IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Board of Education, School District No. 41 (Burnaby) v. KMBR Architects Planners Inc.,* 2025 BCSC 2594

Date: 20251222
Docket: S224218
Registry: Vancouver

Between:

The Board of Education, School District No. 41 (Burnaby)

Plaintiff

And

KMBR Architects Planners Inc., Fast & Epp and Fast + Epp Structural Engineers Inc.

Defendants

And

KMBR Architects Planners Inc., Yellowridge Construction Ltd., PMC Builders & Developers Ltd., Fast & Epp and Fast + Epp Structural Engineers Inc.

Third Parties

Before: Associate Judge Bilawich

Oral Reasons for Judgment

Counsel for the Plaintiff:	M. Harrison J. Chohan
Counsel for the Defendant KMBR Architects Planners Inc.:	A. Way A. Copeland
Place and Date of Hearing:	Vancouver, B.C. November 26 & December 15, 2025
Place and Date of Judgment:	Vancouver, B.C. December 22, 2025

Introduction

THE COURT: In this action the plaintiff (the "District") advances claims arising from a project to replace Burnaby North Secondary School (the "Project"). The Project began in 2018 and was originally supposed to be completed by August 2021. The scope and cost of the Project increased significantly and there have been significant delays. The Project is still not completed.

[1] On May 25, 2022, the District started this action against the defendants KMBR and its subconsultant, Fast & Epp. It claims in negligence, negligent misrepresentation and breach of contract. It alleges that it has suffered damages due to deficient architectural services provided by KMBR, inclu ding:

a) Incomplete coordination of the Project;

b) Incorrect design details for the Project;

c) Inadequate consideration of constructability of constructional components of the Project;

d) Slow or incomplete responses to requests for information, shop drawing approvals, and for design alterations; and

e) Slow or incomplete responses in relation to contemplated change orders, change directives, and other contract administration notices.

[2] In this application, filed September 22, 2025, KMBR seeks leave to file a counterclaim against the District, in the form attached as Schedule "A" to the application. The District opposes the relief sought, on the basis that KMBR has failed to provide an explanation for its delay in applying. Alternatively, it asks that its ability to argue a limitation defence be preserved for trial.

Background

[3] On or about December 10, 2018, KMBR and the District entered into a contract (the "Contract") under which KMBR agreed to provide architectural and consulting services relating to the Project. It was to receive a fixed fee of $6,092,563. KMBR says adjustments were permitted if there was a significant

change in scope which materially affects the total construction budget. KMBR was also to be paid for additional services required due to changes to Project size, scope, quality, or complexity in the construction budget and/or the construction schedule. Initially, the construction budget was $67,809,668.

[4] Pursuant to a CCDC 2 stipulated price contract dated April 2, 2020, Yellowridge Construction Ltd. “(Yellowridge”) became general contractor of the Project. Pursuant to the relevant CCDC contract, the construction cost was $91,817,858. Due to approved change orders, the construction cost eventually increased to $107,150,708.

[5] Under the Contract, the “ready for takeover” date was originally supposed to be August 20, 2021. As of the date KMBR filed its application, the takeover date had not yet been achieved. Construction of the new school building was completed in or around December 2023. The demolition of the old school and the reinstatement of landscaping, parking, and site work continues.

Procedural Steps and Proposed Counterclaim

[6] On May 25, 2022, the District filed its notice of civil claim against KMBR and Fast & Epp. On April 3, 2023, KMBR was served with the notice of civil claim.

[7] The essence of the District’s claim is a flow-through of various claims made by Yellowridge for delays and extra costs. The District alleges that KMBR and Fast & Epp are at fault for those.

[8] KMBR says that on at least three occasions it raised with the District that it was incurring additional fees and facing claims from subconsultants due to increased Project scope and delays, and that it would be seeking additional compensation for the additional time and expense incurred. These include:

a) April 2023 Mr. Tawfik, principal of KMBR, discussed with Mr. Shepherd, project manager, who directed him to speak with Mr. Horswill, secretary treasurer of the District;

b) Mr. Tawfik later approached Mr. Horswill who discouraged KMBR from making such a request and suggested it would impair its ability to secure future work on District projects; and

c) On or about April 15, 2024, Mr. Tawfik raised the issue with Mr. Khunguray, who was not receptive to the request.

[9] Based on the foregoing, KMBR says it did not submit a request for additional fees until it became apparent that the District had no intention of addressing its claim for additional fees, notwithstanding the ongoing Project delay.

