IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kelowna (City) v. 1004364 BC Ltd.,*
2023 BCSC 1580

Date: 20230912
Docket: S130623
Registry: Kelowna

Between:

City of Kelowna

Plaintiff

And

1004364 BC Ltd.

Defendant

Before: The Honourable Mr. Justice Betton

Reasons for Judgment re Costs

Counsel for the Plaintiff:	B.S. Williamson
Counsel for the Defendant:	J. Frame
Written Submissions Received:	June 19, June 28 and July 5, 2023
Place and Date of Judgment:	Kelowna, B.C. September 12, 2023

Introduction

[1] This decision is in relation to costs flowing from a trial. My trial decision is indexed at 2023 BCSC 554.

[2] The trial proceeded on the basis of the amended notice of civil claim, which was filed on the eve of the trial. The plaintiff ("City") sought declarations that the corporate defendant ("Owner") was in breach of a statutory right of way and for a permanent injunction precluding the Owner from obstructing public use of the statutory right of way. A counterclaim filed by the Owner sought a declaration that the statutory right of way was invalid and unenforceable and that its registration be cancelled.

[3] The trial decision held that the statutory right of way was valid and no permanent injunction was ordered.

Background

[4] I will refer to some portions of that decision to provide context for this decision on costs:

> **A. The Filling of the Owner Foreshore**
>
> [8] The previous owner of the Lands, a corporation called "R93", made a marina proposal including the reclamation and placement of fill within a section of land alleged to be eroded and lying within Okanagan Lake immediately adjacent to the Lands. In or around 1989, the Province's Surveyor General took the position that the proposed fill area was land belonging to the Crown and requested that R93 apply for a tenure if it wished to place fill within the proposed fill area. R93 proceeded with placement of fill within a portion of Okanagan Lake after obtaining approval from the Province to do so. The area actually filled (the "Fill Area") was substantially larger than the area proposed and approved by the Province.
>
> . . .
>
> [11] In a letter dated July 9,1998, a MELP [Ministry of Environment, Lands and Parks] representative wrote to a property officer with the City to advise that he had met with Mr. Nixon from the Hotel to discuss "foreshore issues fronting his property." It indicated that Mr. Nixon was interested in purchasing a 515 square metre area of fill immediately in front of the Hotel. It further stated:
>
> > During our meeting, Mr. Nixon expressed an interest in dedicating a public walkway in front of his property to connect the boat launch

> access to the walkway in front of the Manteo Beach. Most of this walkway appears to [*sic*] within the area of fill.

[12] On October 26,1998, the City's representative sent a fax to MELP. The fax stated that, further to the July 9,1998 letter, the City and R93 were "agreeable to a right of way over the fill area for Public access." A draft of the agreement was attached and the City asked that MELP advise Mr. Nixon "how you wish to proceed from here." Mr. Nixon was copied on the fax.

[13] On December 2, 1998, the City advised the Province that the City and R93 had met on site regarding the public route of access area. Noting that the boardwalk was five metres wide over a sloping rock shore, the City advised it would like to obtain a three-metre wide public access route over that portion of the boardwalk adjacent to the filled upland area and that the access route should line up with the public right of way over the Manteo Beach property.

[14] It is not clear when the boardwalk was constructed.

[15] Specifically, the City stated it did not want a right of way over the filled area because of the existence of the boardwalk. It proposed the entire boardwalk be "leased under a licence of Occupation" with the City receiving a licence over three meters of the boardwalk and a separate licence to the Hotel for the additional two meters. It then proposed the City would then sub-licence to the Hotel "under which [the Owner] would assume maintenance liability responsibilities but still allow public access during daylight hours."

[16] The evidence does not explain why, but the City's proposal was not adopted.

