Citation: Urbanmine Inc et al v ELG Metals Inc, 2022 MBCA 51
Date: 20220531
Docket: AI21-30-09606

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

VALE CANADA LIMITED	)	
	)	
(Plaintiff)	)	
	)	***K. A. McCandless*** *and*
- and -	)	***K. D. J. Moore***
	)	*for the Appellant*
URBANMINE INC., MARK CHISICK and ADAM CHISICK	)	
	)	
	)	***D. G. Hill*** *and*
(Defendants) Respondents	)	***R. Nerbas***
	)	*for the Respondents*
- and -	)	
	)	
MICHAEL JAMES SCHWARTZ, HARRY JOHN SCHWARTZ also known as JOHN SCHWARTZ, GRANT SCHWARTZ, SCHWARTZ BROS. CONSTRUCTION LIMITED also known as SCHWARTZ BROS. CONSTRUCTION LTD., ALEX MCCARTHY, CALVIN KINSMEN, ARLEN REEME, ROGER JACOBS, MARK KOCH, ALLAN MATECHUK, and DAVE THOMPSON	)	***S. M. Hamm***
	)	*on a watching brief*
	)	*for Vale Canada Limited*
	)	
	)	
	)	*Appeal heard:*
	)	***December 1, 2021***
	)	
	)	
	)	*Judgment delivered:*
(Defendants)	)	***May 31, 2022***
	)	
- and -	)	
	)	
ELG METALS, INC.	)	
	)	
(Third Party) Appellant	)	

On appeal from *Vale v Schwartz et al*, 2021 MBQB 46

LEMAISTRE JA

Introduction

[1] This appeal considers the application of section 2(1)(c) of *The Tortfeasors and Contributory Negligence Act*, CCSM c T90 (the *Act*) on a motion for leave to commence a claim against a third party under r 29.02(1)(b) of the MB, *Court of Queen's Bench Rules*, MR 553/88 (the *QB Rules*) (the leave motion), in an action based on the tort of conversion.

[2] ELG Metals, Inc. (the third party) appeals the motion judge's decision granting leave to Urbanmine Inc., Mark Chisick and Adam Chisick (the defendants) to commence a claim against it as a third party to the plaintiff's claim (the third party claim).

Background

[3] The plaintiff owns and operates a nickel mining, smelting and refining operation. The "Schwartz defendants" (see *Vale Canada Limited v Urbanmine Inc*, 2022 MBCA 18 at para 2 (*Vale #1*)) stole nickel from the plaintiff and sold it to the defendants. The defendants then sold some of the nickel to the third party. There is no suggestion that the defendants or the third party were aware that the nickel was stolen.

[4] The plaintiff brought a claim against the defendants based in part on the tort of conversion and was granted partial summary judgment on this aspect of its claim. In *Vale #1*, Urbanmine's appeal of the partial summary judgment order was dismissed.

[5] The plaintiff did not file a claim against the third party.

[6] After the expiry of the time period prescribed by r 29.02(1)(a) of the *QB Rules*, the defendants sought leave under r 29.02(1)(b) to commence the third party claim for "indemnity and/or contribution for any amounts which the [defendants] may be found liable to pay to the plaintiff from this action".

[7] Rule 29.01 permits a defendant:

> . . . [to] commence a third party claim against any person who is not a party to the action and who,
>
> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
>
> (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of a transaction or occurrence or series of transactions or occurrences involved in or related to the main action; or
>
> (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

[8] The defendants relied on section 2(1)(c) of the *Act* as one of their grounds for the leave motion. Section 2(1)(c) provides as follows:

> **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 him in respect of the liability in respect of which the contribution is sought.

[9] The defendants' position on the leave motion was that section 2(1)(c) provides them with a statutory right to contribution from the third party because, by purchasing the stolen nickel from the defendants, the third party committed the tort of conversion against the plaintiff. The defendants argued that, based on section 2(1)(c), they are "entitled to contribution and indemnity for any amounts for which they may be found liable to [the plaintiff]". Conversion is a strict liability tort, and is made out once there is "wrongful interference with the goods of another", even if done in "all innocence" (see *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 31).

