COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Neale Engineering Ltd. v. Ross Land Mushroom Farm Ltd.,* 2023 BCCA 429

Date: 20231124
Docket: CA48873

Between:

Neale Engineering Ltd.

Appellant
(Third Party)

And

Ross Land Mushroom Farm Ltd.

Respondent
(Plaintiff)

And

Ferro Building Systems Ltd.

Respondent
(Defendant)

And

Dynacor Coatings (2004) Ltd., Stobbe Construction Ltd., and RPM Canada Company/Compagnie RPM Canada and RMP Canada Investment Company, a Partnership Doing Business as a Proprietorship Known as RPM Canada Doing Business as a Sole Proprietorship Known as Carboline

Respondents
(Third Parties)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated January 16, 2023 (*Ross Land Mushroom Farm Ltd. v. Ferro Building Systems Ltd.*, 2023 BCSC 66 (unreported), New Westminster Docket S194600).

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Place and Date of Hearing:	Vancouver, British Columbia October 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 24, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

Summary:

This is an appeal from an order granting leave to the respondent, Ferro Building Systems Ltd., to file and serve a third party notice against Neale Engineering Ltd. claiming contribution and indemnity. Neale Engineering opposed the application before the chambers judge on the basis that the limitation period for bringing a third party claim had expired. The chambers judge, considering herself bound by the decision of this Court in Sohal v. Lezama, 2021 BCCA 40, concluded that the time for bringing a claim for contribution and indemnity had not begun to run because the plaintiff had not served a pleading alleging fault on the part of two or more persons. On appeal, Neale Engineering contends that the relevant passage of Sohal relied upon by the chambers judge is obiter. Alternatively, it says Sohal was wrongly decided. Held: Appeal allowed. The relevant passage of Sohal, which suggests that a claim for contribution or indemnity is only "discovered" under s. 16(a) of the Limitation Act when a plaintiff serves a pleading alleging damage caused by the fault of two or more persons, is obiter. A claim for contribution or indemnity is "discovered" under s. 16(a) of the Limitation Act on the date of service upon the claimant of a pleading which could, if the cause of action is proven, result in a defendant paying more than its share of damages. This interpretation of the provision accords with its remedial purpose and with common sense. When s. 16 of the Limitation Act is properly applied, the chambers judge's unchallenged conclusions are dispositive of the appeal. The proposed third party proceedings against Neale Engineering are statute-barred.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

[1] This appeal turns upon the interpretation of provisions in the *Limitation Act*, S.B.C. 2012, c. 13, establishing the statutory limitation period for claims for contribution or indemnity. The *Act* provides for a two-year limitation of causes of action running from the date a claim is *discovered*. Section 16 provides:

> 16 A claim for contribution or indemnity is discovered on the later of the following:
>
> (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
>
> (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.
>
> [Emphasis added.]

[2] The chambers judge, considering herself to be bound by the decision of this Court in *Sohal v. Lezama*, 2021 BCCA 40, and bound by horizontal *stare decisis* to

follow *Sharma v. Mohammad*, 2022 BCSC 270, held that the part of s. 16 of the *Act* I have underlined above means that a claim is "discovered" for the purposes of s. 16(a) on the date upon which a plaintiff brings a claim alleging fault on the part of *two or more* persons. Accordingly, she held that a proposed third party claim against the appellant was not time-barred. Time did not begin to run when the respondents were served with a pleading in which they alone were named as defendants. It did not matter whether they knew or ought to have known at that time that they had a plausible claim for contribution or indemnity against potential third parties.

[3] Indeed, on the interpretation of s. 16 of the *Act* applied by the chambers judge, the proposed third party claim for contribution and indemnity had yet to be discovered, and time had not begun to run at all. Her reasons for judgment are indexed at 2023 BCSC 66 (unreported).

[4] The appellant, Neale Engineering Ltd. ("Neale Engineering"), says the passage in the judgment of this Court in *Sohal* that the chambers judge considered to be binding upon her is *obiter dicta*, inessential to the outcome and non-binding, and that it ought not to have been followed and applied in *Sharma*. In the alternative, it says *Sohal* was wrongly decided. We sat as a division of five justices to consider the latter submission.

Background

[5] As explained further below, *Sohal* involved consideration of s. 22 of the *Act*. The critical passage in *Sohal* for the purpose of this appeal is found in the Court's response to counsel's suggestion that an interpretation of that section urged upon the Court would result in an absurdity. The "absurdity" was described as follows:

> [109] … [S]uppose a plaintiff commences action against defendant A, then 2½ years later, applies to add B as a defendant notwithstanding the expiry of a limitation, which is permissible according to section 22(1)(d). The court finds it is just and convenient to do so, and B is added. Defendant A then seeks to claim contribution from defendant B by third party notice. But, the appellants say, on the judge's interpretation, defendant A's claim for contribution from defendant B would be time-barred.

[6] Grauer J.A., writing for the Court, said that hypothetical was not problematic because a defendant is not served with a pleading "in respect of a claim on which the claim for contribution or indemnity is based" until served with a pleading alleging damage caused by the fault of two or more persons:

> [111] … [A] claim for contribution is *based upon* a finding of fault against two or more persons. A pleading alleging damage caused by the fault of two or more persons could not be served upon defendant A until the application to add defendant B. That is when time would begin to run in accordance with section 16(a). It follows that, consistent with the scheme of the new Act as a whole, a third party claim for contribution by defendant A against defendant B would not be time-barred.
>
> [Emphasis by underlining added.]