B. The Crown Grant

[17] On February 17, 1999, MELP provided R93 with an Offer of Crown Grant for 0.0515 hectares (515 m^2) of filled area fronting the Hotel. The purchase price was $22,825, plus documentation fee, Occupational Rental of $5,706, and GST of $2,007.67, for a total of $30,688.67. A sketch plan with 515 m^2 shown in bold and the proposed three-metre "easement for City of Kelowna" was attached to the offer. The offer stated that a letter was to be provided to MELP's BC Assets and Land Corporation office, which confirmed that a registered BC land surveyor had been hired to prepare a boundary survey.

[18] The offer included the following as a precondition of the Crown grant:

> This offer is subject to you surveying a right of way/easement through the fill for the purpose of establishing a public walkway in favour of the City of Kelowna.

[19] On January 12, 2000, R93 executed the Form C for granting the statutory right of way under s. 218 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] in favour of the City over the portion of the Lands immediately adjacent to Okanagan Lake for public access.

. . .

C. The Instrument and the Right of Way

. . .

[22] The key clauses (1.1, 2.1, 2.2 and 2.3) of the Instrument are as follows:

> NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the sum of the One Dollar ($1.00) of lawful money of Canada, now paid by the Grantee to the Grantor (the receipt and sufficiency of which is hereby acknowledged by the Grantor), and in consideration, the Grantor doth hereby;
>
> 1.1.1 Grant, convey, confirm and transfer, in perpetuity, unto the Grantee, in common with the Grantor, the full, free and uninterrupted ingress or egress at all times hereinafter as the Grantee considers necessary to, though [*sic*], over and under that portion of the lands of the Grantor comprising 280 m^2 shown outlined in dark black on the Plan of statutory Right-of-Way deposited in the Kamloops Title Office under Plan KAP 67233, a reduced copy of which is attached as Scheduled "B" hereto (hereinafter called the Perpetual Right-of-Way) and, in common with the Grantor, for:
>
> (a) the Grantee:
>
> (b) its officers, invitees, licensees, employees, servants, agents; and
>
> (c) to the extent permitted by the Grantee, every member of the public during daylight hours only.
>
> (d) At their will and pleasure, to enter, go, pass and repass upon and along the Perpetual Right-of-Way.
>
> . . .
>
> 2.1 THE GRANTOR HEREBY COVENANTS TO AND AGRESS [*sic*] WITH THE GRANTEE that the Grantor will not, nor permit any other person to erect, place, install or maintain any building, structure, mobile home, concrete driveway or patio, pipe, wire or other condition, over and under any portion of the Perpetual Right-of-Way so that in any way [*sic*] interferes with or damages or prevents access to the Perpetual Right-of-Way.
>
> 2.2 The Grantor shall at all times maintain and keep the Perpetual Right-of-Way in a state of good repair and kept free of refuse, reasonable wear and tear excepted, and shall replace the Perpetual Right-of-Way or portions thereof from time to time when necessary at the cost of the Grantor.
>
> 2.3 The Grantor agrees to maintain, at the sole cost of grantor, a 3.0 m wide public boardwalk within the Perpetual Right-of-Way. The Grantee acknowledges that the Grantor has prior to execution of this agreement, constructed a boardwalk partially over the perpetual right-of-way (approximately 1.5 m wide) with the remainder of the boardwalk located partially over the adjacent foreshore of Okanagan Lake. In the event that the width of the boardwalk accessible to the public is reduced to less than 3.0 m wide, the Grantor agrees to expand the

> boardwalk surface within the Perpetual Right-of-Way, at the Grantor's cost, to a minimum of 3.0 m wide.

[5] At the time the instrument was created, the City's basic objective was to acquire a further link in its broader effort to establish a continuous public walkway along the shore of Okanagan Lake.

