IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *391102 B.C. Ltd. v EXP Services Inc.,*
2026 BCSC 1993

Date: 20261016
Docket: S266969
Registry: Vancouver

Between:

391102 B.C. Ltd.

Plaintiff

And

EXP Services Inc.

Defendant

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Plaintiff:	J. Wierenga S. Ibrahim
Counsel for the Defendant:	N.K. Virk
Place and Date of Hearing:	Vancouver, B.C. October 5, 2026
Place and Date of Judgment:	Vancouver, B.C. October 16, 2026

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Introduction

[1] The plaintiff applies for an interlocutory injunction restraining the defendant from operating a device known as the “Marshall Hammer” at the premises being Units 175A and 275, 3001 Wayburne Drive, Burnaby, British Columbia (the “Premises”) until the trial of this action or further order of this Court.

[2] In the alternative, the plaintiff seeks an interlocutory injunction restraining the defendant from operating the Marshall Hammer until and unless it has conducted effective sound mitigation in a manner sufficient to eliminate noise or vibration contrary to the terms of its lease as determined by the Landlord in its reasonable discretion, until the trial of this action or further order of this Court.

[3] The application is opposed by the defendant.

Issues

[4] For reasons I will explain, I have concluded that it is just and equitable to grant the primary relief sought. In so determining, I have concluded that:

a) The serious question to be tried standard applies at the first stage of the test;

b) The applicant has met that standard;

c) The applicant will suffer irreparable harm if the relief sought is not granted; and

d) The balance of convenience lies with the applicant.

Analysis

Legal Principles

[5] The parties agree upon the legal principles that govern this application and those will be briefly described.

[6] Generally, injunctive relief is available to an applicant who demonstrates that:

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a) there is a serious question to be tried;

b) they will suffer irreparable harm if the injunction is refused; and

c) the balance of convenience lies with them.

See *RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 [*RJR*].

[7] Injunctions are equitable remedies and the fundamental question in each case is whether the granting of the injunction is just and equitable in all the circumstances of the case: *British Columbia (Attorney General) v Wale*, 1986 CanLII 171 (BCCA), [1987] 2 WWR 331 (BCCA), aff'd 1991 CanLII 109 (SCC), [1991] 1 SCR 62.

What test should be applied at the first stage?

[8] The first branch of the test has been modified in situations where the injunction sought is mandatory as opposed to prohibitive. In mandatory interlocutory injunctions, the applicant must meet a higher threshold at the first stage. It must demonstrate a strong *prima facie* case that it will succeed at trial. This is described as needing to show a strong likelihood on the law and evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice: *R v Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*] at para 18.

[9] The applicant takes the position that the injunction they seek in the primary order sought is a prohibitive injunction, and therefore, they submit that at the first stage they need only show a serious question is to be tried. The defendant, EXP Services Ltd. ("EXP") is of the view that regardless of whether the relief sought is the primary or alternative order, the injunction is mandatory and that therefore the higher standard of a strong *prima facie* case is required at the first stage.

[10] In *CBC*, the Court commented on the difficulty of distinguishing between mandatory and prohibitory injunctions and concluded that the essential question is

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whether the overall effect of the injunction would be to require a party to do something or to refrain from doing something:

> [15] Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.

[11] In my view, the primary order sought by the applicant in this matter is prohibitive in nature. The substance of the injunction sought is to require EXP to refrain from doing something, specifically, to refrain from using the Marshall Hammer until the trial of this action.

[12] Thus, to be successful on the injunction, in this case for the primary order sought the applicant must meet the serious question to be tried standard which is a low threshold that merely requires the applicant to establish that the claim is not frivolous or vexatious: *RJR* at pp 314, 337.

There is a serious question to be tried

[13] The applicant owns the building located at 3001 Wayburne Drive, Burnaby British Columbia (the “Building”), including the Premises. EXP is the applicant’s tenant pursuant to a lease dated for reference December 15, 2011 as extended and modified by an agreement dated for reference October 19, 2021 (together, the “Lease”), which expires on May 31, 2032.

[14] The applicant alleges that EXP has and continues to breach various terms of the Lease in its use of a Marshall Hammer. I will describe the use of the Marshall Hammer before turning to a consideration of the Lease terms which are said to be breached.