[7] This statement has been relied upon in a number of decisions of the Supreme Court of British Columbia as a definitive description of the effect of s. 16(a) of the *Act*: no limitation period begins to run from the date of service of a notice of civil claim upon a single defendant. As we will see, that rule is problematic. In my view, it was not the intended purpose or effect of s. 16(a).

Discussion

Standard of Review

[8] The correct interpretation of a provision of the *Act* is a discrete question of law, reviewable on a correctness standard: *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.,* 2023 BCCA 95 at para. 17; *Sohal v. Lezama*, 2021 BCCA 40 at para. 4.

Sohal v. Lezama

[9] The issues considered in *Sohal* were complicated. The motor vehicle accident giving rise to the claim occurred in 2012, before the coming into force of the *Act* (referred to in *Sohal* as the "new *Limitation Act"*). The *Act* came into force on June 1, 2013. The plaintiff's action was commenced in 2014. An application to add third parties to the claim was brought in 2018. A master granted leave for two defendants to file third party notices claiming contribution and indemnity from parties not previously named in the litigation. In doing so, the master dismissed the argument that s. 22(2) of the *Act* stood as a bar to the third party proceedings.

[10] Section 22 reads, in part, as follows:

> 22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
>
> (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
>
> (b) third party proceedings may be brought;
>
> (c) claims by way of set off may be advanced;
>
> (d) new parties may be added or substituted as plaintiffs or defendants.
>
> (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution or indemnity after the expiry of a limitation period applicable to that claim.
>
> (3) Subsection (1) does not enable a person to make a claim against another person if a claim by the other person
>
> (a) against the first mentioned person, and
>
> (b) relating to or connected with the subject matter of the proceeding,
>
> is or will be defeated by the first mentioned person pleading a provision of this Act as a defence.
>
> [Emphasis added.]

The first appeal: 2019 BCSC 1709

[11] The third parties appealed the master's ruling to the Supreme Court of British Columbia. They challenged the master's conclusion that s. 22(2) of the *Act* did not prohibit the third party proceedings. In addition, they raised a new issue: whether the provisions of the "old *Limitation Act*" governed the plaintiff's claim.

[12] The issues on appeal were described by Justice Kent as follows:

> [3] … The question on appeal for both defendants is … whether s. 22(2) of the new *Limitation Act* prohibited the third party proceedings or whether it was open to the master to exercise a discretion to permit the third party claims to proceed notwithstanding expiry of the limitation period, a discretion of the sort that existed under the Rules and the now repealed *Limitation Act*, R.S.B.C. 1996, c. 266 (the "old *Limitation Act*").

> [4] On appeal the defendants seek to argue for the first time that the old *Limitation Act* actually governs the within claim, that no limitation period respecting the proposed contribution claims had actually expired under that old *Limitation Act*, and that the master properly exercised the discretion that was available to her under the former regime. In the alternative, if the master's interpretation of the new *Limitation Act* is not moot, then the defendants submit that she was correct in her determination that s. 22(2) of the new *Limitation Act* did not prohibit the third party proceedings.

[13] Referring to the question of whether s. 22(2) of the *Act* operated as a bar to the proposed third party proceedings in the circumstances of the case, he summarized the issue: “The question now is whether the new legislation effectively prohibits third party proceedings for contribution or indemnity between concurrent tortfeasors if, whether through inadvertence or otherwise, they are not brought within the new two-year limitation period”: at para. 43.

[14] Kent J. concluded that the proposed third party proceedings were time-barred by operation of the *Act*. With respect to the *Act* generally, and s. 22 in particular, he held:

> [58] … In my opinion …
>
> - properly interpreted, the new *Limitation Act* provides that a two-year limitation period (following "discovery") applies to contribution or indemnity claims under the *Negligence Act* whether brought as a plaintiff by way of a separate action or as a defendant by way of a third party proceeding in an action already underway;
> - expiry of the two-year limitation period is a substantive and complete defence to any such contribution/indemnity claim and one which, except in rare circumstances such as waiver or estoppel, will usually result in dismissal of the claim;
> - unlike s. 4(1) of the old *Limitation Act*, ss. 22(1) and (2) of the new *Limitation Act* do not remove an accrued limitation defence as a bar to third party proceeding for contribution or indemnity under the *Negligence Act*; to the contrary, where such a defence has accrued and applies, the court should enforce same;
> - Rule 3-5(4) bestows a discretion upon the court to permit the filing of Third Party Notices; while that procedural discretion must be exercised judicially and with reference to the factors discussed in the case law, the rule does not permit the court to extinguish a substantive legal defence to a proposed contribution claim based on an expired limitation period; and
> - if the merits of any such limitation defence are in question (*e.g*. date of discovery, waiver or estoppel, *et cetera*), the court should direct that the

> issue be determined in the proposed third party proceeding or, if considered more appropriate, by way of a separate action.

[15] In so concluding, he dismissed the argument that s. 22(2) only precludes leave being granted to commence new court proceedings after the expiry of a limitation period and does not preclude the issuance of third party notices in existing proceedings.

