

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

B E T W E E N :

WINNIPEG CONDOMINIUM	)	
CORPORATION NO. 913 on its own behalf	)	
and on behalf of unit owners of	)	
CONDOMINIUM CORPORATION NO. 913	)	<i>D. G. Giles and</i>
	)	<i>M. D. Zacharias</i>
(Plaintiffs)	)	<i>for the Appellant</i>
	)	
- and -	)	
	)	
PRE-CON BUILDERS LTD.	)	<i>K. L. Dixon</i>
	)	<i>for the Respondents</i>
(Defendant) Appellant	)	
	)	
- and -	)	
	)	<i>J. Kendall</i>
CREEK BEND PROJECT INC.	)	<i>on a watching brief</i>
	)	<i>for the Plaintiffs</i>
(Defendant)	)	
	)	
- and -	)	
	)	<i>Appeal heard:</i>
NEIL COOPER ARCHITECT INC. and	)	<i>November 5, 2025</i>
NEIL COOPER	)	
	)	
(Third Parties) Respondents	)	
	)	<i>Judgment delivered:</i>
- and -	)	<i>March 4, 2026</i>
	)	
CITY OF WINNIPEG, HART & SON	)	
PLASTERING (1999) LTD., HIEBERT	)	

HERMANOS LTD., 7110804 MANITOBA)
LTD. operating as RG INSTALLATIONS)
AND HIEBERT HERMANOS, and)
5631654 MANITOBA CORP.)
(Third Parties))
- and -)
KENROC BUILDING MATERIALS CO.)
LTD.)
(Fourth Party))

On appeal from *Winnipeg Condominium Corporation No 913 v Creek Bend Project Inc et al*, 2025 MBKB 40 [KB reasons]

RIVOALEN CJM

Introduction

[1] The appellant (Pre-Con) appeals the judgment of a judge of the Court of King’s Bench (the motion judge) in which he granted the motion for summary judgment of Neil Cooper Architect Inc. and Neil Cooper (together, Cooper) and dismissed the third party claim filed by Pre-Con against Cooper.

[2] While there are several parties named in the style of cause, the only parties relevant to this appeal are Pre-Con and Cooper.

[3] The third party claim against Cooper was summarily dismissed by the motion judge based on a “common sense proposition” (*B (I) v Canada (Attorney General)*, 2001 CarswellSask 357 at para 4, 2001 SKQB 243 [B (I)], quoted in *KB reasons* at para 50; see also *ibid* at para 52), which, if endorsed, would suggest that a defendant should not be permitted to seek contribution

or indemnification from a third party in circumstances where the defendant *might* have successfully defended the underlying action and avoided liability.

[4] For the following reasons, I would allow the appeal with costs.

The Essential Background

[5] The main litigation concerns the construction of a condominium complex. Pre-Con was the general contractor retained to perform all necessary work for construction of the complex. Pre-Con engaged Cooper to provide architectural design services related to the construction of the complex.

[6] Construction of the complex was completed in 2014.

[7] On March 29, 2021, a fire occurred on the balcony of a unit in the complex. During demolition and repair activities following the fire, dark staining and mould were discovered on the backside of certain exterior walls of the affected units. This discovery prompted more intrusive investigations of the building envelope which, according to the plaintiffs, revealed “certain latent and dangerous deficiencies” in the complex that were contrary to exterior insulated finish systems industry standards and best practices.

[8] On April 5, 2022, the plaintiffs filed a notice of application under Part II of *The Limitation of Actions Act*, RSM 1987, c L150 [the *LOAA*], as repealed by *The Limitations Act*, SM 2021, c 44, s 53, seeking leave to extend the limitation period during which an action could be commenced in relation to the construction of the complex (the Part II application). The Part II application was necessary because, at that time, limitation periods in Manitoba ran from the date on which the cause of action *arose* rather than the date the claimant *discovered* the material facts on which the cause of action

was based. The Part II application named Pre-Con and Cooper as two of the respondents.

[9] Cooper took the position that they would oppose the Part II application. Pre-Con took no position. Both Cooper and Pre-Con were aware of their respective positions throughout.