[10] Relying on *Loeppky et al v Taylor McCaffrey LLP et al*, 2019 MBQB 59, the motion judge properly set out the two-part test for leave to commence a claim against a third party under r 29.01 (see *Loeppky* at paras 36-37):

> 1) Has the defendant established a prima facie cause of action against the third party?
>
> 2) Would the plaintiff suffer prejudice that could not be overcome by an award of costs against the party seeking leave?

[11] The motion judge recognized that the analysis involves a "limited weighing of the evidence" (at para 12), but does not include consideration of the merits of a defence. She stated (*ibid*):

> As set out by Edmond J in . . . ***Loeppky*** . . . whether to grant leave to issue a third party claim involves a two-part test. The first part of the test is to determine if the defendants have established a

> *prima facie* cause of action against the proposed third party. If such a *prima facie* case is established, leave will generally be granted. The second part of the test involves consideration of the plaintiff's interests. The court may still decline to grant leave to add a third party if the plaintiff can establish either that the third party claim will, (a) cause the plaintiff to suffer prejudice that cannot be remedied by an award of costs and that outweighs the court's interest in avoiding multiplicity of actions, or (b) will unnecessarily delay the plaintiff's prosecution of its action against the defendant. At the leave stage, the court is to conduct only a limited weighing of the evidence and is not to consider the merits of any defence or affidavit evidence contradicting the allegations made in the proposed third party claim (***Loeppky*** at para. 57).

[12] Regarding the first part of the test, the motion judge noted that the defendants were relying on section 2(1) of the *Act* to support the third party claim but she characterized the issue as whether the third party was guilty of conversion in respect of the defendants. She stated, "[the defendants assert] that [the third party] is *prima facie* liable to it for conversion for all of the same reasons that [the defendants were] found liable to [the plaintiff]" (at para 14).

[13] The motion judge acknowledged the third party's position on the leave motion that section 2(1) of the *Act* did not apply to the tort of conversion. She stated that the application of section 2(1) was "a complex defence to the [third party] claim" that was "beyond the scope" of the leave motion (at para 16). However, she concluded that (*ibid*):

> . . . It is arguable that [the third party], like other defendants, could have been named on the original claim and found jointly and severally liable for the tort. It is also possible that [the third party] could be held liable to indemnify [the defendants] for any judgment found against it, or to contribute toward such a judgment. . . .

Issues and Positions of the Parties

[14] On appeal, the third party contends that the motion judge erred when she stated the defendants' position was that the third party was liable to them for conversion. It argues that the only claim available to the defendants would have been the statutory cause of action for contribution arising from section 2(1)(c) of the *Act* and that the motion judge failed to decide whether this cause of action is available in an action based on a strict liability tort such as conversion. Its position is that section 2(1)(c) must be read together with section 2(2) of the *Act* (which deals with the amount of contribution recovered) and is incompatible with an action based on the tort of conversion; therefore, the motion judge erred when she concluded that the defendants had established a prima facie case against it.

[15] The defendants suggest that the motion judge misspoke when she characterized the third party claim as being based in conversion. They agree with the third party that the third party claim was based in the statutory right to contribution provided for in section 2(1)(c) of the *Act*. However, the defendants contend that section 2(1)(c) does apply to an action based in conversion and that the motion judge did not err when she exercised her discretion and granted them leave to commence the third party claim.

Standard of Review

[16] The motion judge's decision granting leave to the defendants to commence the third party claim under r 29.02(1)(b) of the *QB Rules* is a discretionary decision entitled to deference unless she committed an error of law, a palpable and overriding error of fact or mixed fact and law or her decision is so clearly wrong as to amount to an injustice (see *Wilde et al v The*

Rural Municipality of Taché et al, 2022 MBCA 31 at para 6; see also *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 25, 28; and *Vale #1* at para 8).

[17] Whether the motion judge applied the correct legal principles on the leave motion is a question of law reviewable on the standard of correctness (see *Vale #1* at paras 8-9).

[18] The interpretation of section 2(1)(c) of the *Act* also raises a question of law reviewable on the standard of correctness (see *Sagkeeng v Government of Manitoba et al*, 2021 MBCA 88 at para 31).