[16] His conclusions were founded upon his review of the jurisprudence, including conflicting interpretations of s. 22(2); commentary leading to the revision of the *Act*; and explanatory publications (some of which were previously canvassed by Master Elwood, as he then was, in *Dhanda v. Gill*, 2019 BCSC 1500):

> [59] In his Reasons for Judgment Master Elwood refers to the "White Paper on *Limitation Act* Reform: Finding the Balance" (September 2010), issued by the Ministry of Justice as well as another ministry publication "The New *Limitation Act* Explained" (June 2013). He observes:
>
> > [55] The White Paper includes a draft provision in substantially the same language as s. 22 of the current Limitation Act. The comment below the draft provision reads, at p. 70:
> >
> > > This section provides that there is no limitation period for a secondary claim (i.e., a counterclaim, a third party proceeding, or a claim by way of set-off) so long as this secondary claim is related to the primary claim (or original lawsuit), and the primary claim was commenced in time. Judges will still have discretion to refuse relief on grounds unrelated to the expiry of a limitation period.
> >
> > > This section carries forward the principles from section 4 of the current Act but removes the application of this section to claims for contribution. Contribution claims will be governed by limitation periods in the new Act. (Emphasis added by Master Elwood.)
> >
> > [56] The New Act Explained provides the following explanation of s. 22, at p. 41:
> >
> > > Subsection (1)
> > >
> > > This provision has been carried forward from the former Act. It has been revised to fit within the language of the new Act. Subsection (1) provides that there is no limitation period for a person to commence a related claim (i.e. a counterclaim, a third party proceeding, a claim by way of set off, or the addition or substitution of a new party as plaintiff or defendant), as long as this related claim is related to or connected with the original claim, and the original claim was commenced within the

> limitation period under the new Act. This means that a judge retains the discretion to allow or not allow a related claim to proceed.
>
> Subsection (2)
>
> Section 22 does not apply to claims for contribution or indemnity. Contribution or indemnity claims are governed by the basic and ultimate limitation periods in the new Act. Section 16 sets out that the basic limitation period runs from the later of: the date a person claiming contribution or indemnity is served with the paperwork starting the original claim (on which the contribution or indemnity claim is based), or the date that a person first knew or reasonably ought to have known that he or she could make a claim for contribution or indemnity against a third party. (Emphasis added by Master Elwood.)

[60] The latter document also contained an explanation of s. 16, which further emphasized that the new limitation provisions were designed to remove judicial discretion to refuse to strike [or to grant leave to issue] a third party contribution notice in the absence of meaningful delay or prejudice:

> Under the former Act there was potential for lengthy delays between the running of time in the original lawsuit and the date a third party received notice of a claim against him or her for contribution or indemnity.
>
> Under the former Act it was open to the court to consider delay and prejudice in determining whether to strike a third party notice for contribution or indemnity.
>
> The new Act provides that a claim for contribution or indemnity cannot be brought against a third party more than two years from the time when the original claim (i.e. the one from which the claim for contribution or indemnity would arise) was served ... (p. 30)

[61] These materials were also before the Court on this appeal along with extracts from Hansard evidencing discussion of the proposed new Act in the legislature:

> Hon. S. Bond: What we see in [s. 22] is actually a carry-forward of the principles from s. 4 of the current Act, so there is no new law. What it does do, though, is remove the section to claims for contribution or indemnity ... basically, it's a carry-forward and the removal of contribution or indemnity, which is covered off in s. 16. [Emphasis added by Kent J.]
>
> Hansard, 2011 Legislative Session: 4th Session
> 39th Parliament, Thursday, April 26, 2012
> (Vol. 3, No. 6) at page 11169

[62] It is perhaps noteworthy that Canada's leading commentator on the law of limitations agrees that s. 22 of the new *Limitation Act* does not permit

> proceedings for contribution or indemnity once the relevant limitation period has expired:
>
> > The new British Columbia *Limitation Act*, which came into force 1st June 2013, provides in s. 22(1) that if a court proceeding has been brought in a timely way, and there is another claim relating to or connected with the first claim, a proceeding by way of counterclaim and third party claim may be brought, and claims by way of set off may be advanced, even though the limitation period applicable to either or both of the claims has expired. However, this provision does not give a person the right to commence a proceeding for contribution and indemnity once the limitation period for that relief has expired. [*Ibid*, s. 22(2)]. Claims for contribution and indemnity are governed by s. 16 of the Act ... [Emphasis added by Kent J.]
> >
> > Mew, The Law of Limitations (3d edit., LexisNexis, Toronto, 2016) at p. 179

[17] In the course of his analysis, Kent J. added a commentary on the legislative intention evident in the *Limitation Act*:

> [69] … [A]s noted above, claims for contribution or indemnity under the *Negligence Act* have traditionally and invariably been brought by way of third party proceedings. Separate lawsuits in that regard simply did not (and do not) occur as a matter of practice. In such circumstances, it makes no practical sense to impose a radically different limitation period for an essentially non-existent lawsuit and yet remove that limitation for the mechanism almost universally employed in practice to pursue such contribution claims. That could not possibly have been the legislature's intent.

[18] Having concluded that the master erred in holding that s. 22(2) of the *Act* did not stand as a bar to the proposed third party proceedings, Kent J. turned to the argument not raised before the master at first instance: that the “old *Limitation Act*” governed the contribution and indemnity proceedings and that the "old" limitation period applicable to such claims had not expired.

