

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1004364 B.C. Ltd. v Kelowna (City)*,
2026 BCSC 1798

Date: 20260918
Docket: S266020
Registry: Vancouver

Between:

1004364 B.C. Ltd.

Petitioner

And

City of Kelowna

Respondent

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

Counsel for the Petitioner:

P.J. Sullivan

Counsel for the Respondent:

B.S. Williamson

Place and Date of Hearing:

Vancouver, B.C.
September 10, 2026

Place and Date of Judgment:

Vancouver, B.C.
September 18, 2026

I. INTRODUCTION

[1] The petitioner is the owner of certain lands situated along the lakefront in Kelowna on which, with its corporate affiliates, it operates the Hotel Eldorado and Manteo Resort. I will refer to the petitioner and those affiliates as the “Owner”.

[2] The dispute that gives rise to this proceeding is the latest in a series of disagreements between the Owner and the respondent City of Kelowna (the “City”) concerning the parties’ respective rights and duties in relation to a boardwalk that runs along the lakefront over parts of the subject properties. Although the boardwalk sits on land owned by the Owner, the City holds a statutory right of way (“SRW”) that was registered on title on July 31, 2000, before the Owner acquired title, for the purpose of allowing the public to use the boardwalk. The boardwalk runs mostly, but not entirely, within the boundaries of the SRW.

[3] In previous litigation involving the lands on which the Hotel Eldorado sits, the City had sought a permanent injunction to prohibit the Owner from interfering with the public’s access to the associated portion of the boardwalk. The Owner responded with a counterclaim seeking to have the SRW declared unenforceable. In reasons indexed as *Kelowna (City) v. 1004364 BC Ltd*, 2023 BCSC 554, Betton J. refused to grant the injunction on the basis that the Owner had indicated that it had no intention of interfering with the public’s access to the boardwalk going forward, as it had in the past. In resolving the counterclaim, Betton J. declared certain provisions of the SRW to be unenforceable as against the Owner (a point that had been conceded by the City) but otherwise confirmed the validity of the SRW. His decision was later upheld by the Court of Appeal (see *1004364 BC Ltd. v. Kelowna (City)*, 2024 BCCA 418).

[4] Unfortunately, that first round of litigation did not resolve the dispute, which has continued to simmer. In recent months, the parties have again been at cross-purposes, this time in relation to the maintenance of the boardwalk. The boardwalk has fallen into disrepair and is now closed to the public. The City has been trying to carry out the requisite repairs so that it can reopen the boardwalk, but the Owner

has refused to allow the City to access the subject lands for that purpose until the parties have reached an agreement on terms that would govern how such access will be allowed.

[5] Frustrated by the Owner's demands, which it considers unreasonable, the City has resolved to change the rules of the game. On July 13, 2026, in an *in camera* session convened without notice to the Owner, it approved a formal resolution initiating the process of expropriating the strip of land in front of the Hotel Eldorado on which the SRW runs.

[6] In this proceeding commenced by petition, the Owner seeks, among other things, to set aside that resolution and enjoin any further steps in furtherance of the expropriation. It contends that the process leading to the resolution was unfair and that the resulting decision was an unreasonable one, inasmuch as it lacked the requisite elements of transparency, intelligibility and justification. Pending the hearing of the petition, the Owner now applies for an interlocutory injunction prohibiting the City from taking any further steps to advance the expropriation before the petition can be heard and resolved.

[7] The City opposes the application, arguing that the test for interim injunctive relief has not been met, mainly because the petition is, in the City's submission, manifestly devoid of merit.

[8] In the discussion that follows, I will begin by setting out the legal test to be applied on an application of this kind. I will then turn to each element of that test before setting out my conclusion on the application as a whole.

II. THE TEST

[9] The parties agree on the legal test to be applied. It was conveniently reiterated by the Supreme Court of Canada in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, and requires a consideration of the following three elements:

- a) there is a serious question to be tried;

- b) there is a risk of irreparable harm; and
- c) the balance of convenience supports granting an injunction.

[10] It has also been held that the framework is not to be rigidly applied and that the three criteria identified above are not to be treated as watertight compartments but rather as being interrelated, in the sense that strength in one may compensate for weakness in another (*Naghmev v. 1530378 B.C. Ltd.*, 2025 BCSC 1673; *Save Record Ridge Action Committee Society v. British Columbia (Environment and Parks)* 2026 BCSC 477).