[10] On October 16, 2024, KMBR sent the District a written request for additional fees pursuant to certain provisions in the Contract, including GC 2.2.3, based on construction costs submitted in exceeding original construction budget and significant expansion of KMBR's scope of services beyond what was contemplated in the original Contract, and pursuant to GC 2.2.4, based on a minimum 37 months of Project delay which had resulted in the need for additional contract administration services well beyond what was contemplated in the Contract.

[11] On November 5, 2024, the District rejected the request for additional fees, saying the basis for the request was unclear. Mr. Tawfik proposed a meeting to provide a further explanation.

[12] On December 13, 2024, KMBR met with the District to further explain their request and encourage the District to negotiate a solution. It says the District was non-committal.

[13] On March 28, 2025, KMBR filed a response to civil claim denying all claims made against it. It did not offer any explanation for why it did not file a counterclaim at the same time.

[14] On June 30, 2025, counsel for KMBR sent counsel for the District a draft counterclaim.

[15] On September 22, 2025, KMBR filed the current application, seeking leave to file a counterclaim.

[16] KMBR says the District has taken no steps to advance its claim. No lists of documents have been exchanged. No examinations for discovery have been held. No expert reports have been exchanged. No trial date has been scheduled.

Applicable Law

[17] Rule 3-4(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*SCCR*") provides:

> (1) A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.
> [underlining added]

[18] Rule 3-3(3) provides that the time to file and serve a response to civil claim is 21 days after service.

> (3) Unless the court otherwise orders, to respond to a notice of civil claim, a response to civil claim under this rule must be filed and served within the following period:
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> (a) in the case of a notice of civil claim that is served on a person,
>
> (i) if the person was served anywhere in Canada, within 21 days after that service…

[19] Rule 22-4(2) allows the court to extend or shorten any period of time provided for under the *SCCR*, even though the application for an extension or the order granting the extension is made after the period of time it expired.

[20] The factors considered when deciding whether to extend time to file a counterclaim after the time for doing so has expired are set out in *Naudi Investments Ltd. v 0899809 B.C. Ltd*., 2021 BCSC 1121, at paras. 18-19:

> [18] The following factors are to be considered when deciding whether to extend the time for filing a counterclaim after the time for doing so has expired:
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> a) Is the claim in the proposed counterclaim related to or connected with the subject matter of the Plaintiff's claim?

b) Should the court exercise its discretion to extend the period for issuance of the counterclaim?

Smith v. British Columbia, 2010 BCSC 928, at para. 15; *Raven v. A&W Ranching Ltd.*, 2014 BCSC 1359 at para. 29 [*Raven*].

[19] If the first factor is satisfied, the court will then consider whether it is just and convenient to exercise its discretion to extend the time for filing a counterclaim late. The following sub-factors are also relevant when considering whether the court should exercise its discretion to extend the time to permit the filing of a counterclaim:

a) The length of time between receiving the statement of claim and proposing the draft counterclaim;

b) The reasons for delay;

c) Whether the counterclaim would be time-barred but for s.4(1) of the *Limitation Act*, R.S.B.C. 1996, c. 266 (now s. 22 of the current *Limitation Act*. R.S.B.C. 1996, c. 13);

d) The connection between the proposed counterclaim and the plaintiff's claims;

e) The degree of prejudice to the defendant seeking to file the counterclaim by preventing them from making full answer and defence to the claim brought against them; and

f) The degree of prejudice to the plaintiff, such as the requirement for further investigation and potential delay of the trial of the matter.

Smith, at paras. 18 and 19, referring to the decision in *Squamish Indian Band v. Canadian Pacific Ltd*, 1998 CanLII 3909 (BC SC), [1998] B.C.J. No. 1726 (S.C.) at *Raven*, at para. 29.

Analysis

[21] The first factor considered is whether the proposed counterclaim is related to or connected with the subject matter of the District's claim. It clearly is. Both arise from the same Project, the same Contract, and the same alleged changes in budget, Project scope and delay of that Project. The first factor is satisfied.

[22] The second factor is whether it is just and convenient for the court to exercise its discretion to extend time to file a counterclaim.

Length of Delay

[23] KMBR was served with the notice of civil claim on April 3, 2023. The deadline for filing its response to civil claim and a counterclaim, if any, was April 24, 2023.