Discussion

[19] In granting the leave motion, the motion judge concluded that the defendants had established a prima facie cause of action. It is undisputed that section 2(1)(c) of the *Act* creates a statutory cause of action for contribution (see *Investors Group Trust Co v Gordon* (1998), 169 DLR (4th) 462 at para 8 (Man CA)) and that the defendants' only available claim against the third party was one grounded in section 2(1)(c). It is also not disputed that conversion is a strict liability tort. Therefore, the key issue on the appeal is whether the motion judge found that the defendants had established a prima facie right to contribution from the third party under section 2(1)(c) of the *Act* and whether the motion judge made any reversible error in doing so.

[20] In order to address the third party's position that section 2(1)(c) of the *Act* cannot apply to a claim in conversion, I will consider the history and meaning of section 2(1)(c). I will then review the motion judge's decision,

and the nature of the prima facie cause of action that she found had been established.

History of Section 2(1)(c) of the Act

[21] Prior to the enactment of tortfeasor legislation, a tortfeasor who paid damages to a plaintiff was not entitled to contribution from other tortfeasors (see Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act*, Report # 128 (Winnipeg: MLRC, 2013) at 4-5). Similarly, a plaintiff was barred at common law from recovering damages where the plaintiff's own negligence contributed to the injury.

[22] Every jurisdiction in Canada enacted legislation to address these common law rules, beginning with Ontario, and followed one of two models: negligence Acts or tortfeasors Acts. Most jurisdictions in Canada based their statutory provisions providing for contribution among tortfeasors on *The Negligence Act, 1930*, SO 1930, c 27 in Ontario; and *An Act to make Uniform the Law respecting Liability in Actions for Damages for Negligence where more than on Party is at Fault*, SS 1944, c 23, adopted by the Uniform Law Conference of Canada in 1935 (negligence Acts).

[23] In Manitoba, the common law bars regarding contribution among tortfeasors and contributory negligence were abolished by *The Tortfeasors and Contributory Negligence Act*, SM 1939, c 75 (the *1939 Act*). Unlike the negligence Acts in jurisdictions that follow Ontario's statute, the legislation in Manitoba, Alberta, New Brunswick and Nova Scotia (tortfeasors Acts) follows the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK), 25 & 26 Geo V, c 30 (BAILII) (the *English Act*). The current section 2(1)(c)

of the *Act* is virtually identical to the equivalent sections of both the *English Act* (see section 6(1)(c)) and the *1939 Act* (see section 3(1)(c)).

Prerequisites for the Statutory Cause of Action of Contribution in Tortfeasors Acts and Negligence Acts

[24] The statutory cause of action for contribution, in both tortfeasors Acts and negligence Acts, has two prerequisites. First, there must be liability to the plaintiff. Liability to the plaintiff can arise in two situations: (1) where a tortfeasor has been sued and held liable; and (2) where a tortfeasor has not been sued, but, if he or she had been sued, he or she would have been held liable (see *County of Parkland No 31 v Stetar*, [1975] 2 SCR 884 at 897; *Giffels v Eastern Construction*, [1978] 2 SCR 1346 at 1354-55; and *Preston v Chow et al*, 2002 MBCA 34 at para 20).

[25] Second, the damage for which contribution is claimed from the second tortfeasor must be the same as the damage in the original claim, whether or not the injury occurred as a result of the same tortious act (see *MacKay v Farm Business Consultants Inc*, 2006 ABCA 316 at paras 12-15; see also *McWilliams v Krakner*, 2001 ABCA 197 at paras 15, 20-21; *Raymond v Asper et al*, 2002 MBQB 21 at paras 11-12; and *Towers Ltd v Quinton's Cleaners Ltd et al and Amec Earth & Environmental Limited et al and Quinton's Cleaners Ltd*, 2010 MBQB 91 at para 26, aff'd 2011 MBCA 6). However, there is no requirement that the second tortfeasor be liable for the same extent of damage (see *Allan v Bushnell TV Co Ltd* (1968), 67 DLR (2d) 499 at 501-2 (Ont CA)).

Difference in Wording in Negligence Acts and Tortfeasors Acts

[26] The same words within a legislative text are presumed to have the same meaning and different words are presumed to have different meanings. This presumption of consistent expression applies across statutes; particularly those dealing with the same subject matter (see Halsbury's Laws of Canada (online), *Legislation*, "Determining Legislative Intent: Textual Analysis: Presumption of Consistent Expression" (VIII.I(4)) at HLG-69 "Same words, same meaning, different words, different meaning"). In addition, section 6 of *The Interpretation Act*, CCSM c I80 (the *Interpretation Act*) states that "[e]very Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."

