue as of and from the Effective Date; (b) the Current Liabilities; and (c) all liabilities and obligations of Nord-Sen with respect to the Transferred Employees pursuant to Article 8 hereof. For greater certainty, Assumed Liabilities do not include any other liabilities of [Engineered Systems] or Strongco of any nature or description. . . .

[12] Sections 4.4 and 4.6 addressed the allocation of liability for the Assumed Liabilities, including that the Purchasers would not be liable for any of Strongco's liabilities, whether known or unknown, other than the Assumed Liabilities:

> 4.4 **No Assumption of Liabilities**. Strongco hereby acknowledges and agrees that the Purchasers have not assumed, and shall not be responsible for, any liabilities, debts and obligations of Strongco of whatsoever nature, kind or description (including bank indebtedness), whether known or unknown, absolute, accrued, contingent or otherwise, and whether arising prior to, on or subsequent to the Effective Date, other than the Assumed Liabilities. . . .
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> …
>
> 4.6 **Assumed Liabilities.** Upon Closing, the Purchasers shall receive the full benefit of (including the assets represented thereby) and assume the Assumed Liabilities as of the Effective Date [May 8, 2009] and hereby covenant to jointly

> and severally indemnify and save and hold Strongco free and harmless from and against all liabilities, debts and obligations (whether absolute, accrued, contingent or otherwise) in connection therewith.

[13] Section 6.3 indemnified Strongco for certain liabilities:

> 6.3 **<u>Indemnification by Purchasers.</u>** Subject to Section 6.12.2, the Purchasers shall jointly and severally indemnify and save harmless Strongco from and against any Loss suffered or incurred, directly or indirectly, by Strongco as result of, arising out of or relating to:
>
> …
>
> 6.3.3 any of the Assumed Liabilities.

[14] Section 7.1 set out the liability for "Ongoing Business", and provided that Schedule 7.1 contained a list of ongoing (uncompleted) projects as of the Effective Date (each an "Ongoing Project"). It stated that "[w]ithout limiting the generality of Section 4.6 hereof, liability (to the extent such liability arose outside the ordinary course of business) in respect of Ongoing Projects shall be assumed, as between Strongco and the Purchasers as follows":

> 7 .1.1 if the cause of action relating to such liability arose on or prior to the Closing Date, such liability will not form part of the Assumed Liabilities and is accordingly assumed by Strongco to the complete exoneration of the Purchasers; and
>
> 7.1.2 if the cause of action relating to such liability arose after the Closing Date, such liability will form part of the Assumed Liabilities and is accordingly assumed by the Purchasers to the complete exoneration of Strongco; and
>
> 7. 1 .3 if it is not clearly determinable whether the cause of action relating to such liability arose prior to, on or after the Closing Date, such liability shall be assumed, as between Strongco and the Purchasers, based on the percentage of completion of such Ongoing Project as set forth in <u>Schedule 7.1</u> annexed hereto (such percentage to be calculated according to the relative cost of labour of the Ongoing Project fulfilled by Strongco and the Purchasers).

[15] The "Ongoing Projects" set out in Schedule 7.1 included the Sheets Contract.

[16] Finally, section 10.6 provided guidance for the allocation of liability for other damages that arose before the closing date:

> 10.6 **<u>Risk of Other Liabilities</u>**. It is further expressly agreed that Strongco shall remain solely responsible for, and shall hold Purchasers harmless from any damages suffered by third parties upon the Premises up to the Closing Time, if such

> damages were caused by or attributable to the negligence or wilfull misconduct of Strongco; its directors, officers and employees.

[17] Engineered Systems designed and engineered the grain elevator and delivered most of the materials for its construction under the Sheets Contract before the close of the Agreement. Nordsen delivered the remaining materials to Sheets. By the closing date, Sheets had begun preparing the site for the construction of the grain elevator. Construction was not substantially completed until February 1, 2011.

[18] According to Westlock's statement of claim, it discovered in 2016 that the grain bin system designed and provided by Engineered Systems was failing. Westlock commenced an action against Sheets, Strongco (and related entities), and Nordstrong for defects in the grain bins. Strongco issued a third-party notice against Nordstrong.

[19] Westlock settled the action with Strongco (and related entities) and Sheets on October 14, 2023, and agreed to dismiss the action against Nordstrong without costs. Sheets settled with Westlock for $1,000,000. Westlock's negligence claim against Strongco was settled for $10,750,000.

[20] Only Strongco's third-party notice against Nordstrong remained. Strongco and Nordstrong disagreed about whether the indemnity clauses in the Agreement allowed Strongco to recover from Nordstrong the $10,750,000 paid to Westlock. At trial, Strongco relied on sections 4.6 and 6.3 to advance its claim, stating the Sheets Contract was an "Assumed Liability" from which it had suffered a loss through the settlement with Westlock, and Nordstrong was obligated to indemnify Strongco.