[10] Cooper took active steps to file affidavit materials to oppose the Part II application and scheduled cross-examinations.

[11] In July 2022, the plaintiffs agreed to settle their application against Cooper. Cooper was released from the “action” (although one had not yet been commenced) in exchange for a waiver of costs.

[12] On October 14, 2022, the plaintiffs executed a release and confidentiality agreement in favor of Cooper (the release), abandoning their Part II application. The release did not include a provision requiring the plaintiffs to indemnify Cooper should Cooper be found liable in tort in a subsequent related proceeding.

[13] On January 12, 2023, the plaintiffs filed a notice of abandonment of their Part II application against Cooper.

[14] On January 18, 2023, counsel for the plaintiffs appeared before another judge of the Court of King’s Bench on the uncontested civil motions list to provide an update regarding the Part II application. Counsel advised the presiding judge that the application against Cooper had been abandoned and that Pre-Con continued to take no position on the application. A form of order was provided to the presiding judge. The order was signed that morning, thereby extending the limitation period for the causes of action and providing

the plaintiffs fourteen days from the date of the order to file and serve their statement of claim.

[15] On January 19, 2023, the plaintiffs filed a statement of claim naming Pre-Con as a defendant. Cooper was not named as a defendant.

[16] On February 28, 2023, Pre-Con filed its statement of defence and crossclaim. On September 21, 2023, Pre-Con filed an amended third party claim against Cooper and others (the third party claim).

[17] On July 12, 2024, Cooper filed a notice of motion for summary judgment seeking to dismiss the third party claim against them. The grounds raised by Cooper were:

- (1) The plaintiffs had settled and abandoned any claim against them and released them from liability for the matters at issue in the litigation.
- (2) Cooper had no liability to the plaintiffs and Pre-Con had no viable cause of action against Cooper for contribution or indemnity for the plaintiffs' claim.
- (3) Alternatively, the third party claim should be dismissed based on the expiry of the applicable limitation period, estoppel and/or abuse of process.

[18] On March 27, 2025, in written reasons for judgment, the motion judge granted Cooper's motion for summary judgment and dismissed the third party claim (see *KB reasons*).

[19] In his reasons, the motion judge found that, based on the principles of equity, the circumstances called out for Pre-Con to have advised the other parties, as well as the Court, that the abandonment of the Part II application against Cooper was not the end of their potential liability. The motion judge concluded that Pre-Con's silence effectively deprived Cooper of the opportunity to raise a limitation defence (the estoppel conclusion) (see *KB reasons* at paras 48-49).

[20] However, a review of the *KB reasons* establishes that the motion judge did not rely on the estoppel conclusion as the basis for granting summary judgment. Rather, he relied exclusively on the decision of the Saskatchewan Court of Queen's Bench in *B (I)* (see *KB reasons* at paras 50-53).

[21] The motion judge explicitly held as follows: "The reasoning in *B. (I.)* is applicable here and the conclusion to dismiss the third-party claim arrived at by [the Saskatchewan trial judge] is also the appropriate basis for granting these motions for summary judgment" (*KB reasons* at para 52).

[22] The motion judge determined as follows: "In view of the reasons for my conclusion that Pre-Con is precluded from proceeding with the third-party claims, I do not need to determine these motions on the additional arguments advanced by Cooper" (*ibid* at para 53).

[23] Afterwards, the motion judge set out the additional arguments raised by the parties but provided no analysis of those arguments. He relied solely on the reasoning in *B (I)* when coming to his conclusion to grant the motion for summary judgment and dismiss the third party claim against Cooper.

[24] This now brings me to the present appeal.

Issues

[25] Pre-Con submits that the motion judge made material errors of both fact and law in dismissing its third party claim. Taken together, it says that these errors yielded an unjust result that it submits should be set aside on appeal.

Standard of Review

[26] The standard of review is not in dispute. The decision to grant or dismiss a motion for summary judgment is a discretionary one, reviewed on a deferential standard. It will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust. Where a motion judge applies an incorrect principle of law or errs with regard to a purely legal question, that aspect of the decision will be reviewed on the correctness standard (see *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at para 32; *Hryniak v Mauldin*, 2014 SCC 7 at para 84).

