IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Horning v. Schroeder-Collen,* 2025 BCSC 1698

Date: 20250902
Docket: S49629
Registry: Penticton

Between:

Jack Stanley Horning and Gloria Diane Horning

Plaintiffs

And

Amonika Luis Schroeder-Collen, Ryan Kenneth Sather and Amber Lacey Pearson, Scott Michael Tremblay and Sheri Anne Souch, Ryan David Cleverdon and Lana Angela Mary Cleverdon, and Morris Mark Weremchuk and Della Ruth Weremchuk

Defendants

Before: The Honourable Justice Hardwick

Reasons for Judgment re: Costs

Counsel for the Plaintiffs:	A.J. Spraggs
Counsel for the Defendants R.K. Sather and A.L. Pearson:	D.J. Mildenberger
Written Submissions Received:	July 25 and August 8, 2025
Place and Date of Judgment:	Penticton, B.C. September 2, 2025

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Overview

[1] In reasons for judgment indexed at 2025 BCSC 1233, I resolved a dispute between the plaintiffs and the remaining defendants, Ryan Kenneth Sather and Amber Lacey Pearson (also known as Amber Lacey Sather) (the "Lot 9 defendants") regarding an easement (the "Reasons"). I did so summarily pursuant to R. 9-7 of the *Supreme Court Civil Rules* [*Rules*].

[2] For efficacy, I shall hereinafter adopt all the same defined terms I used in the Reasons.

[3] As set out in the Reasons, I ultimately granted the plaintiffs a permanent injunction requiring the Lot 9 defendants to keep the Lot 9 portion of the Easement Lands free from standing vehicles for long as they individually or jointly remain the registered owner(s) of Lot 9.

[4] All other injunctive relief sought by the plaintiffs in respect of the Lot 9 Encroachment, specifically the Retaining Wall and the Irrigation Box, was dismissed. The plaintiffs' claim for damages was also dismissed.

[5] When addressing the issue of costs, I held as follows:

> [91] The plaintiffs requested leave to make submissions as to costs. This request was not opposed by the Lot 9 defendants. Accordingly, I will direct that the plaintiffs have 14 days to provide submissions in writing. The Lot 9 defendants will have 14 days thereafter to provide responding written submissions. If the parties agree on an alternative schedule, they are to advise Supreme Court Scheduling of same before the expiry of the 28 days.
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> [92] Failing receipt of written submissions, I am satisfied that the plaintiffs have been substantially successful in this action and are presumptively entitled to their costs as against the Lot 9 defendants in accordance with R. 14-1(9). I reach this conclusion on the basis that unlike the Retaining Wall, where there actually was room for a compromise which the parties were all *prima facie* agreeable to, the issue of the standing vehicles had only two possible outcomes. The plaintiffs obtained the permanent injunction they were seeking. But for that injunction, the Lot 9 defendants would have continued to permit standing vehicles in the Lot 9 portion of the Easement Area. That, as I addressed above in dismissing the plaintiffs' damages claim, was their position in the action and has been consistent with their conduct since receipt of the August Letter.

> [93] Accordingly, the default order shall be that the plaintiffs are entitled to their costs in accordance R. 15-1(15). Those costs shall be assessed the basis that the matter took one day or less and are subject to the necessary adjustment for taxes in accordance with R. 15-1(17).

[6] As is apparent from the foregoing, I did not make a conclusive determination that the plaintiffs were substantially successful. I made a default order to that effect "failing receipt of written submissions". I did so with in contemplation of the possibility that the parties might reconsider incurring further legal expenses to address the issue of costs given the relatively modest amount in issue.

[7] Written submissions were, however, submitted to the court. Accordingly, I must determine the issue of costs afresh.

[8] Specifically, I must consider the effect, if any, of an offer to settle made by the Lot 9 defendants pursuant to R. 9-1 of the *Rules* (the "Formal Offer").