[15] There are two distinct business operations conducted by EXP at the Premises: consulting engineering, which is conventional office-based work; and a

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materials testing laboratory, which involves the physical testing of various materials sent from construction sites.

[16] Given the nature of EXP's business, part of EXP's laboratory use involves the use of a Marshall Hammer. A Marshall Hammer is a specialized laboratory testing machine, mechanical in nature, used in the asphalt industry to prepare asphalt specimens for quality control and engineering evaluation.

[17] EXP has used the Marshall Hammer at the Premises since in or around July 2012. The Marshall Hammer is used by laboratory technicians at EXP to compact prepared asphalt mixtures into standardized test specimens that are used to assess the performance and compliance of asphalt materials with project specifications. The Marshall Hammer is typically operated using approximately 80 impacts per sample, with multiple samples run throughout a typical workday. I have viewed video evidence of the Marshall Hammer in operation. The Marshall Hammer is secured directly to the concrete floor slab in Unit 175A without vibration isolation and when it operates it generates noise and vibration.

[18] Since at least June 2025, the applicant has received complaints from a neighbouring tenant concerning the noise and vibration from EXP's operation of the Marshall Hammer. The complaints were summarized by the applicant's property manager as follows:

> The Neighbouring Research Tenant has reported to me that the vibrations from the Marshall Hammer shake its laboratory, disrupt sensitive scientific equipment and processes, ruin ongoing experiments (which the Neighbouring Research Tenant has estimated causes losses of between $100 and $2,000 per incident in wasted reagents and materials, see below Exhibit "L"), cause physical discomfort to its staff, and result in lost productivity and research time. I have not verified these complaints (including any alleged monetary losses associated with the complaints), but the Neighboring Research Tenant's reported ongoing experience to this effect, and its ongoing complaints to the Property Manager and the Landlord, have caused material injury to the tenancy relationship, and are doing so on an ongoing basis.

[19] On or around September 4, 2025, in response to these complaints, EXP retained an acoustical consultant, BKL Consultants Ltd. ("BKL") to conduct a site

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inspection. BKL reported to EXP on September 18, 2025 (the "BKL Report"). The BKL Report was subsequently provided to the applicant.

[20] The BKL Report notes that its testing was not fully representative of the noise impact in the neighbouring suite because the hammer was noted to settle into producing a steadier noise level after the initial 10-20 impacts for each sample and the initial impacts were significantly louder. During the test period, the Marshall Hammer was operated with a repeating cycle on a single sample.

[21] The BLK Report set out:

> The noise of the hammer is clearly noticeable throughout the offices and laboratories in [the neighbouring suite], where the vibration monitor received a clear signal on both the floor and wall surfaces during the operation of the hammer, which strongly indicates a structure-borne transfer path.

[22] The BLK Report records that the Marshall Hammer had no vibration isolation, and that typical sound isolation measures (such as furring walls or acoustical ceilings) would not effectively address the noise. BKL advised that mitigation should focus on structural decoupling of the Marshall Hammer and identified three conceptual options: cutting the floor slab around the hammer room; raising the Marshall Hammer on a floating, vibration-isolated slab or mass block; or relocating the Marshall Hammer to a space not structurally connected to neighbouring suites.

[23] EXP has not pursued any of those recommendations. Instead, on August 10, 2026, EXP placed a rubber mat under the Marshall Hammer to help reduce vibration and noise from its use.

[24] Additional noise complaints were received from the neighbouring tenant on August 12, 2026 and September 28, 2026. The September 28, 2026 complaint reflected frustration with the continuing issue noting that repeatedly taking time out of the workday to document and report the same issue was an unnecessary use of time.

[25] The applicant alleges that EXP's use of the Marshall Hammer breaches various terms of the Lease. The Lease permits EXP to use the Premises for general

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engineering office and administration use, and lab use related EXP's business. The Lease also provides in relevant part:

> The following definitions apply in this Lease.
>
> […]
>
> 1. 7 "Hazardous Substance" shall include without limitation, any solid, liquid, smoke, waste, odour, heat, ·vibration, radiation or combination thereof which is deemed, classed or found to affect the nature, physical, chemical or biological quality of the environment or which is or is likely to be injurious to the health or safety of persons or which is injurious or damaging to property, plant or animal life, or which interferes with or is likely to interfere with the comfort, livelihood or enjoyment of life by a person, or which is declared to be hazardous or toxic under any law or regulation now or hereafter enacted or promulgated by any governmental authority having jurisdiction over the Landlord, the Tenant, the Building or the Leased Premises, and without limiting the generality of the foregoing shall include any dangerous, noxious, toxic, flammable or explosive substance, radioactive material, asbestos or PCBs.
>
> […]
>
> Use of Premises
>
> 9.1 (a) The Tenant shall use the Leased Premises solely for the purpose of general engineering office and administration use, and lab use related to the Tenant's business and will not use, permit or suffer the Leased Premises or any part thereof lo be used for any other business or purpose. In particular, but without limiting the generality of the foregoing, the Tenant shall not use, permit or suffer the Leased Premises or any part thereof to be used for any other use not expressly allowed to the Tenant herein and for which the Landlord grants an exclusive covenant in favour of any other tenant of the Building.
>
> (b) The Tenant will not perform any acts or carry on any practices which may injure the Building or the Lands or be a nuisance or a menace to the Landlord or to other tenants in the Building.
>
> […]
>
> **Waste or Nuisance**
>
> 14.1 The Tenant shall not commit or suffer to be committed any waste upon the Leased Premises or any nuisance or other thing which may disturb the quiet enjoyment of any other tenant in the Building.
>
> […]
>
> **Compliance with Environmental Laws**
>
> 14.4 (a) Without limiting any other provision of the Lease, the Tenant agrees to comply in all respects with all laws, ordinances, rules and regulations relating to the storage, transport, use or disposal of any Hazardous Substance on, in or about the Leased Premises. The Tenant agrees to indemnify and hold the Landlord harmless from and against any and all

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> claims, losses, costs, damages, liabilities, civil fines and penalties, criminal fines and penalties, expenses (including legal fees on a solicitor-client basis), cleanup costs or other injury resulting from or arising out of the Tenant's (including employees, contractors and agents) failure to comply with the foregoing sentence. The Tenant agrees to post and keep posted in a prominent location of the working area of the Leased Premises any memorandum or bulletin from the Landlord concerning Hazardous Substances. The foregoing indemnity shall survive the termination of the Lease, any subsequent extensions or renewals and shall continue until the applicable statute of limitation runs out.
>
> (b) The Tenant shall not cause or permit any Hazardous Substance, as defined herein or declared to be such pursuant to any Environmental Laws, to be brought upon, kept or used in or about the Leased Premises or any part thereof without the prior written consent of the Landlord, which consent will not be unreasonably withheld if the Tenant demonstrates to the Landlord's reasonable satisfaction that the Hazardous Substance is reasonably necessary for the Tenant's permitted use of the Leased Premises and that it will be used, kept, stored and disposed of in a manner that complies with all Environmental Laws regulating the Hazardous Substances.
>
> […]
>
> **No Waiver**
>
> 25.12 No condoning, excusing or overlooking by the Landlord or the Tenant of any default, breach or non-observance by the Tenant or the Landlord at any time or times in respect of any covenant, proviso or condition herein contained shall operate as a condoning, excusing or overlooking or any continuing or subsequent default, breach or non-observance, or so as to defeat or affect in any way the rights of the Landlord or Tenant herein in respect of any such continuing or subsequent default or breach, and no waiver shall be inferred from or implied by anything done or omitted by the Landlord or the Tenant save only expressed waivers in writing. All rights and remedies of the Landlord in this Lease contained shall be cumulative and not alternative.
>
> [Emphasis added.]

[26] The applicant argues that these provisions constrain and define the scope of the permitted-use provisions. In particular, s 9(1)(b) does not carve out acts or practices which are required for the use described in s 9(1)(a); ss 14.1 and 14.4 are absolute and unqualified and make no exception for nuisances, other things, or Hazardous Substances that may arise from the use described in s 9(1)(a); and that there is no allegation that there has been an express waiver in writing.

[27] EXP's position is that these provisions must be interpreted in light of the circumstances that were known to exist at the time the Lease was signed. EXP

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points out that the plans for the material testing facility, dated December 2011, indicated an “asphalt lab” and a “marshall lab”. It argues the use of the Marshall Hammer was contemplated by the parties when the Lease was entered into and that these circumstances must be considered in interpreting the terms of the Lease: *Sattva Capital Corp. v Creston Moly Corp.,* 2014 SCC 53 at paras 47-48, 57-58. It also argues that the evidentiary record is lacking because there is no clear measurable evidence with respect to noise and vibration levels that exist and what levels would be acceptable. Further, it is argued that the evidence of complaints is hearsay.