Analysis

The Motion Judge Committed Material Errors of Fact

[27] Pre-Con argues that, during its submissions before the motion judge, it underscored that it had erroneously pled a limitation defence in its statement of defence. Before this Court, in its written material and during oral submissions, Pre-Con acknowledged that the order extending the time to file the action precluded, and continues to preclude, it from relying upon a limitation defence to defeat the main action. It stated once again that pleading a limitation defence was a mistake that it had acknowledged before the motion judge.

[28] In his reasons, the motion judge noted that “pleading a statute erroneously in the circumstances of [that] case [was] of no consequence” (*KB reasons* at para 46). Despite this finding, Pre-Con submits that the motion judge made a series of comments suggesting that he was relying on Pre-Con having pled a limitation defence.

[29] I agree.

[30] For example, the motion judge stated as follows: “[T]he fact remains that at the time of the abandonment of the application for an extension of the limitation period by the plaintiffs, those allegations remained in [Pre-Con’s] pleadings and ostensibly Pre-Con continued to rely on the protection of the limitation period” (*ibid* at para 47).

[31] This statement is factually incorrect. At the time the notice of abandonment in favor of Cooper was filed by the plaintiffs, no statement of defence had been filed. Indeed, no statement of claim had been filed because the order extending the time to file the action had not been pronounced.

[32] As another example, the motion judge stated as follows: “Rather than pursuing a limitation defence that it had specifically raised, Pre-Con chose not to. I cannot speculate as to why it did not do so at that point or whether it will do so in the future” (*ibid* at para 48).

[33] This statement is also factually incorrect. Pre-Con did not raise the limitation defence until after the order extending the time to file the action was granted. This statement is also inconsistent with the motion judge’s earlier comments, wherein he stated that pleading a statute erroneously is of no consequence.

[34] A further example is illustrated by the motion judge's following statement (*ibid* at para 48):

[E]ven though Pre-Con only formally consented to the abandonment of the application to extend the limitation period, based on the principles of equity, the circumstances here called out for Pre-Con to have advised the other parties, as well as the court, that the abandonment of the claim against Cooper . . . by the plaintiffs was not the end of [its] potential liability and that it intended to advance the third-party claims for indemnity and contribution.

[35] This statement is factually incorrect. Pre-Con did not consent—formally or otherwise—to the plaintiffs' abandonment of the Part II application (and any action they might have) against Cooper.

[36] In my view, these examples of factual errors materially impacted the motion judge's reasoning and coloured his view of Pre-Con's silence and failure to advise Cooper that they would be sued as a third party. These errors caused the motion judge to misperceive the factual similarities between *B (I)* and the present appeal.

The Motion Judge Committed Errors of Law

[37] Pre-Con submits that the motion judge erred in law by failing to recognize that the third party claim against Cooper was based on a statutory cause of action with its own limitation period.

[38] Pre-Con submits that it has a statutory cause of action to claim for contribution as against any joint tortfeasors pursuant to section 2(1) of *The Tortfeasors and Contributory Negligence Act*, CCSM c T90 [the *TCNA*]. It says that the *TCNA* permits a defendant to issue a third party claim *before* it has successfully defended an action brought against it by a plaintiff.

[39] I agree with this submission for the following reasons.

[40] In Manitoba, when a defendant is seeking contribution from a third party because of the third party's negligence, a defendant has a statutory cause of action to claim for contribution as against any joint tortfeasors pursuant to section 2(1) of the *TCNA*. The *TCNA* permits a defendant to issue a third party claim *before* it has successfully defended an action brought against it by a plaintiff (see *Loeppky et al v Taylor McCaffrey LLP et al*, 2019 MBQB 59 at para 43; *Investors Group Trust Co v Gordon*, 1998 CanLII 17676 (MBCA)).