[21] The trial judge disagreed. He found the Agreement did not indemnify Strongco for its own negligence, and Strongco was not entitled to recover the settlement amount from Nordstrong.

Decision Below

[22] The trial judge determined that Strongco's settlement with Westlock and the quantum were reasonable. He accepted the expert evidence that the grain elevator was grossly incapable of fulfilling the intended use or handling the loads in the design requirements because of structural deficiencies. He concluded that "Strongco was likely to have been found to have breached the applicable standard of care" of a reasonable and prudent designer, and damages "were likely to have been proven to have arisen as a result of the breaches of the standard by Strongco": Decision at para 32.

[23] The trial judge found that had the negligence claim gone to trial, Strongco likely would have been liable to Westlock for damages ranging from $10,525,000 to $20,000,000 plus interest: Decision at para 32.

[24] Turning to indemnification, the trial judge equated the interpretative analysis of the indemnity provisions in the Agreement to the interpretative analysis of exclusion clauses described by this Court in ***Dow Chemical Canada ULC v NOVA Chemicals Corporation***, 2020 ABCA 320 at para 47 [***Dow Chemical***]: "Exclusion clauses should be interpreted like all other contractual clauses, not in isolation, but giving the words used their ordinary and grammatical meaning, considered in harmony with the rest of the contract and in light of their purpose and commercial context: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para. 47, [2014] 2 SCR 633 [***Sattva***]": Decision at para 40. He held that the starting point for such interpretation "is that 'any indemnity which was given to a person was not intended to extend to loss or cost arising by reason of that person's own negligence or the negligence of that person's employees or agents': *Halsbury's Laws of Canada – Guarantee and Indemnity at HGI-130*". More specifically, while there is "no prohibition against indemnification from damages that arose from an indemnitee's own negligence, there is significant caution exercised in interpreting indemnity clauses in a way that indemnifies a party for its own negligence": Decision at para 41.

[25] The trial judge found at paragraph 42 of the Decision that ***Canada Steamship*** had "established a three-staged test" for interpreting exclusion clauses that "seek to exempt or indemnify a party for its own negligence":

1. The language of the exclusion clause must expressly exclude liability for negligence.

2. If there is no express reference to negligence, the language must be broad enough (after being interpreted *contra proferentem*) to cover negligence.

3. Even if the language is broad enough to cover negligence, there must be no other basis, i.e., no basis other than negligence, upon which the party could be made liable.

[26] The trial judge concluded that the Supreme Court in ***Consumers' Gas v Peterborough***, 1981 CanLII 66 (SCC), [1981] 2 SCR 613 at 615 [***Consumers' Gas***], "added clarity" by adopting this statement from the Ontario Court of Appeal: "If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party **in the clearest terms**" (emphasis in original). He held that following ***Consumers' Gas***, "this 'clearest terms' requirement has been the test in Canada for interpreting indemnity clauses that purport to indemnify a party for its own negligence", and cited in support ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)***, 2018 ABCA 305 at para 99 [***CNRL***], ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2019 ABQB 684 at para 515, and ***Khalil v Durant***, 2021 ABQB 241 at para 113: Decision at paras 43-44.

[27] The trial judge noted that the rationale for the "clearest terms" requirement is rooted in commonsense. He endorsed the reasoning of the House of Lords in ***Smith and others v South Wales Switchgear Ltd,*** [1978] 1 All ER 18 at 22 (HL) [***Smith***] that it is "inherently improbable

that one party should agree to discharge the liability of the other party for acts for which he is responsible". However, he acknowledged that if an interpretation of the plain wording and commercial purpose of the clause reveals a common intention to indemnify a party for their own negligence, the clause will validly do so, citing ***CNRL*** at para 100: Decision at paras 46-47.

[28] In considering whether the Agreement's indemnity provisions permitted Strongco to recover its settlement with Westlock, the trial judge stated he "must discern the intention of the parties at the time they entered into the [Agreement] . . . to be gleaned from the language the parties chose to express their agreement. Those words must be given their ordinary and grammatical meaning in the context of the whole agreement considering the commercial context and the joint purpose of the parties". He concluded that the Agreement did not set out an obligation by Nordstrong to indemnify Strongco's negligence "in the clearest terms"; rather the clauses contained general language and did not expressly contemplate negligence. "Absent such clarity, there is no evidence that the parties intended to 'shift the risk' of Strongco's own negligence." Only the Assumed Liabilities were undertaken by Nordstrong and "[t]here was no claim for negligence as of the Effective Date": Decision at paras 48-50.