[9] The Formal Offer, made June 10, 2025, contained the following material terms:

> Option #1 is that these defendants will pay $4,000 in costs and compensation and the parties will agree to dismiss the current action and the plaintiffs will consent to reduce the easement to a width of 12.00 feet by excluding the southernmost 13.00 feet from the easement area.
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> Option #2 is that these defendants will stop parking in the easement area and their current retaining wall and all utilities be allowed to remain and the plaintiffs will consent to reduce the easement area in width for this purpose to dimensions set out in the Jeremy Park survey at exhibit A of his affidavit. The action will be dismissed by consent and each party will bear their own costs.

[10] For relevant context as to timing, the plaintiffs' summary trial application was filed and served on May 28, 2025. The summary trial was heard on June 20, 2025. Accordingly, the Formal Offer was received by the plaintiffs approximately seven business days after service of the summary trial materials and approximately seven business days prior to the hearing.

[11] The Lot 9 defendants concede that they did beat Option #1 of the Formal Offer in light of the relief ordered.

[12] The Lot 9 defendants, however, submit that the Option #2 was reasonable in timing, scope and substance and offered the same or better options on key points.

[13] On this basis, the Lot 9 defendants submit that "it is appropriate for the Court to reduce or eliminate any costs award to the [p]laintiffs in these circumstances and award costs to the [Lot 9 defendants]".

[14] In the alternative, the Lot 9 defendants submit that if any costs are to be awarded to the plaintiffs, such costs should be pursuant to the Appendix "B" tariff as ordinary costs as opposed to lump sum costs under R. 15-1(15) (the "Fast Track Action Rule").

[15] The plaintiffs submit that the Lot 9 defendants did not beat Option #2 and further, that it was not reasonable for the plaintiffs to accept the Formal Offer.

[16] The plaintiffs, therefore, argue that they should still be entitled to lump sum costs pursuant to the Fact Track Action Rule.

[17] In the alternative, the plaintiffs submit that they should be entitled to the proportion of their Fast Track Action Rule lump sum costs which had accrued to their benefit by the time the Formal Offer was received and urge the court to consider the fact that the Formal Offer was made after the plaintiffs had prepared and filed their summary trial application materials.

The Formal Offer: Analysis

[18] Pursuant to R. 9-1(5), in a proceeding in which an offer to settle has been made, the court may do one or more of the following:

a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made; and

d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[19] Rule 9-1(6) then sets out the considerations that the court may consider in such circumstances:

a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

b) the relationship between the terms of settlement as offered and the final judgment of the court;

c) the relative financial circumstances of the parties; and

d) any other factors the court considers appropriate.

[20] As stated by the Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27:

> The first factor – whether the offer to settle was one that ought reasonably to have been accepted – is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: [citations omitted]. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[21] In *Augla v. Kaila*, 2011 BCSC 466, the same principle was applied by Mr. Justice Harris (as he was then) in a civil proceeding: see para. 7.

[22] The Formal Offer is not, when examined critically, on all fours with the ultimate orders that I made. A written commitment to stop parking on the Easement Lands is not quite the same as a permanent injunction requiring the Lot 9 defendants to keep the Lot 9 portion of the Easement Lands free from standing vehicles. Further, and much more importantly, I expressly did not order a modification of Lot 9 Easement because the Lot 9 defendants did not bring on a counterclaim seeking relief pursuant s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377: see paras. 22–20 of the Reasons.

[23] The Formal Offer thus represented an outcome that the court could have never ordered. By virtue of the pleadings, and specifically, the lack of a counterclaim, the court was left realistically with two outcomes. Having regard to what I found to be a lack of evidence, I concluded that the Retaining Wall and the Irrigation Box did not constitute a significant interference despite an expert report confirming the Lot 9 Encroachment.

[24] Further, Option #2 of the Formal Offer contemplated that the plaintiffs and the Lot 9 defendants bear their own costs.