[19] More specifically, it was argued that the transitional provision, s. 30 of the *Act*, did not have the effect of bringing claims for contribution or indemnity arising out of occurrences before the coming into force of the *Act* into the new limitation regime. That section provides, in part:

> 30 (1) In this section:
>
> …

> "pre-existing claim" means a claim
>
> (a) that is based on an act or omission that took place before the effective date [when the section came into force, June 1, 2013], and
>
> (b) with respect to which no court proceeding has been commenced before the effective date.
>
> (2) A court proceeding must not be commenced with respect to a pre-existing claim if
>
> (a) a former limitation period applied to that claim before the effective date, and
>
> (b) that former limitation period expired before the effective date.

[20] This, in effect, provides that statute-barred claims continue to be statute barred. Further, however, s. 30 provides:

> (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
>
> (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,
>
> (a) in the case of a pre-existing claim referred to in section 3 of this Act, that section applies to the pre-existing claim,
>
> (b) subject to paragraph (a) of this subsection, in the case of a pre-existing claim referred to in section 8 (1) (a) or (b) of the former Act, Part 2 of this Act and section 8 of the former Act apply to the pre-existing claim, or
>
> (c) in the case of any other pre-existing claim,
>
> (i) subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
>
> (ii) Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of
>
> (A) the effective date, and
>
> (B) the day the act or omission takes place under section 21 (2) of this Act.
>
> [Emphasis added.]

[21] Because no court proceeding had been commenced before the effective date, June 1, 2013, the question whether the claim for contribution or indemnity was a "pre-existing claim" as that phrase is defined in s. 30 of the *Act* fell to be determined

by asking whether it was "based on an act or omission" before that date. Kent J. held that the proposed third party proceeding was based on acts, omissions, and resulting loss/damage, all of which occurred before June 1, 2013. The third party claim was therefore a "pre-existing claim" and:

> [94] Whether or not this pre-existing claim is governed by the old *Limitation Act* or the new *Limitation Act* is dependent on the date of its "discovery". If such discovery occurred before June 1, 2013, the old *Limitation Act* applies (s. 30(3)). If the discovery occurred after June 1, 2013, the new *Limitation Act* applies (s. 30(4)(c)(i)).

[22] Kent J. held that, at the very earliest, the third party claim was "discovered" when the defendants were served with the notice of civil claim, after the effective date, June 1, 2013. The third party proceeding was therefore governed by the two-year limitation period contained in the new *Act*. It followed that the transition provisions did not "save" the defendants from the two-year limitation running from the date of discovery.

[23] Kent J. therefore allowed the appeal and set aside the master's order on the basis that the proposed third party claims were statute-barred.

The appeal to this Court: 2021 BCCA 40

[24] On further appeal to this Court, two grounds of appeal were advanced. First, it was argued that the judge erred in his interpretation of the transitional provision (referred to as the "s. 30 issue"). The Court held that the judge had erred in holding that the proposed third party claim was a "pre-existing claim" within the ambit of s. 30 of the Act because:

> [77] … The language of the first branch of the definition does not define a "pre-existing claim" as a claim that is *related to*, or *connected to* an act or omission; rather, it says "based on". So wide an interpretation as the appellants suggest could lead to considerable difficulty in the application of section 30(2), given that claims with quite different limitation periods could arise from the same facts.
>
> [78] … [T]he *basis* of a claim for contribution is a statutory right to restitution that flows from findings of liability, not from the commission of a tort. The connection to the underlying claim is not to the act or omission that gives rise to the tort claim. Rather, the connection arises from the bare fact of the tort action itself, because it seeks to impose liability.

> [79] The purpose of the claim for contribution is to remedy the defendant's loss in paying too much of the plaintiff's judgment as a result of the act or omission of the co-defendant or other third-party in failing to pay its proper share, thereby being unjustly enriched. The act or omission on which the claim for contribution is based thus remains that failure, which is something quite different from the act or omission giving rise to the tort claim. That is why tortfeasors may bring their claims for contribution independently of the tort claim, in a separate action, and are not obliged to attach them to the tort action by way of third-party proceedings.
>
> [Emphasis in original.]

[25] He concluded:

> [113] … [T]he appellants' proposed third party claim for contribution … is not a "pre-existing claim" within the meaning of section 30(1) of the new Act. Although it is a claim "with respect to which no court proceeding has been commenced before the effective date", it is not a claim that is "based on an act or omission that took place before the effective date".
>
> [Emphasis added.]

[26] The *Act* therefore applied to determine whether the claim was statute-barred. That issue turned on the date of discovery of the third party claim for contribution and indemnity pursuant to s. 16.

[27] The Court considered the potential third party claim to have been "discovered" on September 15, 2015, when the amended notice of civil claim was served on the defendants, as that date represented the later of the two possible discovery dates prescribed by s. 16(a) and (b) of the *Act*. September 15, 2015, was, of course, more than two years before the application for leave to file the third party notices was made. Therefore, the proposed third party proceedings, being proposed claims for contribution, were time-barred by a limitation under the *Act*.

[28] The second ground of appeal was that the judge had erred in his interpretation of s. 22(2). The appellant again argued that provision does not apply to claims for contribution or indemnity brought by way of third party notice, as opposed to a separate action (the "s. 22 issue").