[29] More particularly, the trial judge found the "Assumed Liabilities are liabilities under the Assumed Contracts, which accrue as and from the Effective Date. In context, accrual does not include Strongco's pre-closing conduct. Rather, the closing of the [Agreement] created a clean slate, and the indemnity captures only those claims which begin to accrue post-closing". Looking at the third consideration in ***Canada Steamship***, the trial judge held that because the language of the indemnity clause could reasonably be interpreted to cover liability for breach of contract, "it will not provide protection for a claim in negligence, absent very specific language to that effect": Decision at paras 51-54.

[30] The trial judge found nothing in the "commercial context" supporting a finding that Nord-sen intended to indemnify Strongco for its own negligence. In particular, the Sheets Contract was 83% complete on the closing date and Strongco had been paid in full for its work prior to closing. The trial judge wrote: "Nord-sen paid dollar for dollar to acquire the Accounts Receivable. . . [and] Nord-sen received no (or at best negligible) value for the negligent design work undertaken by Strongco prior to the closing . . . . The commercially reasonable interpretation of the [Agreement] is that post-closing liabilities of the parties were to follow fault": Decision at para 55.

[31] While acknowledging that contracts "may be designed to facilitate a clean break", the trial judge rejected any presumption that such a contract absolves a seller of past negligent conduct. Moreover, he found Strongco's assertion that Nord-sen agreed to pay full book value for the accounts receivable while accepting unknown liabilities associated with Strongco's potential past negligence was commercially unreasonable: Decision at paras 57-59.

[32] Lastly, the trial judge held that the "language used in the indemnity clause does not demonstrate a clear intention of the parties that Nord-sen agreed to indemnify Strongco for its negligent design of grain bins". Strongco entered the Sheets Contracts during the "ordinary course

of business", and both "Strongco and Nord-sen acknowledge this. Therefore, section 7.1 ... has no application". The trial judge concluded that the Agreement provided no indemnity for the settlement amount paid by Strongco to Westlock, and he dismissed Strongco's third party claim: Decision at paras 60, 65-67.

Grounds of appeal

[33] Strongco's appeal raises the following questions:

1. Did the trial judge err in law by applying the considerations from ***Canada Steamship*** and ***Consumers' Gas*** as an exhaustive and strict test to determine whether Strongco could be indemnified for its own negligence?

2. Did the trial judge err in finding that under the Agreement, the parties did not intend that Nord-sen indemnify Strongco for its own negligent acts in these circumstances?

[34] Strongco asks this Court to clarify the law by finding that the principles articulated in ***Canada Steamship*** and endorsed in ***Consumers' Gas*** are not an exhaustive and strict test for determining whether an indemnity clause will cover a party for its own negligence. Rather, in keeping with the modern approach to contractual interpretation, the principles are merely an interpretive guide, and must not overtake the purpose of the contract, the surrounding commercial context, and the parties' intentions.

Standard of review

[35] Questions of contractual interpretation are generally questions of mixed fact and law, entitled to deference on a standard of palpable and overriding error. However, on the "rare" occasion the issues under review reveal "extricable questions of law", those questions will attract the heightened standard of correctness: ***Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc***, 2024 SCC 20 at paras 27–28, citing ***Sattva*** at para 50.

[36] The first ground addresses whether the trial judge selected the correct legal test when interpreting the indemnity provisions, which is reviewed for correctness. The second ground concerns whether the trial judge properly interpreted the Agreement, which is reviewed for palpable and overriding error.

Analysis

[37] The principles in ***Canada Steamship*** do not create an exhaustive and strict test for determining whether a party's own negligence is within the scope of an indemnity clause. We agree with the appellant that the guidance provided by the Privy Council more than 70 years ago is just that – guidance. Indemnity clauses, like all clauses in a contract, are properly assessed by

looking at the contract holistically, in the light of the commercial context and the intentions of the parties, and by interpreting the language in keeping with its plain and ordinary meaning. The starting point for the inquiry, however, is whether the contract contains clear wording showing an intention to extend indemnity to a party for its own negligence: ***Consumers' Gas***; ***CNRL***.

[38] We find that the trial judge did not apply ***Canada Steamship*** as an exhaustive and strict test, nor did he rigidly apply its principles in determining whether Strongco was indemnified for its own negligence. Instead, he began by assessing whether the Agreement contained clear language to that effect. Finding none, he ultimately looked to the contractual context and the intentions of the parties. While the trial judge referred to ***Canada Steamship*** and found its third principle worth considering, he was applying its guidance rather than conforming to a binding test. Importantly, the trial judge extensively considered the modern approach to contractual interpretation in ***Sattva*** and considered the commercial context and intentions of the parties, and the commercially reasonable interpretation of the contract.

