# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *I.C.B.C. v. International Raw Materials Ltd.,* 2024 BCSC 1920

Date:20241018
Docket: S1810901
Registry: Vancouver

Between

**The Insurance Corporation of British Columbia**

Plaintiff

and

**International Raw Materials Ltd. and Westcan Bulk Transport Ltd.**

Defendants

and

**The Minister of Public Safety and the Solicitor General of the Province of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia; Teck Metals Ltd., International Raw Materials Ltd., the Regional District of Kootenay Boundary, Westcan Bulk Transport Ltd., and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure**

Third Parties

and

**Marsh Canada Ltd.**

Fourth Party

Before: The Honourable Mr. Justice Riley

## Reasons for Judgment

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| Counsel for the Applicant Westcan Bulk Transport Ltd.: | A. Howden-Duke<br>A. Gubeli |
| Counsel for the Application Respondent Marsh Ltd.: | L. Bracco-Callaghan |

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| Place and Date of Hearing: | Vancouver, B.C.<br>27 August 2024 |
| Place and Date of Decision: | Vancouver, B.C.<br>18 October, 2024 |

## Introduction

[1] This is an application by Westcan Bulk Transport Ltd. (“Westcan”) for leave to file a fourth party notice against the respondent, Marsh Canada Ltd.(“Marsh”). Because Westcan did not file the proposed fourth party notice within 42 days of filing its response to the underlying claim or claims, it now requires leave to do so. The responding party, Marsh, opposes the application on the basis that the proposed fourth party claim is barred by the two-year limitation period established under the *Limitation Act*, S.B.C. 2012, c. 13.

## Background

[2] The underlying action is a claim by the Insurance Corporation of British Columbia (“ICBC”) against a number of defendants, including Westcan and International Raw Materials Ltd. (“IRM”), in connection with damages to over 500 vehicles arising from exposure to acid spilled on the highway near Trail, B.C. (the “ICBC action”).

[3] ICBC has now settled its claim against the defendants, but the defendant IRM is still pursuing a third party claim against Westcan for indemnity and contribution. One claim IRM is advancing is that Westcan is liable in contract for failing to have IRM added as an additional insured under Westcan’s insurance policies in respect of the business undertaking that led to the acid spills.

[4] It is against this backdrop that Westcan seeks to add its insurance broker, Marsh, as a fourth party to the ICBC action. In its proposed fourth party claim, Westcan seeks indemnity from Marsh for any damages Westcan is liable to pay to IRM. Westcan’s proposed fourth party notice alleges that Marsh is liable in contract and in negligence for failing to properly secure insurance coverage for IRM as an additional insured under Westcan’s insurance policies.

**The Related Actions and the History of the Proceedings**

[5] To understand the procedural history of the current application, it is necessary to explain that the ICBC action is one of four related actions that are all subject to a case management order:

a) Action #1 [VA1810901] is the original claim by ICBC against several defendants including IRM and Westcan for damage to vehicles in connection with the acid spills. As noted, ICBC has now settled its claims, and what remains is the third party claim by IRM against Westcan.

b) Action #2 [VA S219774] is a related insurance claim brought by IRM against one of its insurers, Steadfast Insurance Company ("Steadfast"), for denying coverage under an insurance policy issued to IRM in connection with IRM's damages related to the acid spill.

c) Action #3 [VA S224506] is another related insurance claim brought by IRM, this one against Westcan's insurer Zurich Insurance Company Ltd. ("Zurich"). IRM claims that it was an additional insured under the Zurich insurance policy. Zurich denies this, asserting that Westcan failed to arrange for the additional coverage.

d) Action #4 [VA S224514] is yet another related insurance claim. The plaintiff, Ironshore Specialty Insurance Company ("Ironshore"), is IRM's Canadian insurer. Ironshore claims that IRM was an additional insured under the Steadfast policy and therefore seeks indemnity and contribution from Steadfast for IRM's losses in connection with the acid spills.

[6] As noted, Westcan's current application for leave to file a fourth party notice on Marsh is brought in connection with Action #1. The proposed fourth party claim arises out of the third party claim advanced by IRM against Westcan.