[25] The plaintiffs engaged legal counsel in the summer of 2023 to send the August Letter. The August Letter, the recipients of which included the Lot 9 defendants, alleged obstructions and encroachments on the Easement Lands and requested compliance with the terms of the Lot 9 Easement: see para. 14 of the Reasons.

[26] The August Letter did not have the desired result: see para. 15 of the Reasons.

[27] As a result, the plaintiffs filed the notice of civil claim on April 3, 2024.

[28] The filing of the notice of civil claim did not have the desired result and the Lot 9 defendants filed a response to civil claim opposing all of the relief sought.

[29] The plaintiffs then, through counsel, retained Jeremy Park, a professional land surveyor, to prepare a court ready expert report. The plaintiffs did so at their cost.

[30] The plaintiffs' counsel then prepared and served the summary trial materials. Again, at a cost to the plaintiffs.

[31] Acceptance of the Formal Offer thus required the plaintiffs to bear all of their own costs to that date—a date some approximately seven business days before the hearing of the summary trial. Costs which could have been almost entirely avoided had the August Letter prompted a substantive response from the Lot 9 defendants some approximately 22 months prior.

[32] The relative financial circumstances of the parties are not a material factor in assessing the Formal Offer in this case, particularly given the quantum of costs in issue. Nor are there other factors I consider it appropriate to consider pursuant to R. 9-1(6)(d).

[33] Ultimately, based upon my above consideration of the factors set forth in R. 9-1(6)(a) and (b), I decline to make any costs award pursuant R. 9-1(5) on the basis of the Formal Offer.

Substantial Success

[34] Having addressed the Formal Offer, I must again the consider the issue of substantial success pursuant to R. 14-1(9).

[35] Even approaching afresh, I ultimately reach the same conclusion that the plaintiffs were the substantially successful, as that term has been judicially considered: see *Harras v. Lhotka*, 2016 BCCA 246 at para. 48.

Fast Track Costs vs. Tariff Costs

[36] Notwithstanding the foregoing, the Lot 9 defendants make a valid argument about the appropriateness of lump sum costs under the Fast Track Action Rule versus ordinary costs under the tariff.

[37] Rule 15-1(15)(a) provides that:

> Unless the court otherwise orders or the parties consent, and subject to Rule 14-1(10) [costs within small claims jurisdiction], the amount of costs, exclusive of disbursements, to which a part for a fast track action is entitled is as follows:

> (a) if the time spent on the hearing of the trial is one day or less, $8 000; [emphasis added.]

[38] The value of units for Scale B costs under the tariff is $110.

[39] Accordingly, in order to reach $8,000 in costs, exclusive of disbursements and taxes, a substantially successful party in an ordinary proceeding must be able to claim approximately 72 units (72 x $110 = $7,920).

[40] Although I am not regularly tasked with actually assessing costs, it is quite apparent from a review of the evidentiary record that it would be extremely difficult for the plaintiffs to be able to successfully claim 72 units.

[41] There was a single demand letter referred to above sent prior to the commencement of the proceeding, there was very minimal document disclosure required due to the nature of the claim, there were no examinations for discovery conducted and the actual arguing of the summary trial took less than half a day (although it counts as a full day under the tariff as I had counsel return in the afternoon with the possible expectation I might be able to deliver oral reasons for judgment but ultimately was not in a position to do so as I required additional time to consider the appropriate interpretation of the decision in *Grenier v. Elliott*, 2007 BCSC 598: see paras. 33-44 of the Reasons).

[42] Further, the notice to proceed under the Fast Track Action Rule was only filed by the plaintiffs on May 6, 2025. At that point in time the plaintiffs had clearly decided to proceed with having the matters determined summarily and so the efficiencies contemplated by the Fast Track Action Rule were not necessarily engaged.

[43] However, the discretion I noted above for the court to “otherwise order” is somewhat limited under the Fast Track Action Rule. Specifically, it is open to a court to “otherwise order” in fast track cases where “special circumstances” warrant the departure from the limits set out in R. 15-1(15): see *Reid v. I.C.B.C.*, 2000 BCSC 1334 cited with approval in *Travelbea v. Henrie*, 2012 BCSC 2009 at para. 8.