[39] The trial judge reached a proper conclusion that the relevant indemnity provisions did not apply to cover Strongco for its own negligence, which occurred long before the Agreement came into effect.

[40] Strongco argues the trial judge misdirected himself in relying on the historical jurisprudence, so we provide some context for the case law raised in the Decision. That context also explains the trial judge's reference to a "test".

a) Canada Steamship provides guidance, not a strict test

[41] Negligence claims may require the interpretation of either an exemption or exclusion clause, or an indemnity clause, or both. Generally, an exclusion or exemption clause serves to protect a party by limiting, excluding, or exempting them from paying for a loss, even if they are wholly or partially at fault. It acts as a shield against claims by excluding a party's liability when things go wrong. An indemnity clause requires a party to financially reimburse another party for losses or damages, which are often specifically defined. It acts as a sword, shifting or transferring the risk or burden of a claim onto the indemnifying party.

[42] The case law repeatedly insists on clear language for both types of clauses in determining negligence claims. The inquiry begins with whether an exemption or exclusion clause "excludes liability for negligence expressly", or whether an indemnity clause "expressly indemnif[ies] a party from the consequences of their own negligence": ***ITO-Int'l Terminal Operators v Miida Electronics***, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 at 797 [***ITO***]; ***Canada Steamship*** at 793.

[43] ***Canada Steamship*** considered the operation of indemnity clauses in negligence claims. The Privy Council at pages 793-94 approved of this observation by the majority of the Supreme Court of Canada: "... a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless

there is express language to that effect and unless the clause can have no operation except as applied to such a case." The approach to considering such clauses was summarized "with these [three] <u>principles</u> in mind" (emphasis added):

1) First, effect must be given to provisions that expressly exempt a party from the consequences of their own negligence.

2) Second, absent express mention of negligence, the question becomes whether the language is broad enough to encompass indemnification of the *proferens* (that is, the party benefiting from the indemnification clause) for their own negligence.

3) Third, if the language encompasses negligence, the court then asks whether the indemnification clause may apply to indemnify the *proferens* for damages other than those arising from negligence. If so, the indemnification clause will not cover negligence.

[44] Returning to this issue almost 30 years later, the Supreme Court of Canada in ***Consumers' Gas*** at 615 agreed with this statement from the Ontario Court of Appeal: "If one is to be protected against and indemnified for one's own negligence there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms."

[45] The Supreme Court's determination that an indemnity clause must include the "clearest terms" to cover a party for its own negligence remains the law and largely aligns with the first two considerations in ***Canada Steamship***. However, the Court did not directly assess the three principles in ***Canada Steamship*** given that no contract and no indemnity clause existed between the parties in that appeal. Consequently, ***Consumers' Gas*** is not a wholesale endorsement of those principles, as a strict "test" or otherwise.

[46] More recent cases emerging from both the United Kingdom and Canadian courts have clarified that the three principles from ***Canada Steamship*** have always been guidelines rather than a strict test and that exemption and indemnity clauses, like all provisions, are properly assessed though the modern approach to contractual interpretation.

i. The United Kingdom

[47] In ***Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd (The Raphael)***, [1982] 2 Lloyd's Rep 42 at 48, 51 (Eng CA) [***Lamport***], the Court held that describing the three principles from ***Canada Steamship*** as a "test" was a misnomer; "[t]hey are and were only intended to be guidelines" or "aids to interpretation", and "the duty of the Court is just to construe the relevant clause."

[48] The House of Lords came to the same conclusion in ***HIH Casualty and General Insurance Ltd v Chase Manhattan Bank***, [2003] 1 All ER 349 at paras 11, 116 (HL) (Comm) - the ***Canada***

Steamship principles are helpful guidelines to interpretation, but not a code or a rule to be rigidly applied. Instead, courts must still ascertain the intentions of the parties by looking to the surrounding commercial context to produce a result that is consistent with the contract's commercial purpose.

[49] Various cases followed, including ***Capita (Banstead 2011) Ltd v RFIB Group Ltd*,** [2015] EWCA Civ 1310 at para 10, in which the Court of Appeal of England and Wales accepted the following principles set out by the lower court:

> 1. A clear intention must appear from the words used before the Court will reach the conclusion that one party has agreed to exempt the other from the consequences of his own negligence or indemnify him against losses so caused. The underlying rationale is that clear words are needed because it is inherently improbable that one party should agree to assume responsibility for the consequences of the other's negligence.
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> 2. The *Canada Steamship* principles are not to be applied mechanistically and ought to be considered as no more than guidelines; the task is always to ascertain what the parties intended in their particular commercial context in accordance with the established principles of construction. They nevertheless form a useful guide to the approach where the commercial context makes it improbable that in the absence of clear words one party would have agreed to assume responsibility for the relevant negligence of the other.