[41] Furthermore, the limitation period that applied to Pre-Con's claim for contribution as against Cooper under the *TCNA* was governed by sections 2(2) and 17(1) of the *LOAA*:

Counter-claim and third party proceedings.

2(2) Where an action is brought for injuries to the person or for injuries to property within the time limited by this Act or any other Act of the Legislature and third party proceedings are instituted, or a counter-claim is made in respect of damages caused in the same accident, the lapse of time limited by this Act or any other Act of the Legislature is not a bar to the third party proceedings or to a counter-claim by the defendant or third party.

Demande reconventionnelle et demande en garantie

2(2) Lorsqu'une action est intentée dans les délais fixés par la présente loi ou par une autre loi de la Législature, pour infirmité ou pour dommages aux biens, et qu'une procédure d'appel en garantie simple est introduite, ou lorsqu'une demande reconventionnelle est intentée relativement aux dommages causés lors du même accident, la prescription établie par la présente loi ou par une autre loi de la Législature ne constitue pas une fin de non-recevoir à l'égard de la procédure d'appel en garantie ou d'une demande reconventionnelle intentée par le défendeur ou par une tierce partie.

Time limit for claiming contribution between tortfeasors.

17(1) Where, under The Tortfeasors and Contributory Negligence Act, a tortfeasor (in this section referred to as “the first tortfeasor”) becomes entitled to a right to recover contribution in respect of any damage from another tortfeasor

- (a) no action to recover contribution by virtue of that right shall be begun;
- (b) the court shall not grant leave to begin an action to recover contribution by virtue of that right; and
- (c) the court shall not grant leave to continue an action to recover contribution by virtue of that right that was begun;

after the end of the period of two years from the date on which that right accrued to the first tortfeasor.

Réclamations entre coauteurs d’un délit

17(1) Lorsqu’en vertu de la Loi sur les auteurs de délits civils et la négligence contributive, l’auteur d’un délit (désigné comme “premier auteur” au présent article), acquiert un droit d’action contre un coauteur du délit pour recouvrer un montant équivalent à la part de la faute de ce coauteur, les dispositions suivantes s’appliquent :

- a) aucune action en recouvrement de ce montant et en vertu de ce droit ne doit être intentée;
- b) le tribunal ne doit pas accorder l’autorisation d’intenter une action en recouvrement de ce montant et en vertu de ce droit;
- c) le tribunal ne doit pas accorder l’autorisation de continuer une action en recouvrement de ce montant et en vertu de ce droit, lorsque plus de deux ans se sont écoulés depuis la date à laquelle le premier auteur a acquis ce droit d’action.

[42] A review of these provisions satisfies me that Pre-Con was within the limitation period to issue the third party claim against Cooper.

[43] First, the granting of the order extending the time for the plaintiffs to file a claim brought the claim “within the time limited by [the] Act”, as required by section 2(2).

[44] Next, pursuant to section 17, the limitation period applicable to a claim for contribution between Pre-Con and Cooper (as tortfeasors) had not started and, technically, does not begin to run until a settlement or a judgment is issued in relation to the plaintiffs’ claim. This was the case under the *LOAA*, notwithstanding the common practice of initiating third party claims within the main action in the interests of judicial efficiency and economy.

[45] Therefore, it follows that Pre-Con was not outside the limitation period to file the third party claim and it did not deprive the third parties of a limitation right. It exercised its statutory cause of action available to it within the prescribed time.

[46] Nowhere in his reasons did the motion judge address Pre-Con’s statutory right to plead a cause of action against Cooper in tort under the *TCNA*. Instead, he exclusively relied on a decision from a trial court from another jurisdiction as the sole basis for his reasoning.

[47] In my view, this is an error of law.

[48] As mentioned previously, the motion judge adopted the reasoning set out in *B (I)* to justify his order dismissing the third party claim (see *KB reasons* at paras 50-52). As shall be explained, I do not endorse the reasoning found in *B (I)*.