[44] However, even in “special circumstances” the court should not revert to imposing an obligation to assess costs based on the tariff. In this regard, in *Peacock v. Battel*, 2013 BCSC 1902, Justice Affleck reviewed the relevant authorities and concluded as follows:

> [18] Special circumstances have been held to apply in cases where the trial took longer than the maximum amount of days referenced in the fast track litigation rule, or the action was complex or where a reasonable offer to settle was made but not accepted. In *Majewska*, the Court of Appeal allowed an appeal of a trial judge’s decision to award the successful plaintiff costs in a fast track litigation action on Scale B. The trial judge had found that it was within his discretion to award costs on a Scale B rather than pursuant to R. 66(29) (the then equivalent of R. 15-1(15)) because the trial took longer than two days (the limit under the old rule) and both parties had made offers to settle the case: see *Majewska* at para. 12.
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> [19] At issue on the appeal in *Majewska* was the extent of a trial judge’s discretion to depart from the fixed costs outlined in the fast track rule. The court held that while extra trial days and offers to settle were special circumstances that could be considered in awarding a different costs award under R. 66(29), the trial judge had erred in using his discretion to depart from R. 66 altogether. Madam Justice Neilson, writing for the court, held that the lump sum amounts set out in the rule are intended to avoid the time and expense of calculating tariff items and of a costs hearing, not to deprive a successful litigant of costs. Accordingly, the Court of Appeal held that although the trial court may exercise its discretion to award costs beyond the limits set out in the fast track rule where there are “special circumstances,” in doing so, the court should order a lump sum with reference to the amounts set out in the rule rather than imposing an obligation to assess costs based on the tariff.
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> [20] Madam Justice Neilson held that the formula set out in *Anderson v. Routbard*, 2007 BCCA 193 should be applied to determine what amount should be awarded. This formula involves first determining what portion of the lump sum provided for in the Rule is for pre-trial and trial costs. Madam Justice Neilson calculated this by taking the amount enumerated for a one day or less trial and subtracting it from the amount allowed for a two day or more trial. The difference is then multiplied by the number of days that the trial went over (paras. 31, 39). She concluded:
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> > 39 I would therefore allow the appeal, and calculate costs under R. 66(29) as follows. Under the present limits of $5,000 and $6,600 I take the pre-trial portion of costs to be $3,400, and $1,600 as representative of each day of trial. The plaintiff's offer to settle was delivered only six days before trial. Thus, she is not entitled to double costs for trial preparation. She is, however, entitled to double costs for three and a half days of trial, calculated at $3,200 per day. Total costs are thus $14,600 ($3,400 plus $11,200) before disbursements and taxes.

[45] I am satisfied that there are special circumstances by virtue of the late election to proceed under the Fast Track Action Rule combined with the decision to proceed summarily.

[46] However, the above formula does not precisely work in this case.

[47] Rather, in keeping with the instruction to use the lump sum provided for under R. 15-1(15)(a) as a starting point, I consider it an appropriate exercise of my discretion to award the plaintiffs 70% of that amount. Specifically, 70% of $8,000 totals $5,600.

[48] I settled upon the 70% calculation by contemplating what steps would ordinarily be expected to included within the lump sum under R. 15-1(15)(a) and assessing what steps actually occurred in this particular proceeding. It is a discretionary calculation that is by factual necessity not precise, but it is neither arbitrary nor capricious: see *Tisalona v. Easton*, 2017 BCCA 272 at paras. 71 and 72.

Conclusion

[49] In conclusion, plaintiffs are entitled to lump sum costs of this action in the amount of $5,600, exclusive of disbursements. Those costs remain subject to the necessary adjustment for taxes in accordance with R. 15-1(17).

"Hardwick J."