[7] The history of the proceedings in connection with IRM's third party claim against Westcan can be summarized as follows:

a) On 9 October 2018, ICBC filed its notice of civil claim against Westcan, IRM, and seven other defendants.

b) On 30 March 2021, IRM filed a third party notices against a number of the other defendants, including Westcan. The Westcan notice was served several days later. This third party notice adopted the defined terms as set out in ICBC's notice of civil claim and the response to civil claim. The only additional facts alleged in this third party notice were denials of the claims against Westcan, and an allegation that the acid spills – and any loss or damage arising from them – were caused or contributed to by the fault of the third parties. As against Westcan, the notice sought, among other things, a declaration that IRM was entitled to contribution or indemnity of its losses under the *Negligence Act*, R.S.B.C. 1998, c. 333, and contractual indemnity under two contracts with Westcan, namely the Operating Agreement and the Transload Agreement. The notice's legal basis referenced contribution and indemnity under these two contracts and under the *Negligence Act*, and also cited various environmental statutes.

c) On 14 July 2022, IRM filed an amended third party notice against Westcan. It was served on Westcan several days later. This claim further particularized IRM's claim against Westcan for contribution or indemnity

pursuant to the *Negligence Act*, and its claim for contractual indemnity pursuant to the two agreements.

d) On 5 December 2023, IRM filed a second amended third party notice against Westcan. It was served on Westcan shortly thereafter. This pleading focused the claim against Westcan by alleging:

   i. the specific provisions of the two agreements in which Westcan covenanted to obtain specific insurance coverage, and to add IRM to that coverage as an additional insured;
   ii. the particulars of the insurance policies that Westcan had obtained from Zurich;
   iii. that Marsh (Westcan's insurance broker) issued certificates of insurance naming IRM as an additional insured under the Zurich policies with respect to liability arising out of Westcan's operations;
   iv. that Zurich denied coverage to IRM under the policies based on, among other things, IRM not being an additional insured under those policies; and
   v. that Westcan breached its insurance covenants with IRM by failing to provide, maintain, and pay for specific policies which included IRM as an additional insured.

e) At a judicial management conference on 2 April 2024, I ordered, among other things, that: (i) all of the actions were to be heard together, (ii) Zurich and Steadfast were to deliver their lists of documents by 30 April 2024, and (iii) if Westcan intended to bring third or fourth party proceedings, it must file the necessary notices or application materials seeking leave to do so by 15 May 2024.

f) On 2 May 2024, Westcan filed a response to IRM's second amended third party notice.

g) On 9 May 2024, Westcan filed the current application, seeking leave to file a fourth party notice against Marsh.

[8] Westcan's draft fourth party notice alleges that Marsh, as Westcan's insurance broker, failed to follow Westcan's instructions to add IRM as an additional insured in insurance policies issued by Zurich, which policies Westcan had obtained through Marsh. Westcan further alleges that Marsh issued certificates of insurance certifying that IRM was an additional insured under the Zurich policies, but that Zurich has denied coverage to IRM on the basis that IRM was not, in fact, added as an additional insured. Westcan claims that if it is liable for contribution or indemnity of IRM's losses, then Marsh is liable in breach of contract or in negligence for failing to properly add IRM as an additional insured in the Zurich policies, and in issuing certificates of insurance certifying that IRM was an additional insured under those policies.

## Analysis

[9] Rule 3-5 of the *Supreme Court Civil Rules* governs third party claims, and also encompasses fourth party claims. The particular subrule that is engaged in this application is Rule 3-5(4).

[10] I should note that Rule 3-5(4) was amended by B.C. Reg. 321/2021, which came into force on 4 April 2022. Prior to the amendment, Rule 3-5(4) read as follows:

> (4) A party may file a third party notice:
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> (a) at any time with leave of the court, or
>
> (b) without leave of the court, within 42 days after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

[11] After the amendment, Rule 3-5(4) reads as follows:

> (4) A party may file a third party notice:
>
> (a) at any time with leave of the court, or
>
> (b) without leave of the court, within 42 days after the filing of the response.

[12] The change brought about by the amendment is material in this case.

[13] Under the old version of Rule 3-5(4), Westcan would only have had the right to file a fourth party notice on Marsh, without leave, within 42 days of the date on which it had been served with the pleading claiming the relief to which the proposed fourth party claim relates. In this case, that would have been either (a) on Marsh's position, 11 May 2021 (42 days after IRM's initial third party notice against Westcan, filed on 30 March 2021), or (b) on Westcan's position, 16 January 2024 (42 days after IRM's second amended third party notice against Westcan, filed on 5 December 2023). On either party's position, the time for Westcan to file its fourth party notice against Marsh would have expired long before the application for leave was filed on 9 May 2024.