[6] In addressing the issues raised at the trial and assertions of the Owner, the reasons for judgment include the following:

> [79] Underlying the Owner's statement is the key interpretive question raised by the Owner's arguments: is the Right of Way over the boardwalk or is it over the land on which the boardwalk is constructed with acknowledgement of and accommodation for the existence of a boardwalk? The Owner argues that it is the former and that imposes a positive obligation to maintain the boardwalk. The Owner says the result is that the Instrument does not run with the land.
>
> [80] The parties agree and I have already determined that cls. 2.2 and 2.3 are positive covenants that do not bind the Owner.
>
> [81] I do not agree with the Owner's statement that cls. 1.1 and 2.1 prohibit the construction of any structure in the ROW Area.
>
> [82] Clause 1.1 does not prohibit the Owner from building or having anything in the ROW Area. It gives the City and the public the right to move across the ROW Area, which is defined in the map attached as Schedule "B" to the Instrument. The boardwalk does not interfere with this right, but rather enhances it.
>
> [83] The same can be said of clause 2.1. In argument, the Hotel stressed that cl. 2.1 binds the Owner to not allow anyone to erect, place, install or maintain any structure on the ROW Area. This interpretation ignores the final words of cl. 2.1, which continue: "that in any way interferes with or damages or prevents access to the Perpetual Right-of-Way". This restates the common-law principle already implicit in clause 1.1: the Hotel is not prohibited from building anything at all, but rather from building anything that would interfere with the right of way. The boardwalk does not interfere with the right of way.
>
> [84] It is my conclusion that the Right of Way is over the land, not the boardwalk and as a result I do not find that cls. 1.1 and 2.1 and cls. 2.2 and 2.3 contradict one another. The Owner stressed in argument that the boardwalk featured prominently in the negotiation of the Instrument and that the ROW Area was selected to match the location of the boardwalk. The Owner said that these factors mean that the Court should interpret the Right of Way as lying over the boardwalk rather than the ROW Area. In my opinion, cls. 1.1 and 2.1 of the Instrument are clear that the Right of Way is over the ROW Area, not the boardwalk structure.

[7] I provided this by way of summary later in the reasons:

> **VI. SUMMARY**
>
> [104] The Owner argues that the rights of way implicitly lies over the structure of the boardwalk itself, and consequently or additionally imposes positive maintenance obligations on the Owner with respect to that structure. For the reasons set out above, I do not agree.
>
> [105] I made a number of conclusions that I summarize as follows.
>
> [106] The Right of Way lies over the ROW Area, not over the structure of the boardwalk. I made this finding as a matter of interpretation in light of the surrounding circumstances known to the parties at the time of the negotiation of the Instrument. The parties knew of and accounted for the boardwalk when drafting the agreement. It was natural for the City to wish for the ROW Area to align with the area of the boardwalk given its presence so that the public could use it. However, the Instrument expressly defines the Right of Way to correspond with the ROW Area rather than the boardwalk. It accounts for the existence of the boardwalk outside of cl. 1.1, which grants the Right of Way. While cl. 2.2 implicitly and cl. 2.3 expressly refer to the existence of the boardwalk, they do not invalidate or otherwise impact the right of way granted in cl.1.1. With the City's concession that these clauses do not bind the Owner as a subsequent owner, there is no obligation on the Owner to maintain the boardwalk.
>
> [107] While the boardwalk may help the City achieve its goal of creating an interconnected path network, that does not lead to the conclusion that the Right of Way must lie over the boardwalk contrary to its express language. While its presence enhances the access, the Instrument does not require that presence.
>
> [108] The validity of the Instrument is at issue in this proceeding, not its effectiveness in accomplishing the City's goal of an integrated path network. There is a difference between these two issues. The Right of Way is effective over the ROW Area rather than the boardwalk regardless of how much the existence of boardwalk helps the City achieve its goals.
>
> [109] There is no positive covenant or obligation for the Owner to maintain the boardwalk within the area of the statutory right of way. An easement or statutory right of way cannot impose positive obligations. It is settled law that the servient tenement holder has no obligation to maintain a right of way.
>
> [110] The Owner's claim for a declaration that the Instrument is invalid and unenforceable and for an order that its registration be cancelled is dismissed.