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[28] I find that the serious issue to be tried standard has been met in this case. I am mindful that I am not to go beyond a preliminary consideration of the merits. On the basis of the record before me, the applicant’s claims that the vibrations created by the Marshall Hammer fall within the definition of Hazardous Substances in the Lease and that the noise and vibrations disturb the quiet enjoyment of the neighbouring tenant, is neither frivolous nor vexatious.

[29] EXP’s suggestion that the record should contain additional expert evidence setting out what levels of noise and vibration would be acceptable imposes too exacting a standard. On an interim application, the evidentiary record will rarely be complete. The question is whether there is sufficient evidence to meet the serious issue to be tried threshold. I am satisfied that there is. In addition to the attributed hearsay complaints in the record, I have the benefit of:

a) the direct observations of Mr. Santos, the property manager;

b) video evidence of the sound from operation of the Marshall Hammer;

c) EXP’s own consultant report which talks about the clearly noticeable noise throughout the offices and laboratories of the neighbouring suite, and that the vibration monitor received a clear signal on both the floor and wall surfaces during the operation of the hammer.

[30] It is not disputed that EXP has caused the Marshall Hammer to be used in the Premises. EXP argues that the applicant has acquiesced to such use either by not objecting to the plans submitted for the materials testing facility, or by not raising objection prior to 2025 about that ongoing use. However, in light of the no waiver clause in the Lease, the applicant's defence to such a claim raises a serious question to be tried.

The plaintiff will suffer irreparable harm if the injunction is refused.

[31] Analyzing irreparable harm involves assessing the nature of the harm rather than its magnitude. Irreparable harm is harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other: *RJR* at p 341.

[32] The applicant claims the following irreparable harm will be done if the injunction is not granted:

a) The neighbouring tenant has threatened claims against the applicant for breach of the covenant of quiet enjoyment, damages and injunctive relief;

b) The neighbouring tenant may possibly claim for rent abatement;

c) The applicant may suffer material injury to its relationships with its tenants; and

d) Reputational harm.

[33] The first two harms related to possible claims that may be advanced by the neighbouring tenant could be quantified in monetary terms and there is no reason to suggest the applicant would be unable to collect damages in respect of those claims. They are not irreparable.

[34] However, the latter two claims are of a different quality. While one may be able to quantify the loss of existing tenants, albeit with some difficulty, the loss of prospective tenants would be impossible to identify or quantify: *1107051 Ontario Ltd.*

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v Bloke & 4th Inc., 2012 ONSC 4204 at para 14. The applicant would have difficulty, for example, in knowing proving why they were having trouble getting new tenants.

[35] In *RJR*, the Supreme Court of Canada also found that where one party will suffer irrevocable damage to its business reputation that may be an irreparable harm: *RJR* at p 341.

[36] However, in some cases this Court has reached the opposite conclusion. For example, in *UBCGG Leasing Ltd. v Cressey Development Corporation,* 2026 BCSC 444 [*UBCGG*], this Court concluded that a future court, aided by expert evidence would be able to ascribe a value to a loss of goodwill: at para 73.

[37] In my view, the facts in *UBCGG* are distinguishable from those before me. In that case, the applicant lost its lease to operate a Gold's Gym at a prime location on UBC campus. The Court noted that the good will associated with the Gold's Gym name transcends the individual location, through the existence of multiple Gold's Gyms operating for many years in the Lower Mainland area: at para 74. The Court noted that the harm to the tenant could be compensated in damages as quantified as the difference between the profitability in the premises and in an alternative location, plus other quantifiable and compensable damages in relation to the loss of a lease: at para 76.

[38] The present case stands in contrast to such goodwill arguments advanced by a company that has goodwill arising from both name recognition and spread across multiple locations. There is no evidence that the applicant enjoys name recognition, like Gold's Gym. Relatedly, there is no evidence that its goodwill is spread across multiple locations. Rather, this is a commercial real estate landlord with all of its goodwill eggs in one basket. If the Building becomes known as one where tenants will not be constrained in the use to which they put their units, that could cause reputational damage to the applicant that is not possible to quantify.