[50] These principles were repeated in ***PA(GI) Limited v Cigna Insurance (Europe) Limited***, [2023] EWHC 1360 (Comm) at paras 31-32 [***Cigna***], which was raised by Strongco to dispute the trial judge's reliance on ***Smith*** and his finding that it is "inherently improbable" that one party would indemnify another for its own negligent acts. ***Cigna*** at paragraphs 37-40 approved of the clarification in ***Triple Point Technology Inc v PTT Public Co Ltd***, [2021] UKSC 29 at para 111 that a party is "unlikely to have agreed to give up a valuable right [like indemnity] that it would otherwise have had without clear words".

ii. Canada

[51] The reasoning in ***Lamport*** was accepted by the Supreme Court of Canada five years after ***Consumers' Gas*** in ***ITO*** at 795–98. After setting out the three principles in ***Canada Steamship***, the Supreme Court found the first two "tests" require express language about negligence and failing that, language wide enough to cover negligence. However, the third "test" was found to be "the subject of much judicial comment and has given courts some difficulties", including in ***Smith***. In the Court's view, this was due to the "qualifying statement to the effect that the existence of another possible head of damage, other than . . . negligence, would be 'fatal to the *proferens*' even if the words used are *prima facie* wide enough to include negligence". The Supreme Court held "the courts have treated this problem as a question of construction in an effort to give effect to

what may be termed the reasonable intention of the parties. Generally, these cases have accepted the *Canada Steamship Lines* case as authoritative but have endeavoured to relax the qualification expressed in the third test": ***ITO*** at 795.

[52] The Court found at 796-798 that the interpretation of an indemnity clause should be approached in the fashion applied in ***Lamport***, in which the second and third principles in ***Canada Steamship*** require courts to engage in an exercise of "construction". The Supreme Court held that the proper inquiry is what "the parties meant and must be deemed to have meant by the words they used" and that "the guidelines or tests which are referred to in the many authorities are only to be used by the Courts as aids to the successful and correct solution of such exercise". The previous characterization of the principles as "tests" was "really a misdescription". The Supreme Court added, quoting from ***Lamport***:

> Thus, if an exemption clause of the kind we are considering excludes liability for negligence expressly, then the Courts will give effect to the exemption. If it does not do so expressly, but its wording is clear and wide enough to do so by implication, then the question becomes w[h]ether the contracting parties so intended.
>
> ... if there is a head liability upon which the clause could bite in addition to negligence then, <u>because it is more unlikely than not that a party will be ready to excuse his other contracting party from the consequences of the latter's negligence, the clause will generally be construed as not covering negligence</u>. . . [I]n the absence of any express reference to negligence, the Courts can sensibly only conclude that the relevant clause was not intended to cover negligence and will refuse so to construe it. In other words, the Court asks itself what in all the relevant circumstances the parties intended the alleged exemption clause to mean. [Emphasis added]

[53] The proper approach was revisited in the context of interpreting an exclusion of liability clause in ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at paras 64-65, 73, [2010] 1 SCR 69 [***Tercon***]. The Supreme Court confirmed: "The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context". The Court added that the analysis should not overlook the parties' "commercial sophistication and the fact that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions".

[54] A few short years later, ***Sattva*** provided binding guidance on contractual interpretation. The Supreme Court confirmed that the interpretive exercise involves applying the principles of contractual interpretation to the words of the contract, considered in light of the factual matrix, including the intentions of the parties at the time the contract was formed. The contract must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with

the surrounding circumstances known to the parties at the time of formation of the contract": ***Sattva*** at para 47. The evidence of surrounding circumstances is limited to "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": ***Sattva*** at para 58. See also ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at paras 27, 33, [2016] 2 SCR 23.

[55] Thereafter, the Federal Court of Appeal also rejected a rigid application of the ***Canada Steamship*** principles to an exclusion of liability clause. The Court confirmed that "the three-prong approach set out in *Canada [Steamship]* is a guide rather than a decisive test requiring a pre-determined result when the interpretation concerns a clause that excludes or limits liability". Rather, "a contract must be interpreted as a whole, in the light of the circumstances and the commercial context": ***Pêcheries Guy Laflamme Inc v Capitaines propriétaires de la Gaspésie (ACPG) Inc***, 2015 FCA 78 at paras 14-15, citing ***Sattva*** and ***Tercon***. Further, the word "negligence" need not appear to exclude liability if the context is clear.