[29] The Court described the latter argument as follows:

> [20] The interpretation of section 22, and its impact on the third party claims in this case, is the subject of the second ground of appeal (the "section 22 issue"). The appellants concede that the new Act's limitation on claims for contribution had expired before their application to add the respondents as third parties. But, they say, section 22(1) preserves the right to assert that claim by way of third-party proceedings in a related action. The issue is whether that right is subject to section 22(2). That question, as framed by the appellants, turns on whether the reference in section 22(2) to "a right to commence a court proceeding" includes third party proceedings claiming contribution, or contemplates only independent actions for contribution. This focuses on the term "court proceeding" which is used throughout the new Act.

[30] That question was answered as follows:

> [104] … Reading the words of subsection 22(2) in their ordinary meaning, harmoniously with the rest of the statute, and with the contextual and purposive approaches endorsed by Professor Sullivan and the Supreme Court of Canada, they unmistakably include proceedings by counterclaim and third-party proceedings as "court proceedings". That interpretation is fully in harmony with the rest of the statute, including sections 6(1) and 30(1).
>
> [105] In my view, the chambers judge analysed the section 22 issue thoroughly and correctly. He dealt appropriately with the conflicting case law, the legislative background, and the principles of statutory interpretation. After carefully considering the appellants' arguments, he concluded that section 22 of the new Act does not permit proceedings for contribution to be brought by way of third-party notice or counterclaim after the limitation for the claim of contribution has expired, as it had in this case.

[31] He then addressed an "absurdity" the appellant said would result from that reading of the limitation provision. The appellant asked the Court to consider the scenario I have described above: a case where a plaintiff adds a second defendant, with leave of the court, 2½ years after commencing an action against a single defendant. The first defendant's claim for contribution from the second is already time barred at the date of the second defendant's addition as a party. The Court held that scenario "ignores the discoverability provisions for claims of contribution in section 16": at para. 110. Because "a claim for contribution is based upon a finding of fault against two or more persons" the first defendant is not served with a pleading in respect of a claim on which the claim for contribution or indemnity is based until there are two or more parties named as defendants: at paras. 110–111.

[32] In my view, the discussion of the "absurdity" in para. 111 of the reasons was not fundamental to either the conclusion that s. 22(2) bars commencement of third party claims for contribution or indemnity after the expiry of a limitation period (the s. 22 issue), or to the conclusion that the claim was not a "pre-existing claim" (the s. 30 issue). It does, however, reflect the view that led to the conclusion that the limitation ran from the date of service of the amended notice of civil claim. For that reason, trial courts have reluctantly concluded that the opinion expressed in para. 111 is not *obiter*.

Consideration of *Sohal*

[33] In *Sharma*, Kirchner J. described the problematic result of the view that the "pleading" contemplated by s. 16(a) must allege fault on the part of two or more persons:

> [37] … [B]ased on *Sohal* at para.111 and [*0782484 B.C. Ltd. v. E-Pro Enterprises Inc.,* 2021 BCSC 1509] at para. 109*,* in the unique circumstances of this case, time will never start to run on the limitation period for [the defendant's] claim of contribution or indemnity because there is no expectation the plaintiff will amend the notice of civil claim in the First Action to name [the third party] as a defendant. Thus, the circumstance contemplated in *Sohal* at para. 111 and *0782484 B.C. Ltd.* at para. 109 will never come to be here.
>
> [38] The problem becomes especially apparent when one considers that s. 21(2)(c) of the *Act* repeats the language of s. 16(a) for the purpose of the 15-year ultimate limitation. I agree it could not have been the legislature's intention to leave a gap by which certain claims for contribution or indemnity, like the claim in the present case, might be left with no limitation period, be it under s. 6 or s. 21.
>
> [Emphasis added.]

[34] Section 21, to which Kirchner J. refers, establishes the ultimate limitation period. It provides, in part:

> 21 (1) …[A] court proceeding must not be commenced with respect to the claim more than 15 years after the day on which the act or omission on which the claim is based took place.
>
> (2) For the purposes of this section and subject to section 24 and subsection (3) of this section, for any of the following claims, the day an act or omission on which the claim is based takes place is as follows:
>
> …

> (c) in the case of a claim for contribution or indemnity, the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
>
> [Emphasis added.]

[35] Notwithstanding his concern that the combined effect of sections 16 and 21 is that certain claims for contribution or indemnity will have no limitation date, Kirchner J., like the chambers judge in the case at bar, felt himself bound by the judgment of this Court in *Sohal* to interpret s. 16(a) in such a fashion as to do away with any limitation:

> [43] While, I would have been inclined to accept [the third party's] submission and allow the appeal, I consider myself bound by the decisions in *Sohal* and *0782484 B.C. Ltd*. and the doctrine of *stare decisis* compels me to follow them. I acknowledge that Grauer J.A.'s comments in para. 111 of *Sohal* appear to be *obiter* in that he was answering a hypothetical "anomaly" put forward by counsel for the appellant, but it is *dicta* that was intended to address a substantial point raised in the appeal. Regardless, Grauer J.A. found at para. 30 that service of the amended notice of civil claim, which identified the driver's employer as a defendant, is what started time running under s. 16 of the *Act*, not the original notice of civil claim. That conclusion is not *obiter*.
>
> [44] Further, Grauer J.A.'s *dicta* at para. 111 has now been followed in *0782484 B.C. Ltd.,* and I consider myself bound the principle of horizontal *stare decisis* to follow that case. The authority of *0782484 B.C. Ltd.* has not been undermined by subsequent decisions of a higher court, there is no binding authority that was not considered in that case, and there were no exigencies that required an immediate decision without the opportunity to fully consult authority …

[36] In *0782484 B.C. Ltd. v. E-Pro Enterprises Inc.,* 2021 BCSC 150, by which Kirchner J. considered himself to be bound, Power J. found that the third party claim had not been "discovered" pursuant to either s. 16(a) or (b). In addressing s. 16(a), she followed *Sohal,* holding: "pursuant to s. 16(a), the latest [the defendant] discovered its claim for contribution and indemnity against [the third parties] was when it was served with the Plaintiffs' joinder application …"(at para. 109).