[39] In *Potts v Kelowna & District Fish & Game Club*, 2017 BCSC 7 [*Potts*], this Court dismissed an application for an interim injunction brought by a neighbouring

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homeowner against a society operating an outdoor shooting range. In so doing, the Court concluded that damages for pre-trial nuisance would be a perfectly adequate remedy should the plaintiff succeed at trial.

[40] However, this case did not consider the question of irrevocable damage to a business reputation. As well, this application was brought more than five years after the claim was filed during which period the noise continued unabated: *Potts* at para 22. The Court drew the inference that the plaintiff preferred to accumulate a claim for damages for past nuisance in preference over taking action to enjoin the ongoing nuisance and that the plaintiff considered damages to be an adequate remedy: *Potts* at para 24.

[41] I draw no such inference in the case before me where there is no meaningful delay. Any delay that exists arises from the applicant's efforts to resolve the issue without recourse to the Court. Those efforts were ultimately unsuccessful.

[42] In this case, I am satisfied that that the applicant will suffer irreparable harm if an injunction is not granted and in particular irrevocable damage to the applicant's business reputation and related loss of prospective tenants.

The balance of convenience lies with the plaintiff.

[43] The third factor to be applied in an application for interlocutory injunction relief is "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR* at p 342. The Court observed that in light of the relatively low threshold of the "serious issue" requirement and the difficulty in applying the test of irreparable harm in some cases, many interlocutory proceedings will be determined at this third stage of analysis.

[44] The factors to be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. The Court in *RJR* at p 342 cautioned that it would be unwise to attempt to list all the various factors that may need to be

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considered. Nevertheless, a number of factors have often been considered including:

- 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;
- the likelihood that if damages are finally awarded they will be paid;
- the preservation of contested property;
- other factors affecting whether harm from granting or refusal of the injunction would be irreparable;
- which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
- the strength of the applicant's case;
- any factors affecting the public interest; and
- any other factors affecting the balance of justice and convenience.

Canadian Broadcasting Corp. v CKPG Television Ltd. (1992), 1992 CanLII 560 (BCCA), 64 BCLR (2nd) 96 at p 102 (CA).

[45] I accept EXP's evidence that an interim injunction on the use of the Marshall Hammer would cause economic loss, disruption of ongoing client work, and impair EXP its ability to use the Premises for the purpose for which they were leased. In my view, damages would be an adequate remedy to address these losses.

[46] The applicant has agreed to produce an affidavit providing an undertaking as to damages. This is a foundational requirement for any interlocutory injunction and will be a term of the order: *Accurate Material Testing Ltd. v Keshavarzi,* 2023 BCSC 1302 at para 38. Any order made will be conditional upon the applicant producing such an affidavit.

[47] I do not consider that the years of use of the Marshall Hammer at the Premises creates a new *status quo* to be preserved in light of the no waiver clause in the Lease.

[48] I give little weight to the argument that the applicant ought to have adduced evidence that either it or the neighbouring tenant has taken mitigation measures to

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address the noise or vibration concerns. This suggestion is contrary to the locus of responsibility set out in the Lease.

[49] EXP argues that if an interim injunction is granted the applicant will have no incentive to move this matter towards resolution. I do not accept that argument. The applicant will provide an undertaking as to damages which will motivate it to limit those damages. It is also in the applicant's interests to resolve these issues to the satisfaction of both of its tenants as it has years left on its Lease with EXP and would benefit from a positive business relationship. The applicant has also agreed to commit to an expedited trial schedule.

[50] In all of these circumstances, in my view, the balance of convenience favours granting an injunction pending trial.

Order

[51] For all of the above reasons, I order:

> An interlocutory injunction restraining the defendant, EXP Services Inc., whether by itself or by its officers, directors, employees, agents or contractors, from operating the device known as the "Marshall Hammer" at the premises, being Units # 175A and #275, 3001 Wayburne Drive, Burnaby, British Columbia, until the trial of this action or further order of this Court.

[52] The foregoing order is conditional upon the applicant producing an affidavit containing an undertaking as to damages.

[53] The parties will take steps to set the earliest available trial date.

[54] The applicant is entitled to its costs of this application in the cause.

"Latimer J."

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