III. APPLICATION OF THE TEST

A. Serious Question

[11] As the Court of Appeal reiterated in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, this first branch of the test is not particularly onerous. The Owner need only show that the claim is not a frivolous or vexatious one.

[12] In this case, the Owner has two complaints:

- a) the process leading to the impugned resolution was unfair inasmuch as the City proceeded *in camera*, without notice to the Owner and without affording the Owner an opportunity to be heard, despite the impact of the resolution on the Owner (citing *Paull v. Quesnel (City)*, 2025 BCSC 347 and *Trustees of Westwood Congregation of Jehovah's Witnesses v. City of Coquitlam*, 2006 BCSC 1208); and
- b) the decision was, in its substance, unreasonable under the test set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[13] The City argues that these are frivolous claims.

[14] With respect to its decision to proceed *in camera*, the City submits that it was expressly entitled to do so under s 90(1)(e) of the *Community Charter*, SBC 2003, c 26, which permits a hearing to be held in that manner if council determines that public deliberations “could reasonably be expected to harm the interests of the municipality.” Although the City adds that council’s determination in that regard is entitled to deference, it is not entirely obvious what basis the City might have had for that conclusion. It has not put forward any rationale to explain it, leaving the Court with no reasoning to defer to.

[15] More compelling is the City’s argument that, regardless, the statutory scheme admits of no duty of fairness prior to the provision of the expropriation notice, a proposition for which it cites a number of authorities, including *Favor v. Winnipeg (City)*, [1988] MJ No 178 (CA) and *Purchase v. Terrace (City)*, [1995] BCJ No. 247, 26 MPLR (2d) 126 (SC).

[16] In particular, the City notes that under s 10 of the *Expropriation Act*, RSBC 1996, c 125 [EA], an owner, having received notice, may seek a public inquiry unless the expropriation is for the construction, extension or alteration of a “linear development”. As an aside, the parties disagree as to whether the proposed expropriation in issue here falls within that exception. The Owner has formally requested an inquiry. Pursuant to s 12, the Attorney General must appoint an inquiry officer to hold the inquiry but s 11 states that the City may apply to the inquiry officer for an order refusing to hold an inquiry on the basis that, among other things, the request is frivolous, vexatious or not made in good faith. The parties have advised me that they are in the process of exchanging submissions before the inquiry officer on that issue and that no decision has been made yet. The City notes further that even if an inquiry is held, its purview will be limited by s 14 to the question of whether the proposed expropriation is necessary to achieve the objectives of the expropriating authority or whether those objectives could be better achieved by an alternative site or varying the amount of land to be taken or the nature of the interest in the land to be taken. Under s 14(2), the question of the necessity of the project or work for which the expropriation is sought must not be considered at the inquiry.

Under s 4(2), a person may not, in any proceedings under the *EA*, dispute the right of an expropriating authority to have recourse to expropriation.

[17] In the City's submission, those provisions leave the Owner only a very limited right to challenge a proposed expropriation, and none at all in the case of a linear development (a proposition for which it cites *Seaside Acres Ltd. v. Pacific Coast Energy Corp.* [1994] BCJ No 217 (CA) and *Howes v. British Columbia (Attorney General)*, 2022 BCSC 1797). It follows, in the City's submission, that any duty of procedural fairness owed is similarly limited.

[18] Lastly, the City submits that the Owner's complaint about the process is premature because its rights are not affected by the provision of the notice, but only the expropriation itself (citing *Metro Ontario Real Estate Ltd. v. Orillia (City)* 2020 ONSC 7002). Pursuant to s 4 of the *EA*, an expropriation can only occur after:

- a) notice is served under s 6(1)(a); and
- b) the expropriation is approved by the approving authority under s 18 (in this case, the City is its own approving authority).

[19] In other words, it is only if and when the City approves the expropriation under that provision and passes a resolution under s 31 of the *Community Charter* to carry it out that the Owner's rights will be affected. In order to satisfy whatever procedural obligation it may have at that stage, the City has indicated its willingness to provide the Owner with the right to be heard before taking those steps.