[37] *0782484 B.C. Ltd.*, was appealed. Voith J.A., in reasons cited as *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95, observed:

> [94] In *Sharma*, Justice Kirchner, though he felt bound by *Sohal*, explained the difficulties that arise from this conclusion in some detail: see paras. 36–42.
>
> [95] The appellants submit that para. 111 of *Sohal*, and the reasoning that led to this paragraph, are obiter and that this division can revisit those conclusions. There is no need to revisit *Sohal* in this case as the judge's findings under s.16(b) are a complete answer to the appellants' position that [the] third-party claim is time-barred. The question of whether these paragraphs of *Sohal* were wrongly decided may have to await the decision of a five-person division of this Court.

Discussion

The chambers judge was not bound to follow *Sohal*

[38] In my opinion, the views expressed in para. 111 of *Sohal* are *obiter*. The judgment in *Sohal* turned on two questions:

a) whether the claim for contribution was a "pre-existing claim" as defined in s. 30 of the *Act*; and

b) whether s. 22 of the *Act* precluded the court from granting leave to commence third party proceedings that would otherwise be barred by a limitation.

[39] The first question was resolved by determining that the claim for contribution was not "based on an act or omission that took place before the effective date". The second was resolved by determining that the issuance of a third party notice would commence a "court proceeding". Neither question hinged upon the date upon which the third party claim was "discovered". In that sense, the opinion on discoverability is *obiter*.

[40] Kirchner J. was correct to say, in *Sharma*, that the determination that the claim was statute barred hinged, in part, upon the conclusion, at para. 30 of *Sohal*, that time started running under s. 16 of the *Act* when the amended notice of civil claim was served on the defendant. That conclusion was driven by the view that the third party claim was "discovered" when a claim was first made against multiple

defendants. However, either of the alternate readings of s. 16(a) would have led to the claim being statute barred (i.e., that time starts to run with the service of the originating notice even if only one defendant is named, or that it runs from the date of the joinder of multiple defendants). Leave to commence the third party proceedings was first sought more than two years after the service of the first notice of civil claim, but also more than two years after the amended notice of civil claim.

[41] As Southin J.A. noted in *University of British Columbia v. British Columbia College of Teachers*, 2002 BCCA 310 at para. 7: “It is not always easy to discern from reasons for judgment what part is *ratio decidendi* and what is *obiter dicta*”. In my view, it was not necessary to resolve the issue with respect to how s. 16(a) should be read in *Sohal*.

Interpreting s. 16(a)

[42] Prior to the coming into force of the *Act*, the running of time for claims for contribution or indemnity ran from the date the cause of action arose. A cause of action for contribution arises from the date of a finding of liability to pay damages to which the third party had contributed or from the payment of such damages. In the absence of a contractual stipulation or other statutory provision, a cause of action for indemnity similarly ran from the date of judgment or the discharge of the obligation for which the defendant was entitled to be indemnified: *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.,* 2010 BCCA 192 at para 23; see also *George Wimpey & Co. v. British Overseas Airways Corporation*, [1955] A.C. 169 at 177, [1954] 3 All E.R. 661 (H.L.); *British Columbia Hydro and Power Authority v. Van Westen*, 1974 CanLII 1716, [1974] 3 W.W.R. 20 at 22 (B.C.S.C); *Krusel v. Firth* (1991), 61 B.C.L.R. (2d) 612 (S.C.) at paras. 47–50.

[43] That regime could result in long postponement of claims for contribution or indemnity and multiple trials (a result of defendants taking a wait-and-see approach to the necessity of seeking contribution, an approach discussed by Kent J. in his judgment in *Sohal*). The *Act* was intended to remedy that, as well as other problematic limitations.

[44] If read as the respondent, Ferro Building Systems Ltd. (“Ferro”), proposes, and as suggested in para. 111 of *Sohal*, the *Act* will be even more, not less, problematic than its predecessor. Because s. 16 provides that the limitation runs from the later of two “discovery” dates (service of pleadings or knowledge of entitlement to make a claim), the reading adopted by the chambers judge in the case at bar and supported by Ferro would result in there being no effective limitation of third party claims for contribution or indemnity in cases where the plaintiff only names one defendant. That is not uncommon. Plaintiffs, other than those who are or may have been contributorily negligent, often have no incentive to pursue every potential joint tortfeasor. Many plaintiffs will have no idea who might be liable to indemnify the defendants.

[45] In my view, the appellant is correct to say that when a defendant is served with pleadings describing a claim for which that defendant knows or ought to know he may be jointly liable with a third person, or for which he knows or ought to know he may claim indemnity from a third person, he has been served with pleading in respect of a claim on which the claim for contribution or indemnity is based.