[24] In this case, counsel for KMBR sent counsel for the District a draft counterclaim on June 30, 2025.

Reasons for Delay

[25] KMBR says it did not immediately file a counterclaim because the Project was ongoing. It was continuing to provide services to the District and its claim to increased fees was still accruing. It attempted to negotiate with the District, without success. It was not until late 2024 or early 2025 that it became clear that the District did not intend to negotiate with it. Counsel argued that the delay between June 2025 and September 2025 occurred because they were making efforts to have this matter proceed by consent.

[26] The District says KMBR has failed to tender evidence explaining its delay. It argues that KMBR's draft counterclaim obscures the timing of material facts which give rise to its proposed counterclaim. It says KMBR has not discharged its onus to establish it would be just and convenient to extinguish any limitation defences which have accrued to the District. It relies on my reasons in *Durham v. Vancouver Island Health Authority and others*, 2023 BCSC 1309, at paras. 40-41 for the proposition that KMBR has an obligation to provide the clearest and best evidence explaining its delay.

> [40] In *Litt v. Grewal*, 2011 BCSC 1071, at para. 22, Master Caldwell, as he then was, commented as follows regarding the type of evidence necessary in the context of an application to extend time to file a jury notice:
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> > 22 While I am of the view that Rule 22-4(2) (the new version of Rule 3(2)) allows me to extend the time for the filing of a jury notice, I am also of the view that I should only do so on the basis of the clearest and best evidence. The extension of the time for filing a jury notice is a matter of considerable significance; the hurdle faced by the applicant is not cleared by the presentation of "some" evidence of the party's intention and when that intention was formed or, as here, when they received sufficient information to undertake that enquiry.
>
> [41] In my view, the call for an applicant to provide "clearest and best evidence" applies equally well to the provision of evidence regarding reason for delay in the present circumstances.

[27] I agree that KMBR's evidence regarding the reasons for its delay is lacking. There was no evidence suggesting the parties ever discussed or agreed that KMBR could or should delay filing its response to civil claim. There was also no evidence indicating the District ever pressed KMBR to do so, or otherwise took any steps to move the litigation forward. Counsel for the District suggested that it was forced to file the notice of civil claim when it did because the other parties involved would not agree to a tolling agreement, so it felt compelled to start the action so as to preserve its claim. This was offered through submissions of counsel, not in the affidavit evidence. The District essentially argued that if it was being forced to take steps to stop tolling the limitation periods, it is not unreasonable that KMBR should be expected to do so as well.

[28] There is also no evidence from KMBR regarding why, when it did get around to filing its response to civil claim, it did not also file its counterclaim at the same time. By that time, it was well aware that the District had rejected its request to discuss or negotiate additional compensation and it had rejected an express written request. Perhaps more importantly, key dates relating to the increase in the Project budget via the CCDC 2 contract cost figure and the subsequent approved changes were all known to KMBR. It was also aware that there had been multi-year completion delays by that time. KMBR also did not offer any explanation for the additional delay between March 28, 2025, which is when it filed the response to civil claim, and June 30, 2025, when it circulated the draft counterclaim and September 22, 2025, when it filed the current application.

[29] The lack of an explanation for the delay is a concern. This is perhaps balanced somewhat by the District's decision to put the action on what appears to be an informal hold while the Project was in progress.

Connection Between the Proposed Counterclaim and the District's Claim

[30] KMBR refers to *Sabaghchian v. Taghiakbari*, 2024 BCSC 327, at para. 46 which sets out factors considered under this issue. It includes identities of the

parties, the claim and counterclaim arising from the same facts, the causes of action being the same, the nature of the alleged damages being similar, and the time period in which the causes of action arose being similar. It says there is clearly a connection between the District's claim and the proposed counterclaim.

[31] The District did not take serious issue with this factor. As previously noted, I agree there is a close connection between the District's claim and KMBR's proposed counterclaim.

Prejudice to the District

[32] KMBR says there would be no prejudice to the District if leave is granted. It has taken no steps to prosecute its claims since serving the notice of civil claim on KMBR. The close connection between the District's claim and the counterclaim means allowing the counterclaim to proceed is unlikely to substantially increase the amount of time required to complete the trial, or increase the complexity of issues for determination. If the application is not granted, KMBR will have to file a separate claim, which will involve added and unnecessary expense. It suggests the two actions would inevitably be ordered to be tried together in any event.