[14] By contrast, under the new version of Rule 3-5(4), Westcan had the right to file a fourth party notice against Marsh, without leave, within 42 days of the filing of its response. Since Westcan did not file a response to any of IRM's third party notices until 2 May 2024, Westcan had a further 42 days after that date to file a fourth party notice on Marsh. Although Westcan did not in fact file its proposed fourth party notice on Marsh within that time frame, Westcan filed its application for leave to do so on 9 May 2024, a mere seven days after filing its response.

[15] One could argue that since Westcan filed a leave application containing a draft fourth party notice within the 42-day time limit, in substance Westcan has effectively filed the fourth party notice, such that leave to do so is not required. However, that is not what happened. For whatever reason, Westcan did not formally file its proposed fourth party notice on Marsh. The 42-day time limit has passed and Westcan now requires leave.

[16] Marsh asserts that leave to file the proposed fourth party notice should not, and indeed cannot, be given because Westcan's claim for contribution or indemnity against Marsh is statute-barred under the *Limitation Act*. The law is clear that although the decision to grant leave for a third party notice (or, in this case, a fourth party notice) is discretionary, the court cannot exercise that discretion by granting leave where the proposed claim is barred by a limitation period: *Dhanda v. Gill*, 2019

BCSC 1500 at paras. 14, 63–65; *Sohal v. Lezama*, 2021 BCCA 40 at paras. 115–116.

[17] The question of whether a limitation period bars Westcan's claim against Marsh for contribution or indemnity was the focal point of submissions at the application hearing.

[18] Section 22 of the *Limitation Act* addresses limitation periods for counterclaims and other related proceedings. Subsection 22(1) provides that, where a claim has been commenced within the applicable limitation period, related proceedings by way of counterclaim, third party proceedings, or set off may be brought despite the expiry of the limitation period. However, s. 22(2) states that nothing in s. 22(1) gives a person a right to bring a claim for contribution or indemnity after the expiry of the applicable limitation period.

[19] Section 6 establishes a basic limitation period of two years from the day on which the claim is discovered.

[20] Section 16 sets out the discovery rule for claims of contribution and indemnity. It reads as follows:

> 16. A claim for contribution or indemnity is discovered on the later of the following:
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> (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;
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> (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.

[21] The focal point of the dispute in this case is identification of the particular pleading "in respect of a claim on which the claim for contribution or indemnity is based" as contemplated in s. 16(a).

[22] On the one hand, Marsh says the claim in question was IRM's initial third party notice, filed on 30 March 2021, and served shortly thereafter. Marsh points out that IRM's original third party notice sought contribution or indemnity from Westcan

on the basis of breach of contract and negligence, and that the notice specifically pled breaches of the Operating and Transload Agreements – the two agreements under which Westcan covenanted to add IRM as an additional insured in Westcan's insurance policies. Thus, says Marsh, the initial third party notice alleges liability in respect of which Westcan could pursue Marsh for contribution or indemnity.

[23] On the other hand, Westcan says the operative claim was IRM's second amended third party notice, filed on 5 December 2023, and served shortly thereafter. IRM's second amended third party notice: (i) pled the specific portions of the Operating and Transload Agreements in which Westcan covenanted to add IRM as an additional insured, (ii) alleged that Westcan's insurer had denied coverage to IRM, (iii) alleged that Marsh had issued certificates of insurance naming IRM as an additional insured, and (iv) alleged that Westcan was liable in contract and in negligence for failing to effect valid insurance coverage for IRM. Westcan says this second amended notice was the "pleading" on which Westcan's claim against Marsh for contribution or indemnity is based.

[24] In response to Marsh's position, Westcan says IRM's initial third party notice did not engage s. 16(a) of the *Limitation Act* because it did not include any allegation that Westcan was liable for failure to effect valid insurance coverage for IRM. Although the original third party notice advanced claims of breach of contract and negligence, those were claims against Westcan for contribution and indemnity in connection with the spill incidents, not in respect of insurance coverage.

[25] The leading case dealing with the interpretation of s. 16 of the *Limitation Act* is *Neale Engineering Ltd. v. Ross Land Mushroom Farm Ltd*., 2023 BCCA 429. The key passage of the decision reads as follows:

> [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.
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> [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.
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> [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:
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> > 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.
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> [Emphasis added in original quotation.]

