IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Holmes v. Lund,*
2025 BCSC 878

Date: 20250402
Docket: S228475
Registry: Vancouver

Between:

Jarett Holmes

Plaintiff

And

Robert Lund, Republic Records, a division of, UMG Recordings, Inc., Alleson Sheldan, Christopher Weiss, and Michael Weiss

Defendants

Before: Associate Judge Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Sabur Y. Gao
Counsel for the Defendant, Robert Lund:	D. Barber K. Starnes
Counsel for the Defendant, Republic Records, a division of, UMG Recordings, Inc.:	N. Godfrey
Counsel for the Defendants, Christopher Weiss and Michael Weiss:	T. Elneweihi
The Defendant, Alleson Sheldan:	No appearance at this hearing
Place and Date of Hearing:	Vancouver, B.C. April 2, 2025

Place and Date of Judgment: Vancouver, B.C.
April 2, 2025

[1] **THE COURT:** This is an application by the plaintiff, Mr. Holmes, for an order, first of all, removing Alleson Sheldan, Christopher Weiss, and Michael Weiss as defendants in these proceedings; Secondly, an order adding those same parties as plaintiffs in these proceedings; further, an order that the style of proceeding be amended accordingly; and for leave to file an amended notice of civil claim substantially in the form attached as Schedule A to the notice of application.

[2] The underlying action arises from a dispute between the parties in relation to alleged copyright breaches by the defendants, Robert Lund and Republic Records, which is a division of UMG Recordings, Inc. (“Republic”) in relation to a master recording of the composition “Breathe”, which was created through collaboration between Mr. Holmes, and the defendants he sought to be removed, namely, Alleson Sheldan, Christopher Weiss, and Michael Weiss. And I will refer to the latter three as the “band members”, hopefully consistently.

[3] As there was an ongoing dispute between Mr. Holmes and the band members as to the respective rights to “Breathe”, the band members were named as defendants.

[4] Looking at the allegations—and I am going to use broad brush strokes here—based on submissions of counsel. Counsel advised that when using a portion of a previously-recorded song by another artist, a new artist can either include what is called a “sample” of the earlier work, or the new artist can interpolate elements of the original. A sample is where a section of the original song is taken and incorporated, while an interpolation is where a section is re-recorded.

[5] If one is seeking to use a sample, they must get permission from the composer and the holder of the recording licence. However, for interpolation, you do not deal with the recording licence holder, just the composer. That is perhaps a somewhat simplistic analysis, but the point here is that Mr. Holmes alleges the defendant, Mr. Lund, represented that he would use, and got permission in 2019 to use, an interpolation of Mr. Holmes’s and the band members’ 2013 song “Breathe” into his song “Broken.”

[6] “Broken” is said to have been released by Republic in 2020, although I gather it was originally released in 2016.

[7] Apparently, there were some negotiations in 2021 regarding allegations that the alleged interpolation was, in fact, a sample. Those negotiations, however, went nowhere and a notice of civil claim was filed on October 19, 2022. There were apparently issues with service, but service was effected within the year. Rather than filing a response to civil claim, Republic sent a document called a “demand for amendments to and particulars of the notice of civil claim”. That was dated February 1, 2023.

[8] That apparently led counsel for Mr. Holmes to try to resolve matters as between him and the band members. The claims as between Mr. Holmes and the band members were resolved by an agreement dated September 2024. Counsel for the plaintiff advised the other defendants, Mr. Lund and Republic, that the plaintiff and the band members had settled and that they would be seeking to have the band members removed as defendants, added as plaintiffs, and an amended notice of civil claim be filed.

[9] Mr. Lund and Republic oppose the application. The parties are *ad idem* on the applicable law. The governing rule is *Supreme Court Civil Rules*, Rule 6-2(7):

> **Adding, removing or substituting parties by order**
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> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
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> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
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> (b) order that a person be added or substituted as a party if
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> (i) that person ought to have been joined as a party, or
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> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
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> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
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> (i) any relief claimed in the proceeding, or

> (ii) the subject matter of the proceeding
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> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[10] While Rule 6-2(7)(b) is more narrowly construed, subsection (c) is the more commonly-used section on applications of this type. Although it is unusual to add or substitute plaintiffs as opposed to defendants, I am satisfied that the same principles apply.