[27] When the Legislature enacted the *1939 Act* to remediate the common law rule against contribution among tortfeasors, it chose to follow the language in the *English Act* rather than the negligence Acts. In keeping with the presumption of consistent expression and section 6 of the *Interpretation Act*, this Court must give effect to the difference in wording between section 2(1)(c) of the *Act* and the wording used in negligence Acts.

[28] Negligence Acts refer to damage caused by the fault of two or more persons (see, for example, section 3 of Saskatchewan's *The Contributory Negligence Act*, RSS 1978, c C-31 (the *Saskatchewan Act*); see also section 4 of British Columbia's *Negligence Act*, RSBC 1996, c 333). Ontario's current *Negligence Act*, RSO 1990, c N1 also refers to damage caused by negligence (see section 1). By their language, negligence Acts restrict the right to contribution to situations involving negligence and fault.

[29] For instance, the *Saskatchewan Act* has been found to apply only to negligence cases and the negligence Acts in Ontario and British Columbia have been found to apply to cases involving negligence and intentional wrongdoing (see *Bell Canada v Cope (Sarnia) Ltd* (1980), 119 DLR (3d) 254 (Ont CA); *Brown v Cole*, 1995 CarswellBC 968 (CA), applying *Anderson v Stevens* (1981), 125 DLR (3d) 736 at paras 21-24 (BCSC); and *Sound Stage Entertainment Inc v Burns*, 2019 SKCA 18 at paras 78-80).

[30] Tortfeasors Acts use the terms "tortfeasors" and "liability" rather than "fault" or "negligence". Whereas negligence Acts restrict the right of contribution to cases involving "negligence" and "fault", tortfeasors Acts provide for contribution from tortfeasors who may be found liable without the requirement to establish fault. In other words, under the tortfeasors Acts, blameworthiness is not a prerequisite to liability; any tort (negligence, strict liability torts, intentional torts and economic torts) may be the basis of a claim for contribution.

[31] Jurisprudence in jurisdictions with tortfeasors Acts has determined that a party need not establish fault when seeking contribution. For example, in *Howalta Electrical Services Inc v CDI Career Development Institutes Ltd*, 2011 ABCA 234, the Court held that (at paras 21-22):

> The words in s 3(1)(c) "would if sued" make it clear that the governing test is direct liability in a simple suit against the person now asked to indemnify.
>
> The statutory words "would . . . have been liable" do not narrow the question to fault, or anything similar. . . .

Therefore, jurisprudence regarding negligence Acts, which are based on fault and negligence, is not helpful when determining the meaning of section 2(1)(c) of the *Act*.

[32] In determining whether the right to contribution in tortfeasors Acts applies in a particular case, a court need only decide whether the person could be held liable for the same injury. There is no need to consider whether the person is at fault or strayed from any existing duty. Unlike in an action based in negligence, there is also no need to consider apportionment of liability (see *Vale #1* at paras 14-16 where Chartier CJM explained that contributory negligence is not an available defence in an action for conversion). As long as the person can be held liable to the plaintiff, there can be a right to contribution.

[33] As pointed about by Peter B Kutner, "Contribution Among Tortfeasors: Liability Issues in Contribution Law" (1985) 63 Can Bar Rev 1, while negligence Acts do not explicitly include strict liability tortfeasors (at p. 39):

> The provisions for contribution in the tortfeasors acts do extend to strictly liable tortfeasors, as they are "liable in respect of" "damage . . . suffered . . . as a result of a tort". "Fault" is not mentioned. . . .

[34] In my view, the absence of the concept of fault in section 2(1)(c) of the *Act* supports the conclusion that the right of contribution extends to all torts, including strict liability torts.

Application of Section 2(2) of the Act

[35] I disagree with the third party's position that section 2(1)(c) must be read together with section 2(2) and that the requirement to consider a "person's responsibility for the damage" in section 2(2) is inconsistent with the strict liability nature of conversion.

[36] Section 2(2) of the *Act* reads:

> **Amount of contribution recoverable**
> **2(2)** The amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court may exempt any person from liability to make contribution, or direct that the contribution to be recovered from any person amounts to a complete indemnity.