[26] Later in the reasons, at para. 51, Justice Willcock explains that "the *Act* deems the third party claim to be 'discovered' upon *the service of the pleadings* upon the defendant." This "discovery," within the meaning of s. 16(a), "occurs when there is a 'claim' or allegation made against the defendant." The "intent and purpose" of s. 16 is to impose a burden upon a party seeking to pursue indemnity or contribution to "address potential claims for contribution early in litigation": *Neale Engineering* at para. 57.

[27] While I recognize that the intent of s. 16 is to place an expectation on parties to address potential claims for contribution or indemnity early in the litigation, in the case at bar it would be asking too much to expect Westcan to glean from IRM's original third party notice that Westcan would have any claim for contribution or indemnity against its insurance broker, Marsh. The original third party notice focused on shared liability for the spill incidents themselves, not liability for failing to provide insurance coverage. Although the original third party notice pled breach of the contracts that included an obligation for Westcan to add IRM as an additional

insured party under its insurance coverage, there is nothing in IRM's original third party notice indicating that those contractual obligations were breached. There are no material facts in the original third party notice outlining a claim giving rise to even a potential claim by Westcan for contribution or indemnity against Marsh.

[28] I agree with Westcan that material facts capable of engaging a claim for indemnity or contribution against Marsh were not included in any pleading until IRM filed its second amended third party notice on 5 December 2023. This was the first pleading that could reasonably be interpreted to include an allegation that Westcan was liable for a failure to properly effect valid insurance coverage on behalf of IRM. It was this claim by IRM that gave rise to a potential claim by Westcan against Marsh for indemnity or contribution.

[29] I conclude that Westcan's claim against Marsh was not discovered within the meaning of s. 16(a) of the *Limitation Act* until IRM served its second amended third party notice, on or shortly after 5 December 2023. Westcan therefore has until on or shortly after 5 December 2025 to bring a claim against Marsh.

[30] The statute provides that a claim for indemnity or contribution is discovered on the "later of" the date on which a triggering pleading is served as contemplated in s. 16(a), or the date on which the moving party "knew or ought to have known" that a claim for indemnity or contribution could be made as contemplated in s. 16(b). In other words, the limitation period for a claim of indemnity or contribution starts to run from the later of: (i) the date on which the claim is deemed discovered under s. 16(a), or (ii) the date on which the claim became reasonably discoverable under s. 16(b). In this case, because the fourth party proceeding is being brought within two years of the date determined under s. 16(a), it is unnecessary to make any finding as to an operative date under s. 16(b).

[31] This brings me back to the question of whether to grant Westcan leave to file the proposed fourth party notice on Marsh. The overarching question is whether greater injustice would arise from granting leave, or from allowing the claim against the proposed third party to be pursued as a separate action: *Kwikwetlem First Nation*

*v. British Columbia (Attorney General)*, 2021 BCCA 311 at para. 149, applying *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 90 and *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741 at para. 33. In answering that question, the court should consider the following factors: (i) prejudice to the parties, (ii) whether any limitation periods have expired, (iii) the merits of the proposed claim, (iv) any delay in the proceedings, and (v) the timeliness of the application: *Kwikwetlem First Nation* at para. 148, applying *Tyson Creek* at para. 42 and *Clayton Systems 2001 Ltd. v. Quizno's Canada Corporation*, 2003 BCSC 1573 at para. 9.

[32] At the hearing in this matter, counsel for Marsh fairly conceded that if a limitation period does not bar Westcan's claim for contribution or indemnity, none of the other relevant factors weigh heavily against granting leave for Westcan to file the proposed third party notice. That concession was a reasonable one in the circumstances.

[33] While the original action brought by ICBC has been before the court for quite some time, the case has morphed from a dispute about vehicle damages arising from acid spills into a dispute about indemnity between defendants, focused on insurance coverage. The original claim is now accompanied by a collection of inter-related disputes about insurance coverage. The insurance coverage disputes are in their infancy. Lists of documents have been exchanged, but no discoveries have taken place, and no trial dates have been set. Having found against Marsh on the limitation issue, I find it just and appropriate that Westcan's claim against Marsh be heard together with the balance of the related actions. I would therefore grant leave under Rule 3-5(4) for Westcan to file a fourth party notice against Marsh.

"The Honourable Mr. Justice Riley"