[49] First, in *B (I)*, the statutory basis at that time for contribution amongst joint tortfeasors in Saskatchewan was set out in section 11 of *The*

Contributory Negligence Act, RSS 1978, c C-31. In *B (I)*, as in the present appeal, the Saskatchewan trial judge made no mention of this provision or otherwise acknowledged the statutory right of a defendant to settle and subsequently seek contribution and indemnity from third parties.

[50] Instead, the Saskatchewan trial judge simply held as follows: “While I can find no authorities directly on point, it seems to me to be a common sense proposition that if it is possible for a Defendant to successfully defend an action and avoid liability, it should not be permitted to claim for indemnification and contribution from third parties if it fails to do so” (*ibid* at para 4, quoted in *KB reasons* at para 50) (the common sense proposition).

[51] It is therefore evident that the Saskatchewan trial judge’s reasoning in *B (I)*, which essentially holds that a defendant must pursue *all* available remedies that could possibly enable it to successfully defend an action *before* it can seek contribution or indemnity from a third party, is not based on any legal or equitable principles or authorities but, rather, on what he deemed to be mere “common sense” (at para 4).

[52] Aside from *B (I)*’s questionable precedential value, it is also a brief decision comprised of nine paragraphs, none of which explain the legal or equitable foundation for the Saskatchewan trial judge’s reasoning. In the present appeal, since the motion judge simply adopted that reasoning as the basis for granting Cooper’s summary judgment motion, the legal or equitable basis for his decision is similarly unclear.

[53] In their written submissions, Cooper argues:

[A]lthough not specifically stated in his reasons or in the reasons of Justice Malone in *B.(I.)*, the proposition Justice Malone described as a matter of common sense can be seen as flowing

either from the inherent power and jurisdiction of the court to fashion such remedies as may be necessary to do justice between the parties, or from the court's power to prevent an abuse of its process, or both.

[54] In the absence of any explanation from the motion judge regarding the legal or equitable basis for his decision, aside from his wholesale adoption of *B (I)*, and considering Pre-Con's argument that the Saskatchewan trial judge's decision in *B (I)* and the motion judge's decision were both "unmoored to any legal or even equitable foundation", I am left only with Cooper's argument that those decisions, based on the common sense proposition, were grounded in a court's inherent jurisdiction to fashion remedies that are necessary to do justice between the parties or to prevent abuses of process.

[55] For the following reasons, I cannot accept Cooper's argument and I conclude that the motion judge's decision is unsupported by any law or equitable principle and was made in error.

The Court's Inherent Jurisdiction Does Not Trump the TCNA

[56] In my view, the Court's inherent jurisdiction has no application in the present appeal.

[57] The Supreme Court of Canada has described the provincial superior courts' inherent jurisdiction in the following terms in *Endean v British Columbia*, 2016 SCC 42 at paras 23-24:

The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court

“may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-31.

The courts have recognized that, given the broad and loosely defined nature of these powers, they should be “exercised sparingly and with caution”: *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction: see, e.g., *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 63-68. As The Honourable Georgina Jackson and Janis Sarra write, “[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances”: “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 73.

[58] It is settled law that a court cannot rely upon its inherent jurisdiction to bypass a statute or regulation. This Court has recently stated that, “once a statute or regulation addresses an issue, that statute should be how the issue is addressed, with that only rarely being complemented (and never contradicted) by the court’s inherent jurisdiction” (*College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 70 at para 54; see also para 57).

[59] This is important in the context of the present appeal because what is at issue is an order for summary judgment, dismissing a third party claim brought pursuant to section 2(1)(c) of *TCNA*. As explained previously, that

section provides a statutory cause of action to a tortfeasor to claim contribution and indemnity as against any joint tortfeasor. It states:

Where damage suffered

2(1) Where damage is suffered by any person as a result of a tort, whether a crime or not,

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor *who is, or would if sued have been, liable in respect of the same damage*, whether as a joint tortfeasor or otherwise, so, however, that no person is entitled to recover contribution from any person entitled to be indemnified by them in respect of the liability in respect of which the contribution is sought.