[8] As to the permanent injunction, my reasons for judgment includes this:

> **VII. PERMANENT INJUNCTION**
>
> [111] The City seeks a permanent injunction preventing the Owner from restricting future access to the Right of Way.
>
> [112] Since the issuance of the July 4 Order, there have been no unauthorized closures of public access. The Owner's representative testified

> that the Owner had no intention to do so in the future. This conflict emerged in the context of difficult and changing circumstances connected to the COVID pandemic as businesses sought to adapt and to comply with health regulations.
>
> [113] On the whole of the evidence, I am not satisfied that permanent injunctive relief is required at this time. I decline to make the order sought.

[9] On June 16, 2021, the City made an offer to settle the dispute. That offer proposed to:

> a. change the two references to "Grantor" in section 2.2 [of the statutory right of way] to read "Grantee";
>
> b. delete the first and third sentences of section 2.3 [of the statutory right of way]; and
>
> c. add the following at the end of section 2.3 (after the current second sentence): "The Grantee shall have the right, but not the obligation, to construct a boardwalk 1.5 m in width within the Perpetual Right-of-Way immediately adjacent to, and physically connected to, the existing boardwalk for the full distance of the Perpetual Right-of-Way covered by the existing boardwalk (the "Boardwalk Expansion"). . . .

[10] Prior to trial the City brought applications for interim injunctions.

[11] On October 13, 2021, the Court ordered the Owner to allow public access when the Owner's outdoor dining was not operating and only for as long as pandemic-related health restrictions remained in place.

[12] On December 8, 2021, the City's application to vary was dismissed but minor changes to the existing order were made.

[13] A further application by the City to vary the December order was heard on June 21, 2022. The Owner did not oppose an order deleting the Owner's ability to block public access on days it operated food and beverage service on the boardwalk.

Positions of the Parties

[14] The City says the validity of the statutory right of way was the central issue at trial and that issue was determined in its favour.

[15] It argues this is not a case where the costs of the counterclaim should be decided separately from the main action. While acknowledging it was unsuccessful in its claim for a permanent injunction, it notes the reasons for judgment stated an injunction was not required as a result of the Owner's assurances that it would not take steps to block the statutory right of way in future. Within its written argument is the following:

> 25. The City notes that the Court did not dismiss the City's action. Rather, the Court determined that "permanent injunctive relief is [not] required at this time"; para. 112, RFJ.
>
> 26. This implicitly recognizes, in the City's submission, that in respect of the validity of the SRW, the action and the counterclaim were fundamentally intertwined in respect of the central issue.

[16] The City concedes it is not entitled to its costs of the December 1, 2021 (December 8, 2021 order) variation application.

[17] The Owner says the City was not successful in its claim for a permanent injunction. It points out that in an earlier interim injunction application the City alleged the statutory right of way was over the boardwalk. The Owner argues in relation to its position on costs that: "The City sued the Hotel expecting that it had and would have rights to the boardwalk (as reflected in its June 16, 2021, offer)." The argument goes on and states:

> The Hotel asked the City to work with it and only sought the cancellation of the SRW in response to being sued. In the end, the Hotel was never forced to unlock the date during operating hours while COVID measures were in place. On the other hand, the City is left with rights over the rocky sloped shore lying beneath the boardwalk and the Hotel has no obligations to maintain anything.

[18] The Owner asserts that it was substantially successful and ought to recover its costs.

Analysis

[19] There is no doubt that the vast majority of the evidence, submissions and trial time was focused on the issue of the validity of the statutory right of way.

[20] The counterclaim seeking a finding that the statutory right of way was not valid or enforceable failed. In advancing its position at trial, it was the Owner that asserted that the statutory right of way was over the boardwalk. Included within its written argument at trial was the following:

> 118. Covenants One and Two when read in isolation may appear to be negative in nature. They are not. Reading the document as a whole, it becomes clear that the entire agreement is about access over a constructed boardwalk. That is a rock slope that does not meet up with the boardwalk to the north (akin to the staircase in *Parkinson*). If it is a right to cross the ground beneath the boardwalk, then the boardwalk is a "structure" that is being maintained that "would interfere with access to the "Perpetual Right-of-Way" in violation of Covenants One and Two. It does not make sense that the very boardwalk that must be maintained under Covenants Three and Four violates Covenants One and Two. Reading the agreement as a whole, Covenants One and Two are meant to prevent obstruction of the boardwalk, which is precisely what the City is arguing. The gist of the City's complaint is that the locked gate blocks the public from using the boardwalk. The City is complaining about the gate on the boardwalk being locked.
>
> 119. In addition to looking at the words of the agreement, the court is to consider the surrounding circumstances to ascertain the intentions of the parties. Here, it is clear. The intention of the parties was to grant rights to the public to use the boardwalk during daylight hours and to require the Hotel to maintain the boardwalk. This agreement cannot run with the land. As explained in *Nordin*, and *Parkinson* an agreement to access a structure places a positive obligation on the servient tenement to maintain that structure.

[21] Paragraph 57 of the reasons for judgment states: "The central issue in this case is the interpretation of the Instrument and whether what remains without cls. 2.2 and 2.3 is a valid statutory right of way."

[22] Paragraph 79 quoted above identifies the key interpretive question raised by the Owner's arguments as being whether the right of way was over the boardwalk.

[23] It was the Owner that argued that the statutory right of way was over the boardwalk. It was that assertion that underpinned the argument that there were positive covenants to maintain the boardwalk and resulted in the right of way being unenforceable against the Owner. That is the argument that failed.

[24] The City's arguments at trial on the issue of validity of the statutory right of way focused on the question of whether, with the excision of clauses 2.2 and 2.3, there remained any positive covenant on the Owner. It took the position there was not. Alternatively, the City argued that, pursuant to s. 35 of the *Property Law Act*, cancellation of any charge is discretionary. Its arguments included the following:

> 89. It the case at bar it is clear that the registration of an easement or right of way was a condition of the Crown Grant for the filled foreshore strip that lies below the boardwalk. The owner of the Hotel at the time considered it important to obtain title to the filled strip. Whether he was reluctant to grant the statutory right of way is irrelevant; it was, as in *Burmont Holdings* and *Canitalia*, a *quid pro quo* of the agreement that resulted in the acquisition of a valued strip of land that was later consolidated with the Hotel property.
>
> 90. The positive covenants in sections 2.2 and 2.3 can be severed to maintain the integrity of the bargain between the Province and the Hotel – the City's interest in obtaining an access of right of way as achieved through the addition of the express condition in the Crown Grant.

[25] The Owner points out how the original position of the City was altered on the eve of trial. Whatever modifications to their original positions in the pleadings or in negotiations, the question of costs of the trial must be determined on the basis of the issues presented at trial together with any relevant offers to settle.

[26] The Owner argues, and I agree, that:

> 25. Nothing turns on whether the test is "substantial success" or some variation thereof. Costs are inherently discretionary although applied in a principled manner. Here, it does not matter if the claim and counterclaim are looked at together or considered separately. . . .

[27] The City's claim for a permanent injunction was not granted because there was no ongoing basis to conclude that the Owner would not abide by the terms of the statutory right of way if it was valid. The history of issues in that regard have been heavily influenced by the COVID pandemic and related health orders. By the time of trial, the health orders had been lifted and the principal remaining issue between the parties was the validity of the statutory right of way.

[28] When the positions advanced by the parties are considered in context, and on the analysis contained within the reasons for judgment, is my conclusion that the City was substantially successful. It is my conclusion that the City is entitled to its costs of the trial.

[29] Based on the content of the offer to settle contained within the June 2021 correspondence, it is my conclusion that it does not justify any different or additional order as to costs.

[30] The parties' arguments also refer to the City's interim injunction applications. They did not specifically say so but I infer they ask for this decision to address costs of those applications. No orders as to costs were made at the time by the presiders.

[31] Given the results, the City will have its costs of the application giving rise to the October 13, 2021 order; the Owner is awarded costs of the application resulting in the December 8, 2021 order; and each party will bear their own costs for the application resulting in the June 21, 2022 order.

"Betton J."