[11] Because of my conclusions otherwise on this application, I am going to make my determination under Rule 6-2(7)(c). Under that rule, the court must be satisfied, firstly, that there is a question or issue between the parties relating to the relief, remedy, or subject matter of the suit; and, secondly, that it is just and convenient to determine the issue in the proceeding. And for that, I will refer to the application response of Republic where they refer to *Forde v. Interior Health Authority,* 2007 BCSC 1706, at paras. 10 and 11.

[12] Republic also noted that the factors to be considered in determining whether it is just and convenient to join a party include the extent of the delay in bringing the application, the reasons for the delay in bringing the application, any explanation for the delay in bringing the application, the degree of prejudice caused by the delay in bringing the application, and the extent of the connection between the existing claims and the proposed new causes of action. They cite *Byrd v. Cariboo (Regional District),* 2016 BCCA 69, at para. 31. Those factors, I think, are commonly referred to as the *Letvad* factors (See: *Letvad v. Fenwick*, 2000 BCCA 630].

[13] Looking at the initial order sought—that is the removal of the band members as defendants—it is clear to me that that actually should go under Rule 6-2(7)(a). These band members have ceased to be proper defendants as there is no longer a *lis* between them and Mr. Holmes. I am satisfied, however, that there are common questions here between the proposed plaintiffs, *i.e*., the band members, and the action as it stands presently.

[14] Indeed, it seems patently obvious as the parties are the same, the rights alleged are regarding the same song, and the alleged breaches are similar, if not identical.

[15] There are distinctions urged upon me by counsel for Republic and counsel for Mr. Lund, but those distinctions fail to satisfy me that it is inappropriate to add these parties as plaintiffs. Mr. Lund and Republic go on to argue further that the band members should not be added as plaintiffs largely on the basis of the delay and the alleged expiry of the limitation period.

[16] There is an issue as to whether there has been an expiry of the limitation period. Section 43(1)(i) of the *Copyright Act*, R.S.C. 1985, c. C-42 provides:

> **Limitation or presentation period for civil remedies**
>
> 43.1 (1) Subject to subsection (2), a court may award a remedy for any act or omission that has been done contrary to this Act only if
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> (a) the proceedings for the act or omission giving rise to a remedy are commenced within three years after it occurred, in the case where the plaintiff knew, or could reasonably have been expected to know, of the act or omission at the time it occurred; or
>
> (b) the proceedings for the act or omission giving rise to a remedy are commenced within three years after the time when the plaintiff first knew of it, or could reasonably have been expected to know of it, in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the act or omission at the time it occurred.

[17] Mr. Holmes argues that this section applies here and that acts alleged to constitute the breach of copyright could not have been known at the time they occurred and, hence, the discoverability question arises.

[18] Mr. Lund and Republic also submit that some of the allegations in the existing notice of civil claim and, indeed, in the proposed amended notice of civil claim, are not properly breaches under the *Copyright Act,* but are breaches more in the nature of fraudulent misrepresentations and so forth and that those would carry a shorter limitation period under the *Limitation Act*, S.B.C. 2012, c. 13 of two years.

[19] Before dealing with the *Limitation Act* issue, I will deal with the issue of delay.

[20] Mr. Lund and Republic argue that the delay by the band members bringing their actions is egregious; that there is evidence that memories have faded; and that prejudice should be presumed given what they say is the expiry of the limitation period. They say there is no explanation for why the band members did not, for example, third-party Mr. Lund and Republic or bring their own action when they allegedly learned of the breach.

[21] I note that Mr. Christopher Weiss in his evidence, affidavit #1 made March 19, 2025, says:

> 14. In or about June 2021, I heard from Mr. Lund's representative, Bryan Christner, that Mr. Lund might have infringed the Original Master. I discussed this with my fellow Band Members, and we sought more details and to negotiate with Mr. Lund about his potential infringement. However, sometime after we agreed to negotiate with Mr. Lund, Mr. Holmes filed his Notice of Civil Claim in this proceeding and the negotiations eventually ceased.