[37] Although "[t]here is a presumption of statutory interpretation that the provisions of a statute are meant to work together 'as parts of a functioning whole' . . . and form an internally consistent framework" (*Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 28), in my view, section 2(2) becomes relevant only after there has been a finding that a party is liable for the same damage under section 2(1)(c) and does not give meaning to that section in the manner suggested.

[38] Moreover, in *Preston*, Steel JA pointed out that, in *Fraternal Order of Eagles Winnipeg Aerie No 23 v Blumes*, 1994 CarswellMan 141 (CA), Scott CJM "briefly considered [section] 2(2) and did not, in any way, suggest that it could be used to narrow the application of [section] 2(1)(c)" (at para 27).

[39] Section 2(1)(c) uses the term "liability" without any mention of "responsibility". As I have already explained, liability refers to whether a tortfeasor can be found liable at law for contribution for the damage suffered by the plaintiff. Section 2(2) of the *Act* comes into play only at the point at which the amount of such contribution must be determined. Section 2(2) directs that the amount of the contribution be assessed having regard to the third party's responsibility for the damage. Liability and responsibility are two separate concepts that arise at different stages under the *Act*.

The Remaining Words in Section 2(1)(c) of the Act

[40] Once the prerequisites for contribution under section 2(1)(c) have been established, there is a statutory right to contribution. A defence is created by the remaining words in section 2(1)(c): "[N]o person is entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

[41] A plain reading of this phrase indicates that, if a defendant is required to indemnify the other tortfeasor (for example, due to a contract between the tortfeasors), the defendant cannot request contribution from the other tortfeasor. However, this does not affect whether the other tortfeasor is or would have been liable directly to the plaintiff.

Conclusion

[42] The parties agree, as do I, that the motion judge correctly set out the test for leave under r 29.01 of the *QB Rules*. The question is whether she erred in her application of it.

[43] I agree with the third party that the motion judge's reasons devote little analysis to whether the defendants had established a prima facie cause of action and that, to the extent that she characterized the defendants' third party claim as one based in conversion, she was mistaken.

[44] However, in my view, a fair reading of the motion judge's reasons, in the context of the parties' submissions, demonstrates that she did make the necessary finding that the defendants had established, prima facie, that section 2(1)(c) of the *Act* provided a statutory right of contribution in this case.

[45] The third party claim alleged that the third party committed the tort of conversion and was liable for loss sustained by the plaintiff, and that the defendant was entitled to "indemnification and/or contribution" from the third party. As a tortfeasor is not entitled to contribution from other tortfeasors at common law, the defendant argued that the cause of action was grounded in section 2(1)(c) of the *Act*.

[46] It was in that context that the motion judge concluded that "it [was] arguable" (at para 16) that the third party could have been found liable to the plaintiff for conversion and "it [was] possible" (*ibid*) that the defendants could be entitled to contribution or indemnification from the third party for the damage suffered by the plaintiff.

[47] This conclusion addresses the two prerequisites for contribution in section 2(1)(c) of liability to the plaintiff for the same damage.

[48] I see no error in the motion judge's conclusion that the defendants established a prima facie case that they have a statutory right to contribution from the third party. In my view, the third party claim reasonably established

that the third party would, if sued, have been liable in conversion to the plaintiff for acquiring the stolen nickel and that the third party was liable for the same damage as the defendants (the plaintiff's loss of the nickel).

[49] On a motion for leave under r 29.02(1)(b) of the *QB Rules*, once the two prerequisites of liability to the plaintiff and the same damage have been established, there is a prima facie case for a statutory right to contribution from the third party and the defendant need not go further.

[50] In this case, the issue of whether the third party is entitled to be indemnified by the defendants is not a procedural bar to the defendants' third party claim under section 2(1)(c) (see *Sun Life Assurance Co of Canada v 671095 Alberta Ltd*, 2011 ABCA 234 at para 27; and *Burndred v Topley and Sanders Investments Ltd*, 2009 ABQB 541 at para 27). Rather, it is a potential defence to be raised later if the third party claim proceeds.

[51] In the result, I am not persuaded that the third party has demonstrated any error in principle, or that the motion judge's decision is so clearly wrong as to amount to an injustice. I am of the view that her decision to grant the leave motion was a proper exercise of judicial discretion.

[52] For these reasons, I would dismiss the appeal with one set of costs to the defendants.

leMaistre JA

I agree: Mainella JA

I agree: Pfuetzner JA