Personnes subissant un dommage

2(1) Lorsqu'une personne subit un dommage résultant d'un délit civil, qu'il s'agisse ou non d'un crime :

c) tout auteur du délit responsable de ce dommage peut recouvrer une contribution de tout autre auteur *qui est également responsable de ce dommage ou qui l'aurait été s'il avait été poursuivi*, que ce soit en qualité de coauteur ou à tout autre titre. Toutefois, personne n'a le droit de recouvrer une contribution de quiconque ayant droit d'être indemnisé par elle relativement à toute action fondée sur la responsabilité qui donne lieu à la demande de contribution.

[emphasis added]

[60] This section outlines two prerequisites to claim the statutory right to contribution and indemnity from a joint tortfeasor. First, a tortfeasor must demonstrate that the tortfeasor against whom contribution or indemnity is sought would, if sued, have been liable to the plaintiff. Second, they must demonstrate that that liability is in respect of the same damage for which they themselves are liable. If these prerequisites are not met, then a court would be

justified in denying the tortfeasor this statutory right. Accordingly, as the *TCNA* expressly governs the issue of whether a tortfeasor is entitled to claim for contribution and indemnity from a joint tortfeasor, this makes it the applicable source of statutory authority upon which a court may either grant or deny that statutory right.

[61] The motion judge's decision to grant summary judgment in this case and, thus, summarily deny Pre-Con its statutory right to contribution, not only circumvented the *TCNA*, but also contradicted section 2(1)(c) of the *TCNA* by essentially creating a new threshold requirement for a claim for contribution that does not exist in the governing legislation: namely, that a tortfeasor must first exhaust all possible defences available to it.

[62] In my view, it was not open to the motion judge to rely on the Court's inherent jurisdiction to circumvent this statutory scheme in order to do what he thought was fair between the parties. The inherent jurisdiction of the Court is to be treated as a residual source of power that is secondary to statutory grants of power and is to be drawn upon only where broad statutory authority is unavailable. This is not the case here given that the *TCNA* provides the relevant statutory authority.

[63] Moreover, in the present appeal, there was no breach of due process, improper vexation, oppression, or other misuse or abuse of the Court's process that was manifestly unfair to Cooper or that would bring the administration of justice into disrepute. Therefore, there was no real justification for the motion judge's supposed exercise of the Court's inherent jurisdiction.

[64] Again, Cooper submits that the motion judge's reliance upon the Court's inherent jurisdiction was based on the common sense proposition:

namely, since Pre-Con had abandoned a limitation defence that may have allowed it to avoid liability altogether, it would not be fair to allow it to seek contribution from Cooper in respect of an action that could have been avoided.

[65] As stated earlier in these reasons, the motion judge's reliance on the common sense proposition was based on a factual error: namely, that Pre-Con abandoned a valid limitation defence. The motion judge's reasons reveal his erroneous conclusion that Pre-Con raised a limitation defence when it was entitled to do so (before the Part II application was granted), which could have enabled it to avoid liability altogether but, then, like the defendant in *B (I)*, simply chose not to pursue it or abandoned it.

[66] Aside from this error, the common sense proposition simply does not point to any kind of unfairness that amounts to a breach of due process, vexation, oppression or abuse of a court's process to trigger that court's inherent jurisdiction.

[67] For these reasons, the motion judge erred by circumventing and not applying the *TCNA* to the matters before him.

There Was No Duty for Pre-Con to Advise Cooper That They Would Be Sued

[68] As a final argument, counsel for Cooper stressed during oral submissions that Pre-Con should have let Cooper know that it was going to issue a third party claim against them. According to counsel, Cooper's right to defend the main action brought by the plaintiffs was "taken away" when the plaintiffs filed their notice of abandonment of the Part II application in Cooper's favor. This, Cooper submits, resulted in an unfairness when Pre-Con issued the third party claim against them because Cooper could have potentially successfully defended the action by arguing that the plaintiffs'

action was statute-barred. Cooper frames this unfairness argument as one being founded on the Court's equitable jurisdiction and specifically references estoppel.

[69] I cannot find that either the Saskatchewan trial judge's decision in *B (I)* or the motion judge's decision in the present appeal to dismiss the third party claims was grounded in estoppel.