He goes on at paragraph 15:

> 15. Due to the circumstances of this matter, including the aforementioned representations made by Mr. Lund, […]

And the representations referred to are Mr. Lund's alleged representations that the new master did not contain any elements of the original master. Returning to paragraph 15 of his affidavit:

> […] I did not discover with certainty that the Band Members had a claim in relation to the Original Master until sometime after Mr. Holmes filed his Notice of Civil Claim in this proceeding and Mr. Lund ceased negotiating in relation to the potential infringement. I am advised by my fellow Band Members, Alleson Sheldan and Michael Weiss, and verily believe it to be true that they also did not discover with certainty that the Band Members had a claim in relation to the Original Master until sometime after Mr. Holmes filed his Notice of Civil Claim and Mr. Lund ceased negotiating in relation to the potential infringement.

[22] As is pointed out by Mr. Christopher Weiss, it has been the case apparently that, throughout, Mr. Lund and Republic have denied that there was any breach and alleged that the song "Broken" was released after obtaining proper approvals for what was said to be an interpolation from "Breathe." Further, as noted, Republic, rather than filing a response to civil claim, provided the document which was a

demand for amendments to and particulars of the notice of civil claim. After receipt of that document, Mr. Holmes and the band members set on resolving the differences between them. That is the explanation for the delay that is presented.

[23] Other than presumed prejudice, I am not satisfied there is any real prejudice to Mr. Lund and Republic if the band members are added as plaintiffs. The action remains essentially the same. The allegations are well known or have been well known since even prior to the filing of the notice of civil claim. The causes of action remain unchanged and the factual scenario is virtually identical.

[24] In all of those circumstances, I am satisfied that it is in the interests of justice that the band members be added as plaintiffs.

[25] I should point out, too, with respect to the limitation period, Mr. Holmes contends that no limitation period has expired because the new master continues to be distributed by Republic and Mr. Lund and continues to be downloaded and played, and that it is alleged that each moment, I suppose, if I can say that, that the new master continues to be distributed is a fresh infringement and, therefore, there is no limitation question.

[26] The question of the extinguishment of the limitation period was dealt with in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, where the Court of Appeal noted:

> [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s.4(1)(d) of the *Limitation Act* is to extinguish such a defence if the proposed defendant is added. *In Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.,* 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
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> > 1 If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.

> 2 If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
>
> 3 If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s.4(1)(d) of the *Limitation Act*.
>
> [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.,* 1987 CanLII 164 (BC CA), [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s.4(1) of the *Limitation Act*, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial.

[27] Mr. Holmes submitted that I should follow the course set out in the third option and conclude that the parties (the band members) should be joined and the potential limitation defence is extinguished. Counsel for Mr. Lund submitted that to allow the application without preserving the limitation defences would result in an absurdity that Mr. Holmes could have such defences raised against him and, indeed, they have been plead, but the new plaintiffs could not.

[28] As I pointed out, to have the band members added as plaintiffs, preserving limitations against them to the date Mr. Lund and Republic were given notice of the proposed amendments would result in a similar problem with limitation periods ending at different times for different plaintiffs. Counsel for Republic agreed it was sensible in those circumstances that, if I intended to allow the joinder and amendment, that the limitation defences be preserved up to the filing of the original notice of civil claim.

[29] Counsel for Mr. Holmes pointed out that that was indeed their intention that the band members be added to the claim as it stands with the defendants entitled to rely on any limitation defences that accrued prior to the filing of the original notice of civil claim.

[30] I am satisfied that that is the appropriate order in all of the circumstances. Thus, the application is allowed—that is all of paragraphs 1, 2, 3, and 4—without prejudice to any limitation defences regarding all parties that accrued as at the date of the filing of the original notice of civil claim. Those defences are referred to the trial.

[31] All right. Are there any questions?

[SUBMISSIONS ON COSTS]

[32] THE COURT: Well, I think part of the problem was we are dealing with adding plaintiffs rather than defendants and that makes it somewhat difficult to apply the analysis. But, in any event, I am satisfied that it is appropriate that the regular rule apply here and that the plaintiffs will have their costs of this application in the cause.

"Muir A.J."