[20] In response to the second ground of review, relating to the reasonableness of the decision to initiate the expropriation process, the City argues that it was left with little choice inasmuch as the Owner has been making unreasonable demands and improperly impeding the City's effort to repair the boardwalk for the benefit of the public. It notes that, despite successfully resisting the injunction application before Betton J. on the basis that it had no intention of impeding public access to the boardwalk going forward, the Owner has more recently been doing just that. On that basis, it asserts that the Owner has not come to court with clean hands, in that the

petition has been brought for an improper collateral purpose, namely, to coerce the City into accepting the Owner's unreasonable demands in the negotiations, now stalled, over the terms on which the City can exercise its rights under the SRW (citing *Cosman Realty Ltd. v. Winnipeg (City)*, 2001 MBQB 154, aff'd on other grounds, 2001 MBCA 159).

[21] In any event, in the City's submission, its position in the negotiations and, in particular, its willingness to agree to terms with the Owner are not matters that are properly subject to judicial review (citing *Eagleridge Bluffs & Wetlands Preservation Society v. British Columbia*, 2006 BCCA 334; *Redeemed Christian Church of God v. New Westminster (City)*, 2021 BCSC 1401).

[22] Although I agree with the City that the Owner's complaint about the fairness of the process is not a strong one, I would not go so far as to say that it is entirely frivolous. In particular, I agree with the Owner that, however narrow its scope under the EA to complain about the expropriation may be (and in the case of a linear development, that scope may be very limited indeed), the decision of the City to embark on that path cannot be completely insulated from review – see *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28. That being said, the City's promise to afford the Owner with the opportunity to be heard before the expropriation actually occurs undermines the strength of the Owner's claim as it relates to its inability to be heard to date.

[23] I have reached a similar conclusion with respect to the Owner's complaint that it was unreasonable for the City to initiate an expropriation rather than continue negotiating. In that regard, the Owner refers to the following remarks of Betton J.:

[102] Here the boardwalk is a single structure with portions of it both inside and outside the ROW Area. This fact may complicate the maintenance obligations between the parties, but it does not make the Right of Way an invalid positive covenant. As noted in *Babine* above, the cost of maintaining the portion of the boardwalk within the ROW Area may well be the subject of negotiation and agreement between the parties. I have made the legal rights and responsibilities of the parties clear here. They may determine a practical solution between them.

[24] Relying on those remarks, the Owner argues that the City was duty-bound to continue negotiating until an agreement was reached. In response, the City submits that the passage just cited was merely *obiter dicta* and did not create any new obligation on its part to continue negotiating indefinitely, regardless of the impasse. In particular, the City says that its decision to abandon the negotiations in favour of an expropriation was not unreasonable given the Owner's overreaching in the negotiation and its conduct in improperly holding the repairs hostage in an effort to secure more favourable terms.

[25] To this, the Owner responds that its demands in the negotiations were not unreasonable. For example, the Owner has been seeking a term that would allow it to recoup expenses it incurred to date to maintain the boardwalk – the City has been willing to reimburse the Owner for only part of that cost. In addition, the Owner seeks an indemnity from the City to address its own potential liability to users of the boardwalk as an occupier. The parties' positions on those and other issues appear to be far apart.

[26] Here too, although the Owner's claim is not without problems, I am satisfied that it is not frivolous. The outcome will likely turn on whether the City's decision to abandon the negotiations in favour of an expropriation is seen by the Court to have been a reasonable one, in light of the parties' positions in the negotiations just described, among other things.

[27] In summary, I am satisfied that that the Owner's claims have sufficient merit to meet the first branch of the injunction test. The relative strength of the parties' positions on the merits will be considered again later in the context of the balance of convenience.

B. Irreparable Harm

[28] Irreparable harm is harm that cannot be remedied in damages. The focus of the inquiry is on the nature of the harm, rather than its magnitude. It has been held that irreparable harm may arise where, for example, the subject matter of the claim

may be rendered moot in the absence of injunctive relief: *Penner v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 26.

[29] The Owner submits that a transfer of title will cause it irreparable harm, in part because it will leave part of its business (namely, a restaurant patio and adjacent marina) cut off from the rest of the property. To address this concern, the City has offered, if the expropriation occurs, to provide the Owner with an easement over the relevant portion of the expropriated lands to allow that access to continue.