[33] The District did not suggest it would be prejudiced in terms of its ability to defend against the issues raised in the proposed counterclaim. There has been no trial date scheduled, so delay of trial is not an issue in this case. The District has not yet taken significant steps to move the action forward.

Prejudice to KMBR

[34] KMBR says it would be put to added and unnecessary expense having to start a separate action if leave to file a counterclaim is not granted. Many of the same issues would be addressed and much of the same evidence would be adduced in both actions. It is inevitable that they would be ordered to be tried together.

[35] I agree that if KMBR is forced to start a separate action, that would involve duplication given the overlap in the issues and evidence. The claims are really

different sides of the same Project coin, so to speak. It does make sense to have the claim tried at the same time and by the same presider.

Would the counterclaim be time barred but for Section 22 of the *Limitation Act*?

Would it be just and convenient to extinguish the District's limitation defences?

[36] KMBR says the Project is still ongoing, it continues to provide services in accordance with the Contract and its claim for additional fees continues to accrue. It argues it is still within the applicable limitation period for pursuing a contractual claim for additional fees. Alternatively, s.22(1) of the *Limitation Act*, S.B.C. 2012, c. 13 gives the court discretion to allow a counterclaim to be filed despite the fact it would be out of time when there is a real and substantive connection between the original action and the counterclaim.

> 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 …

[37] The District argues that all or at least part of KMBR's proposed counterclaim is likely statute barred. It complains that the counterclaim is drafted in such a way as to obscure limitation issues. KMBR has delayed for almost 2.5 years in seeking leave to file the proposed counterclaim. The basis for that counterclaim is alleged to have arisen more than 5 years ago, in June 2020. The District also pointed to language in the relevant agreements which suggests that KMBR may have had an obligation to obtain prior approval from the District for additional expenses, which it suggested did not occur for some items set out in the proposed counterclaim. As the Project is still not completed, it appears arguable that at least some aspects of the counterclaim could still fall within the applicable limitation period.

[38] I do not have sufficiently detailed or clear evidence or argument before me on this application with which to determine whether the limitation periods applicable to any of KMBR's claims set out in the proposed counterclaim have expired. Due to the manner in which KMBR has drafted its counterclaim, namely in a way which obscures limitation issues, the defences which may have accrued are not easily determined.

[39] If the Court is inclined to grant KMBR leave to file its proposed counterclaim, the District argues that a determination of any of its limitational defences ought to be preserved and left for a determination by the trial judge, with the benefit of a proper evidentiary record. The District relies on *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, at paras. 47-48:

> [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. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [*Shaw*] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc*., 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

[40] I agree that the claims set out in the proposed counterclaim are pleaded in a vague and general manner which makes it impractical to pinpoint when various claims may have arisen. Neither party offered detailed arguments on substantive limitation issues during their respective submissions. I also previously concluded that KMBR has failed to tender adequate evidence to explain its delay in bringing the claims set out in the counterclaim forward. KMBR has not established that considerations of justice and convenience justify extinguishing limitation defences which the District may have to the various claims raised in the counterclaim. Accordingly, upon considering all of the foregoing, I conclude that:

a) It is just and convenient to exercise my discretion to extend time for KMBR to file its proposed counterclaim; and

b) This extension of time is on the basis that the District's limitation defences to the claims raised in the counterclaim are preserved and to be determined at trial.

[41] With respect to costs, there has been mixed success. It was necessary for KMBR to make this application, but it was also reasonable for the District to oppose it, in an effort to preserve its limitation defences. My preliminary view is that costs of the application should be in the cause.

[SUBMISSIONS REGARDING COSTS]

[42] THE COURT: I will just leave it at costs in the cause. The District's offer was not presented as a formal, "with prejudice with respect to costs offer", so I am going to just leave costs as I initially indicated. Thank you.

[43] CNSL A. WAY: Thank you, Your Honour. Can I clarify one thing for the order, Your Honour? So, the second element in terms of the preservability of the limitation defences that the District may have, is that for any limitation defences that would have accrued as of a certain date, like the date of the notice of application being filed?

[44] THE COURT: I think that as of the date of the draft counterclaim was circulated would probably be the appropriate date.

[45] CNSL A. WAY: Right. Which I believe it would be the June 30, 2025 date.

[46] THE COURT: Unless Mr. Harrison has other views.

[47] CNSL M. HARRISON: I don't take any issue with that, Your Honour.

"Associate Judge Bilawich"