[46] I agree with the appellant’s characterization of the statutory definition of the date upon which a claim is discovered under s. 16(a): it is the date of service upon the claimant of a pleading which *could*, if the cause of action is proven, result in a defendant paying more than its share of damages. Contrary to this Court’s reasoning in *Sohal*, the pleading need not allege fault on the part of two or more defendants. It is for the defendant to determine if there are other potential tortfeasors who may be responsible for the plaintiff’s loss or parties potentially liable to indemnify the defendant. If so, it is for the defendant to initiate proceedings before the expiration of the limitation period against the potential third parties if they wish to preserve their right to seek contribution and indemnity.

[47] That is the plain reading of s. 16(a) and a reading that accords with its remedial purpose and common sense. In this regard I note that the commentary on the *Act* at the time of its enactment simply referred to the service of the originating

notice upon the defendant, by the claimant, as the date upon which a limitation would begin to toll. The *New Act Explained*, cited above, stated at p. 41:

> Section 16 sets out that the basic limitation period runs from the later of: the date a person claiming contribution or indemnity is served with the paperwork starting the original claim (on which the contribution or indemnity claim is based), or the date that a person first knew or reasonably ought to have known that he or she could make a claim for contribution or indemnity against a third party.
>
> [Emphasis added.]

[48] I would not accede to Ferro's argument that reading s. 16(a) as I do will result in inconsistent definition of the phrase "based on", as it is used in s. 30 of the *Act* and, in a modified form ("on which the claim is based"), in s. 16(a) of the *Act*. When considering that argument, I bear in mind what was said by Drapeau J.A. in *Democracy Watch v. Premier of New Brunswick*, 2022 NBCA 21, about the rules of statutory interpretation:

> [63] Three related tenets of statutory interpretation are particularly relevant here: (1) the Legislature does not intend courts to settle upon an interpretation that contradicts the object of a provision: *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 23; (2) legislation stands to be read in a manner that harmonizes its components "in as much as possible, in order to minimize internal inconsistency*": Willick v. Willick,* 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, [1994] S.C.J. No. 94 (QL), at para. 24; and (3) the legislation must be considered as a whole, and it behooves the judicial interpreter to "try to make all its parts fit and work together": *R. v. W. (C.K.),* 2005 ABCA 446, [2005] A.J. No. 1753 (QL), at para. 40.

[49] I agree with the conclusion in *Sohal* that a claim for contribution is not "based on" the acts or omissions giving rise to the plaintiff's claim (referred to by the Court as "loss or damage caused by the fault of others") as that phrase is used in s. 30. It is rather, as noted in *Sohal* and previously in *Scott Management*, a restitutionary claim for contribution based upon the obligation of one person to discharge a debt owed wholly or in part by another, or the incurring of a debt from which the third party has agreed to indemnify the claimant.

[50] On the other hand, a claim for contribution or indemnity may properly be said to be *based on* a claim made against the claimant, as that phrase is used in s. 16(a). By initiating third party proceedings, the claimant is saying to the third party: "a claim

has been made against me; if that claim succeeds I will look to you for contribution or indemnity". To borrow language used by Grauer J.A. in *Sohal*, the claimant is not advancing a claim that is only *related to*, or *connected to* the plaintiff's claim but, rather, one that cannot be brought until a claim is made against the defendant who then seeks contribution or indemnity. The third party claim is wholly dependent upon the initiation of proceedings against the defendant.

[51] As the judgment in *Sohal* recognizes, the *Act* deems the third party claim to be "discovered" upon *the service of pleadings* upon the defendant. Discovery does not hinge upon either the act or occurrence that gives rise to the plaintiff's claim (on one hand) or the finding of liability against the defendant, which gives rise to the cause of action for contribution (on the other). Discovery occurs when there is a "claim" or allegation made against the defendant; a claim made against co-defendants is not the basis for the third party claim. The claim for contribution or indemnity does not depend upon a finding that two or more defendants are at fault. A single defendant who is wholly at fault for an act or omission may bring an action for indemnity before or after being found liable. As Southin J.A. noted in *Tucker (Guardian of) v. Asleson*, 1993 CanLII 2782, 78 B.C.L.R. (2d) 173 (B.C.C.A.):

> [116] … I think the right of contribution and indemnity among several concurrent tortfeasors is independent of what the injured person does if, in fact, damage or loss has been caused by the fault of two or more. A finding in an action between the person suffering the loss and one of the several concurrent tortfeasors that the latter has caused some part of the damage by his fault, makes that person liable to the person suffering the loss for the whole of the loss, subject to deduction for what that person has received from the released tortfeasor, but does not prevent the tortfeasor who was sued from maintaining his claim for contribution, whether in that action or a separate action. In the first action, it is quite unnecessary for the court to make any division of fault but in the proceedings for contribution it must do so in order to implement the statute.

[52] There is, in my view, nothing in the wording of s. 16(a) to support the view that a claim is "discovered" when parties other than the claimant are added as defendants. I agree with the appellant that the plaintiff's decision to add a defendant to an action cannot trigger discovery.

[53] The case upon which the Court relied in *Sohal*, *Placzek v. Green*, 2009 ONCA 83, is consistent with the interpretation of s. 16 I have described. In that case, Simmons J.A., writing for the Court, held that a claim for contribution is based on unjust enrichment and while such claims "may be related to the tortious acts that underlie the accident, they are not founded on those acts: at para. 34. Rather, they are founded on the acts or omissions giving rise to the claims for restitution." The Court noted:

> [35] There is ample authority in Ontario for the proposition that a claim for contribution and indemnity under s. 1 of the *Negligence Act* is not a damage claim arising out of a tort, but instead is a statutory claim founded on principles of restitution and unjust enrichment. [Footnote omitted.]