[30] Regardless of the prospect of a stranded patio and marina, it is not seriously disputed that a transfer of title would, by itself, constitute irreparable harm. The mere initiation of the expropriation process through the provision of notice is not itself irreversible. Under s 19 of the *EA*, the City may abandon the expropriation, at least until payment for the expropriated property is made under s 20. However, s 18 states that, in the absence of an inquiry, the City, in its capacity as approving authority, must approve the expropriation, whereupon it must:

- a) pay the Owner for the Property within 30 days (s 20); and
- b) file a vesting notice in the land title office to transfer title 30 days after that (s 23).

Once those steps have been taken, s 51 operates to preclude any legal proceedings to challenge the validity of the expropriation.

[31] For that reason, I am satisfied that if the City, in its capacity as approving officer, approves the expropriation before the petition can be heard and resolved, the Owner may suffer irreparable harm in the sense that title would be lost irretrievably and its complaints in this proceeding rendered moot. There is no indication that the City will agree to pause the expropriation process in the meantime. The second element of the test is therefore satisfied.

C. Balance of Convenience

[32] The third and final branch of the injunction test concerns itself with balancing the risk of irreparable harm to the Owner if the injunction is refused with the risk of harm to the City and others if it is granted. The factors to be considered in that balancing of competing interests were conveniently set out in *Wizedemy Inc. v. Karras*, 2024 BCSC 630, aff'd 2024 BCCA 301, as follows:

- a) which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
- b) any factors affecting the public interest;
- c) the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
- d) other factors affecting whether harm from granting or refusing the injunction would be irreparable;
- e) the likelihood that if damages are finally awarded, they will be paid;
- f) the strength of the applicant's case; and
- g) any other factors affecting the balance of justice and convenience.

[33] As is often the case in the context of applications of this kind, the parties disagree about which of them first acted to alter the *status quo*. The Owner says that the City is responsible for doing so because it initiated an expropriation instead of continuing with negotiations, as Betton J. expected. The City blames the Owner for this, arguing that it altered the *status quo* by refusing to permit it to carry out overdue repairs to the boardwalk except on unreasonable terms that went beyond the Owner's entitlement under the SRW. I would agree with the City on this point had the issue arisen in the context of an action brought by the City to enforce the SRW, but that is not where we are. In particular, the City has sought to alter the *status quo* by initiating a process that, if successfully seen through to completion, will

permanently and irrevocably change the parties' legal relationship. I agree with the Owner that in these circumstances, responsibility for altering the *status quo* lies with the City. On that basis, I find that this factor weighs in favour of an injunction.

[34] On the other hand, turning to the public interest, it appears that the public has an interest in seeing the boardwalk repaired and public access to it restored. I accept that, given the present impasse in the negotiations between the parties, allowing the expropriation to proceed is more likely to bring about that result in the near future. For that reason, I find that this factor weighs against an injunction.

[35] Returning to the merits of the Owner's underlying claims, while I have not found them to be frivolous, neither are they particularly strong. Indeed, I am not persuaded that the position of either party on the merits is so obviously strong as to weigh significantly in the balance of convenience in favour of one side's position over the other.

[36] In summary, I have found that refusing the injunction may cause irreparable harm to the Owner and that it is the City that has acted to alter the *status quo*. Although I have also found that the public interest weighs against an injunction to some extent (inasmuch as the expropriation, if it proceeds, may expedite the reinstatement of public access to the boardwalk), any prejudice flowing to the public if the injunction is granted will only be temporary. Moreover, allowing the expropriation to proceed may not, by itself, be sufficient to guarantee that the boardwalk will remain open to the public on a reliable and stable basis any time soon.

[37] Overall, I have concluded that the balance of convenience favours the injunction.

IV. SUMMARY AND CONCLUSION

[38] Having found that the Owner has satisfied each element of the applicable test, I am granting the Owner an interim injunction prohibiting the City, in its capacity as approving authority, from approving the expropriation under s 18 of the *EA* or

resolving under s 31 of the *Community Charter* to proceed with it, pending the outcome of this proceeding or further order of the Court.

“Milman J.”