[70] To reiterate, the estoppel conclusion accepted by the motion judge in the present appeal is that Pre-Con's failure to advise Cooper of its intention to advance a third party claim when it learned that the plaintiffs were abandoning the Part II application against them effectively deprived Cooper of the opportunity to raise a limitation defence. The motion judge seems to have accepted that Pre-Con ought to have been estopped, by reason of its silence or inaction, from bringing the third party claim against Cooper. However, this estoppel conclusion was raised in passing and, clearly, the motion judge did not rely on it as a basis for granting summary judgment.

[71] While, at times, Cooper frames the Saskatchewan trial judge's conclusion in *B (I)* as one based on estoppel, in reality, he simply held that, "if it is possible for a Defendant to successfully defend an action and avoid liability, it should not be permitted to claim indemnification and contribution from third parties if it fails to do so" (at para 4). In my opinion, if the Saskatchewan trial judge in *B (I)* intended to indicate that the defendant in that case was estopped from pursuing a third party claim because its conduct deprived the third party of a potentially meritorious defence, as Cooper suggests, he would have framed his conclusion not as a matter of common sense, but one of estoppel, citing supporting legal authorities.

[72] I surmise that the estoppel argument relied upon by counsel for Cooper to reach the conclusion that Pre-Con should have warned Cooper that it would be suing them appears to be grounded in the equitable doctrine of estoppel by convention.

[73] In *Ryan v Moore*, 2005 SCC 38, the Supreme Court explains that estoppel by convention requires that the parties' dealings must have been based on a shared assumption of fact or law, that one party must have acted in reliance on that assumption to their detriment, and that it would be unfair or unjust to allow the other party to resile from the assumption. As Bastarache J explained, the crucial requirement for estoppel by convention is that, at the material time, both parties must be of "a like mind" (*ibid* at para 61), such that each party is *aware* of the assumption of the other and the estopped party has communicated that they share that assumption. Further, the assumption must be based on some conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and which is said to have "cross[ed] the line" (*ibid* at para 62).

[74] In my view, based on this record, any estoppel by convention argument raised in the present appeal fails on this first requirement alone. There was no evidence of mutual assumption upon which Cooper was entitled to rely.

[75] That is, there was nothing in the record before the motion judge suggesting that Pre-Con was aware of Cooper's assumption—that Pre-Con's silence in respect of the abandonment of the Part II application against Cooper was an indication by Pre-Con that it would not pursue a third party claim against Cooper—and certainly no indication that Pre-Con ever communicated to Cooper that it indeed shared that assumption.

[76] It follows that, if Cooper could not prove that they relied upon a shared assumption, it is not necessary to consider whether they could prove detriment and unfairness warranting the equitable remedy of estoppel.

[77] Also, there is no authority of which I am aware that requires a non-settling party to an action to advise a settling party as to its legal position, including the possibility that the settling party might be brought back into the litigation by way of a third party claim. I cannot accept the proposition that, in this case, Pre-Con had a positive obligation to advise a party against whom it might have a claim, and the Court, of its litigation strategy and its intentions, just as I would expect Cooper to have no obligation whatsoever to explain their litigation strategy and choices they made in defending the Part II application.

[78] If this proposition were to carry the day, then a defendant would be precluded from seeking contribution and/or indemnity from a third party through no fault of the defendant—in other words, because of nothing the defendant did or failed to do. If, for whatever reason, the plaintiffs decided to let Cooper out of the main action and Cooper was responsible in tort in respect of the same damage attributed to Pre-Con, then would Pre-Con not have a fairness argument of its own?

[79] I see no unfairness or breach of any equitable principles in the case before this Court.

[80] In summary, there was no duty on the part of Pre-Con to provide notice to Cooper that they would be sued and brought back into the main action by third party claim.

Conclusion

[81] For these reasons, there were material errors of fact and of law, and the third party claim should not have been dismissed.

[82] The appeal should therefore be allowed, the third party claim restored and costs awarded to Pre-Con.

_____ CJM

I agree: _____ JA

I agree: _____ JA