[54] That is consistent with the conclusion in *Sohal* that the defendant's claim to contribution was not a "pre-existing claim" within the meaning of s. 30 of the *Act*.

[55] However, the Court in *Placzek* went on to note that under s. 18 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, the equivalent of s. 16 in our Act[1]:

> [49] … [T]he acts or omissions on which [the defendant's] counterclaims are based are deemed to have occurred on June 8, 2005, the day he was served with the … statement of claim.

[56] In my view, it was correct for the Court to answer to the "absurdity" suggested by the appellants in *Sohal* by saying the scenario "ignores the discoverability provisions for claims of contribution in section 16". The appellants in *Sohal* suggested that it would be an absurd result if a defendant (say "defendant A") could not bring third party proceedings against a defendant added to litigation ("defendant B") 2½ years after the service of the notice of civil claim on defendant A. In those circumstances, however, defendant A will still be able to bring a third party claim against defendant B if A first knew or reasonably ought to have known that a

[1] It reads: "18 (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place."

claim for contribution or indemnity might be made against B less than two years before the addition of B as a defendant.

[57] Defendant A is only precluded from adding B as a third party, in this scenario, if A knew of the potential claim for indemnity or contribution for two or more years and failed to add B. That would be the case, in this scenario, if A knew from the outset of litigation (in the words of s. 16(a) from "the day on which the claimant for contribution or indemnity was served with a pleading in respect of a claim on which the claim for contribution or indemnity is based") that A might be liable for damages to which B had contributed. This result certainly imposes a burden upon A to address potential claims for contribution early in litigation. In my view, that is the intent and purpose of s. 16 of the *Act.* The result is not absurd.

Application to the Case at Bar

[58] As I have noted, Lamb J. considered herself to be bound by the judgment in *Sharma* (by horizontal *stare decisis*) and by *Sohal* to find that the third party claim was not statute barred. When the application for leave came on before her, the plaintiff had not added Neale Engineering as a defendant and the notice of civil claim did not allege that damage was caused by the fault of two or more defendants. As a result, she felt bound to conclude that Ferro's claim for contribution and indemnity against Neale Engineering had not been discovered under s. 16(a) of the *Act*. For reasons I have set out above, I am of the view that *Sharma* was wrongly decided, and that the Lamb J. was not bound by the view expressed in *Sohal* with respect to the interpretation of s. 16(a).

[59] Fortunately, she went on to consider whether the third party claim would be barred by a limitation in the event s. 16(a) were to be interpreted in the manner I say we should now interpret it. There was no doubt the notice of civil claim was served upon Ferro more than two years before the application for leave to commence the

third party proceedings. There remained the question when the third party claim was discovered pursuant to s. 16(b). She held:

> [18] … I accept the submissions of Neale Engineering that Ferro knew or ought to have known that it may make a claim for contribution and indemnity against Neale Engineering when Ferro was served with the original notice of claim, i.e. May 15, 2018.
>
> [19] The Court of Appeal in *Roberts v. E. Sands & Associates*, 2014 BCCA 122 at para. 34 reviewed the principles of discoverability:
>
> > [34] The two operative concepts in this case are diligence and the knowledge of facts supporting a cause of action. According to the doctrine of discoverability, a limitation period does not begin to run until the claimant knows the material facts upon which a cause of action is founded. The claimant must be diligent in discovering those facts. The judge understood the doctrine; his discussion on the topic correctly summarizes the law:
> >
> > > [44] The concept of discoverability was discussed by the learned author of *The Law of Limitations* (2nd Ed.) (LexisNexis Butterworths) 2004:
> > >
> > > > In all cases where the discoverability rule is invoked, the claimant must have exercised reasonable diligence in discovering the material facts upon which to found an action. It has been clear for some time now that wilful blindness to the existence of damages will not be an effective answer to a limitation defence.
> > > >
> > > > As to what amounts to "reasonable diligence", the test is a subjective one. In the 1996 decision of *Bourne v. Saunby*, the court declined to apply the discoverability rule because "everything was then and there available to enable the plaintiff and his family and their advisors, exercising due diligence to bring an action". Similar approaches have been taken in more recent cases. It is not adequate, for example, to say that where medical evidence is available but has unreasonably not been obtained, that lack of knowledge of the nature and extent of an injury should trump a limitation defence. A claimant cannot simply wait until he or she has an expert report in hand which supports the claim. [Emphasis added by the author.]
> > >
> > > (at p. 54)...

[60] After reviewing the evidence, she concluded:

> [23] In my view, there are no specific material facts in the proposed third party notice that were not known or knowable to Ferro when it was served with the notice of civil claim had Ferro exercised due diligence.

> …
>
> [28] On the whole of the evidence, I find that Ferro knew or reasonably ought to have known the material facts to support a claim for contribution and indemnity against Neale Engineering on May 15, 2018.

[61] That conclusion, unchallenged in this Court, is dispositive of the appeal. I would allow the appeal and set aside the order granting leave to Ferro to file the third party notice joining Neale Engineering to the proceedings.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Mr. Justice Butler"