iii. Alberta

[56] Alberta jurisprudence has also considered a "clearest terms" requirement and the modern approach to interpreting contracts when assessing indemnity and exclusion clauses. In ***CNRL***, this Court interpreted an indemnity clause "according to its plain wording and its commercial purpose, not based on any artificial presumptions about which party will bear the burden of any loss". The majority at paragraphs 99-100, held: "Given the purpose of the indemnity clause in the contract there is no room for any rule of interpretation that a party seeking to rely on the clause must show that its words can 'bear no other meaning'. Rather, the issue was one of contractual interpretation, not a matter of 'onus'". However, the Court noted that ***Consumers' Gas*** "holds that clear wording is required to extend indemnity to a party for its own negligence".

[57] In ***Dow Chemical***, this Court took a similar approach to interpreting a limitation of liability clause in a sales contract. At paragraph 47, this Court relied on ***Tercon*** and ***Sattva*** to find: "Exclusion clauses should be interpreted like all other contractual clauses, not in isolation, but giving the words used their ordinary and grammatical meaning, considered in harmony with the rest of the contract and in light of their purpose and commercial context".

iv. Summary

[58] Canadian courts now approach indemnity and exclusion clauses in negligence claims on the same principles of contractual interpretation as any other contractual provision. The provisions are considered through their plain language, read in the context of the whole contract, and the common intentions of the parties in the reality of the commercial circumstances. However, clear and unambiguous terms are required to indemnify a party for its own negligence because a common intention for that outcome remains "unlikely": ***Consumers' Gas***.

[59] While the principles in ***Canada Steamship*** continue to provide judicial guidance for assessing an individual case, they are not an exhaustive and strict test. Rather, the law in both the United Kingdom and Canada - in particular ***ITO, Tercon,*** and ***Sattva*** - have relaxed these factors over time, directing a contextual analysis of the parties' intentions. This modern approach to contractual interpretation now governs.

[60] As will be discussed below, the trial judge properly found that "[s]ince ***Consumers' Gas***, [the] 'clearest terms' requirement has been the test in Canada for interpreting clauses that purport to indemnify a party for its own negligence": Decision at para 44. While he referenced the "test" in ***Canada Steamship***, his use of that case and its principles was one of guidance. The trial judge did not err in finding that the indemnification provisions in the Agreement did not require Nordstrong to indemnify Strongco for its own pre-closing negligent acts.

b) The trial judge's analysis was not limited to a strict application of Canada Steamship

[61] The trial judge correctly began his assessment of whether Nordstrong was required to indemnify Strongco for its negligent design of the grain bins under the Sheets Contract by referring to this Court's findings in ***Dow Chemical*** at paragraph 47. He concluded that indemnity clauses, like exclusion clauses in ***Dow Chemical***, "should be interpreted like all other contractual clauses, not in isolation, but giving the words used their ordinary and grammatical meaning, considered in harmony with the rest of the contract and in light of their purpose and commercial context: ***Sattva***": Decision at para 40. The trial judge noted that while there is no prohibition against indemnifying for damages caused by the indemnitee's own negligence, "significant caution" is exercised in interpreting indemnity clauses in a way that indemnifies a party's own negligence. These findings are in keeping with the principles of contractual interpretation related to indemnity clauses set out above.

[62] More importantly, while the trial judge wrote that the "Privy Council established a three-staged test" for interpreting exclusion clauses related to indemnity for a party's own negligence, he correctly contextualized that statement. As he found, the "clearest terms" requirement is grounded in the "commonsense notion" that it would be rare to indemnify another for loss caused by that person's own negligence, as expressed by the House of Lords in ***Smith*** at 22. (The Supreme Court cited ***Smith*** in ***Consumers' Gas*** at 615, in endorsing the "clearest terms" requirement.) The trial judge also relied on ***CNRL*** at paragraph 100, to caution himself that there are occasions where a party may indemnify another for its own negligent acts; he wrote: "When the parties are careful and specific about the language they use in a given indemnity clause such wording must be 'interpreted and applied according to its plain wording and its commercial purpose'": Decision at paras 46-47.

[63] Applying these principles to the facts, the trial judge determined that the question before him was "whether the indemnity provisions permit recovery by Strongco. To make this determination, I must discern the intention of the parties at the time they entered into the [Agreement] . . . gleaned from the language the parties chose to express their agreement." He

added that the "words must be given their ordinary and grammatical meaning in the context of the whole agreement considering the commercial context and the joint purpose of the parties": Decision at para 48. These instructions were entirely in keeping with the modern approach to contractual interpretation required by ***Tercon*** and ***Sattva***, as applied to indemnity clauses in ***CNRL***.

