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When Settling Out Isn’t Enough: Contribution Claims After Pre-Con Builders Ltd v Neil Cooper Architect Inc

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When Settling Out Isn't Enough: Contribution Claims After *Pre-Con Builders Ltd v Neil Cooper Architect Inc*, 2026 MBCA 20

If you settle a client out of multi-party **litigation** with nothing more than a release, you may not have walked away at all.

That is the lesson from *Pre-Con Builders Ltd v Neil Cooper Architect Inc*, 2026 MBCA 20. The Court of Appeal restored a third-party claim that had been summarily dismissed below and in doing so reaffirmed three points: (1) the right to contribution under *The Tortfeasors and Contributory Negligence Act* (the "Act") is a statutory cause of action with its own rules; (2) a defendant need not raise every available defence to the main action before claiming over; and (3) there is no duty to warn a settling co-defendant that a third-party claim may follow.

What happened

The case arose out of **construction defects** in a Winnipeg condominium complex completed in 2014. After a 2021 balcony fire exposed problems with the building envelope, the condominium corporation brought a Part II application under the old *Limitation of Actions Act* to extend the time to sue. Both Pre-Con and Cooper were named as respondents. Cooper opposed the application while Pre-Con took no position. Before the application was heard, the plaintiff settled with Cooper, gave Cooper a release and abandoned the Part II application against Cooper. The order extending time was granted against Pre-Con alone. The plaintiff sued Pre-Con and Pre-Con issued a third-party claim against Cooper for contribution and indemnity.

Cooper moved successfully for summary judgment dismissing the third-party claim. The motion judge relied on a single Saskatchewan decision, *B(I) v Canada (Attorney General)*,

2001 SKQB 243, for the "common sense proposition" that a defendant that fails to raise an available defence — here, a limitation defence — should not be permitted to claim over.

The statutory cause of action

The Court of Appeal disagreed. The Chief Justice of Manitoba, Marianne Rivoalen, writing for a unanimous panel, treated the case as a straightforward application of s. 2(1)(c) of the *Act*, which gives a tortfeasor a statutory right to claim contribution from any other tortfeasor who is, or would have been if sued, liable for the same damage. The two prerequisites are that the third party would have been liable to the plaintiff and that the liability is in respect of the same damage (paras 59–60).

Nothing in the statute requires a defendant to raise every available defence before claiming over. The Court reiterated that the Act "permits a defendant to issue a third party claim before it has successfully defended an action brought against it by a plaintiff" (para 40). The motion judge's contrary view grafted onto the legislation a threshold that was not there (para 61).

On the limitation period for the third-party claim, the Court confirmed that the clock does not start running until "a settlement or a judgment is issued in relation to the plaintiffs' claim" (para 44). Issuing the third-party claim within the main action is common practice, but it is a matter of efficiency, not necessity. The same result follows under s. 8(f) of the new *Limitation of Actions Act*, S.M. 2021, c. 44, which ties discovery of a contribution claim to confirmation of the claimant's liability by judgment, award or settlement.

Common sense is not a substitute for the statute

The strongest writing in the decision is on the limits of judicial discretion. Drawing on *Endean v British Columbia*, 2016 SCC 42, and *College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 70, the Court confirmed that inherent jurisdiction is a residual power that can never be used to bypass a statute or regulation. Once a statute addresses an issue, the statute governs and inherent jurisdiction may "only rarely" complement and never contradict it (paras 57–58). The Court declined to follow *B(I)*, noting that the Saskatchewan judge had ignored the relevant statutory provision and rested his reasoning "not on any legal or equitable principles or authorities but, rather, on what he deemed to be mere 'common sense'" (paras 49–51).

No duty to warn the settling party

Cooper's fallback was estoppel by convention under *Ryan v Moore*, 2005 SCC 38. It failed at the first hurdle: There was no evidence of a shared assumption that Pre-Con would not claim

over and no evidence Pre-Con had communicated such an assumption to Cooper (paras 73–75). More broadly, the Court refused to recognize any positive obligation on a non-settling defendant to disclose its litigation strategy or telegraph a potential third-party claim. On Cooper's theory, a defendant could lose its statutory contribution right "through no fault of [its] own" because the plaintiff chose to settle with someone else (paras 77–78).

Practical takeaways

For defence counsel pursuing contribution, the statutory pathway is intact. You need not raise every available defence before claiming over, and you owe no warning to a settling co-defendant.

For defence counsel on the settling side, the case is a warning. A release from the plaintiff, on its own, does not buy your client finality. Cooper settled, took a release, saw the Part II application against it abandoned — and still ended up litigating a third-party claim. The critical fact, flagged by the Court at para 12, is that the relevant release did not include an indemnity from the plaintiff against future contribution claims.

If you are settling a defendant out of a multi-party action, a release is not enough. You should build in an indemnity against contribution and **indemnity claims**. Where co-defendants remain in play, a *Pierringer* or *Mary Carter* structure — with the plaintiff covenanting to limit recovery against the non-settling defendants to their several share — is another option. Without something along those lines, your client remains exposed to a claim-over until the main action is resolved and the limitation period for contribution has expired.

For plaintiffs' counsel, you should expect to be asked for an indemnity and price your settlement accordingly.

Citation: *Pre-Con Builders Ltd v Neil Cooper Architect Inc*, 2026 MBCA 20 (Rivoalen CJM; leMaistre and Turner JJA concurring); judgment delivered March 4, 2026.

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