[64] While the trial judge "analyzed" the third principle in ***Canada Steamship*** in the context of this case, his approach was one of guidance not conformity, and he did not apply the wrong legal test.

c) The Agreement reveals that the parties did not intend to indemnify Strongco for its own pre-closing negligent acts

[65] The trial judge's determination that none of the relevant indemnity clauses in the Agreement provided "clear terms" obligating Nord-sen to indemnify Strongco's negligence is entitled to deference. As the trial judge held, the clauses did not mention negligence but instead included "the type of general language eschewed in ***Canada Steamship*** and ***Consumers' Gas***. Absent such clarity, there is no evidence that the parties intended to 'shift the risk' of Strongco's own negligence to Nord-sen": Decision at paras 8, 48-49.

[66] The trial judge's comments do not suggest that "negligence" is a magic word that had to appear within the indemnity clauses. However, he was entitled to note the absence of an express reference to negligence in assessing whether the Agreement contained "clear terms" imposing indemnification.

[67] The trial judge further assessed the Assumed Liabilities undertaken by Nord-sen through the Agreement. He determined that the Sheets Contract limited any claims by Sheets to "direct damages not exceeding the aggregate amount of the Purchase Order". While Nord-sen would have understood it was assuming liabilities based on those provisions as of the Agreement's closing date, liabilities beyond those contractual protections would not have been assumed or intended. Rather, the Agreement specifically set out that "Nord-sen assumed no liabilities 'known or unknown' other than the Assumed Liabilities (Section 4.[4])": Decision at paras 50-51.

[68] We find no error in the trial judge's conclusion that the closing date of the Agreement "created a clean slate, and the indemnity provisions capture only those claims which began to accrue post-closing". As he noted, "Nord-sen was to assume 'Assumed Liabilities' as of the Effective Date ...". However, "[t]here was no claim for negligence as of the Effective Date. Assumed Liabilities are liabilities under the Assumed Contracts, which accrue as and from the Effective Date. In context, accrual does not include Strongco's pre-closing conduct": Decision at paras 50-51.

[69] At this point in his assessment, the trial judge turned to the third branch of ***Canada Steamship*** for guidance, finding it "merits analysis". Having determined the indemnity clauses did not expressly extend to Strongco's own acts of negligence, he assessed whether such a right may

be inferred by necessary implication – "in the sense that no other interpretation of the indemnity agreement is possible other than it must extend to negligence in order for the provision to be given meaning." The trial judge found that no application of the relevant clauses to Strongco's negligence arose by necessary implication. Further, as the indemnity clause could reasonably be interpreted to cover a claim for breach of contract, rather than negligence, "it will not provide protection for a claim of negligence, absent very specific language to that effect" (emphasis added): Decision at para 54. This was not a rigid application of the third principle in ***Canada Steamship***. Rather, the trial judge imposed the "clearest terms requirement" and the principles of contractual interpretation over top of the guidance provided by ***Canada Steamship***.

[70] This becomes even more evident in the trial judge's consideration of whether the "commercial context" would support indemnity for a party's own negligence. He ultimately determined that nothing between the parties supported a finding that Nord-sen intended to indemnify the negligent acts of Strongco. As the trial judge held, "Nord-sen had nothing to gain by agreeing to be responsible for Strongco's preclosing negligence in its performance of its obligations under the Sheets Contract". Nord-sen had paid dollar for dollar to acquire the Accounts Receivable and "received no (or at best negligible) value for the negligent design work undertaken by Strongco prior to the closing of the [Agreement]. The Sheets Contract was, at closing, about 83% complete", including the "design and engineering work in respect of the grain bins and the delivery of most of the components occurred prior to the closing date". There was no palpable and overriding error in the trial judge's finding that the "commercially reasonable interpretation of the [Agreement] is that post-closing liabilities of the parties were to follow fault" and the fault related to the Sheets Contract was all pre-closing: Decision at paras 4, 55-56.

[71] These findings were in keeping with ***CNRL***. An indemnity clause is to be "interpreted and applied according to its plain wording and its commercial purpose, not based on any artificial presumptions about which party will bear the burden of any loss": ***CNRL*** at paras 99-100. This includes any presumption about a strict reallocation of risks based solely on the nature of an assets purchase agreement. As ***CNRL*** provides, "presuming that the risk of any damage must fall on the party who suffered the damage unless there is 'no other possible meaning'" may undermine the core purpose of a particular indemnity clause; so too would presuming it falls on the asset purchaser to indemnify the pre-agreement negligence by the asset seller. While contracting parties may intend to re-allocate the risk of one party's negligence, that intention must be gleaned in the clear terms of the agreement.

[72] This requirement promotes commercial certainty rather than detracting from it, even in an asset purchase of a going concern business. In such agreements, existing liabilities relating to an asset do not transfer with the ownership of the asset unless the parties have agreed to transfer the liabilities. The liabilities accrue to the owner, not the asset. The owner does not divest itself of pre-closing liability simply by transferring ownership. Here, the Agreement was clear that the Effective Date of May 8, 2009, was the date the Assumed Liabilities would transfer to Nord-sen, not the date of the Sheets Contract. Strongco's interpretation would not just result in a "clean break" but

provide it a windfall – protection from liability for its own negligence - while no consideration for that benefit is evident in the clear terms of the Agreement.

[73] While Strongco and Nord-sen were free to contract a full risk transfer, this record shows little effort to assess and value the risk of claims that had not yet been filed. Nord-sen could have purchased Strongco's risk of liability, but having paid full book value for the assets, the record does not show any consideration negotiated or received for assuming any pre-closing risk. Further, as the trial judge explained, "the parties chose not to reference negligent acts in Sections 4.6 to 6.3.3 of the [Agreement]. Arguably, this omission was intentional, and no indemnity was intended to be granted for the vendor's prior negligent acts": Decision at para 58.

[74] As the trial judge also concluded, asset purchase agreements are not *pro forma* contracts, but are specifically crafted to accomplish the unique purposes of the parties. While they may be designed to facilitate a "clean break", they do not absolve a seller from past negligent acts unless that purpose is expressed in the contract. As the trial judge held, "it could equally follow from the clean break analysis that a purchaser would not intend to acquire liabilities attached to the vendor's past conduct. . . [and] [t]he 'clean break' leaves each party to bear the risk of its own preclosing conduct": Decision at para 57.

[75] Here, the Agreement's provisions do not align with the "clean break" urged by Strongco, and the aim to "sever ties". To the contrary, the Agreement includes sections 4.4 (No Assumption of Liabilities, by which Nord-sen excepted the Assumed Liabilities, so Strongco has ongoing risk), 4.5 (Strongco remains liable for product warranty claims for products and services of the Business sold before or rendered prior to the Effective Date and must coordinate with Nord-sen), 5.1.30 (Strongco warranted the accuracy of information provided, which addressed litigation, environmental matters, clear title to Premises, expropriation, good condition and repair of buildings, employee contracts and benefit plans, intellectual property rights , permits, etc.), 6.11 (Assistance with tax matters), and 8.6 (Co-operation with tax matters).

[76] Under section 7.1, the parties expressly contemplated that liability in respect of Ongoing Projects (outside the ordinary course of business) be divided by whether the cause of action relating to that liability arose on or prior to the closing date. Not only is this provision inconsistent with Strongco's approach to a "clean break", but Strongco presents no explanation for allocating ongoing business liability (outside the ordinary course of business) in this manner and then changing the allocation for Assumed Liabilities.

[77] Section 10.6 expressly addresses circumstances where "liability for past negligence" is allocated (for personal injury on premises). The trial judge concluded at paragraph 58 that the parties' choice in sections 4.6 and 6.3.3 not to reference negligent acts (in contrast to s 10.6), and the "[Agreement] as a whole" demonstrate "an intention that each of the parties entered into the transaction with a view of retaining latent liabilities that predated the transaction". The trial judge did not assess the various provisions in a silo, but "reasonably construed the [Agreement] as a whole": ***Sattva*** at para 107.

[78] When choosing between competing interpretations of a contract, the interpretation that better promotes commercial certainty should generally be preferred. "This approach is justified as furthering the intentions of the parties, since it is axiomatic that one of the purposes of entering into a written contract is to achieve certainty of one's contractual obligations and entitlements": ***R & D Holdings Ltd v Buranello and French***, 2021 NSSC 359 at para 25.

[79] We find no palpable and overriding error in the trial judge's conclusion that it would have been "commercially unreasonable" for Nordstrong to have accepted latent liability for negligent acts committed by Strongco prior to the Agreement: "To fix Nord-sen with such an unknown liability could render the value received for the purchase of Strongco's assets nugatory. . . Such would not be a commercially reasonable expectation of a purchaser, as the assets (burdened with such contingency), would not have been of the value ascribed": Decision at para 59.

[80] No error is shown in the trial judge's conclusion that the Agreement did not provide indemnification for the acts arising from Strongco's pre-closing negligence, and that Strongco was not entitled to recover the Westlock settlement proceeds.

Conclusion

[81] The appeal is dismissed.

Appeal heard on November 6, 2025

Memorandum filed at Edmonton, Alberta
this 21st day of August, 2026

Feehan J.A.

Woolley J.A.

Feth J.A.

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