IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *CCR Resort Ltd. v. Jaff Family Resort Holdings Ltd.,* 2025 BCSC 1145

Date: 20250306
Docket: S140310
Registry: Kelowna

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Between:

CCR Resort Ltd.

Plaintiff

And

Jaff Family Resort Holdings Ltd.

Defendant

And

Barry Siebenga and Crazy Creek Developments Ltd.

Third Parties

Before: The Honourable Justice Hoffman

Oral Reasons for Judgment

In Chambers

Counsel for the Defendant:	D.W. Draht
Counsel for the Third Parties:	R.A. Chorneyko
Place and Date of Trial/Hearing:	Kelowna, B.C. March 5, 2025
Place and Date of Judgment:	Kelowna, B.C. March 6, 2025

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[1] **THE COURT:** As these are my oral reasons, I reserve the right, if a transcript of these reasons is ordered, to edit them for clarity and grammar. However, the substance of my decision will not change.

[2] In this application, the defendant, Jaff Family Resort Ltd., seeks to dismiss or adjourn a summary trial set down by the third parties to be heard during the assize in Salmon Arm in late May 2025.

[3] The plaintiff is the registered owner of the lands at issue in this proceeding located near Malakwa, British Columbia. I will refer to these lands as the "CCR Lands". The defendant holds an easement over the CCR Lands and owns an adjacent property, which I will refer to as the "Jaff Lands".

[4] Both parties operate tourist businesses on their respective properties. Central features of these two tourist operations are a walking path, a suspension bridge, and a waterfall viewing platform over a waterway known as Crazy Creek. At issue is the ability of each of the parties to access these amenities for the purposes of carrying out their business. The access rights are addressed in two easements.

[5] On September 6, 2024, Justice A. Ross dismissed an application by the plaintiff for an injunction to prevent the defendant from blocking access to the lands covered by the easement: *CCR Resort Ltd. v. Jaff Family Resort Holdings Ltd.*, 2024 BCSC 1658. That decision sets out the factual background in respect of this matter.

[6] On September 16, 2024, the plaintiff appealed the denial of the interim injunction. An application for leave to appeal has not yet been heard. There is no suggestion, however, that this appeal has been abandoned.

[7] The third party proceeding in this matter was commenced on June 20, 2024, when the defendant filed its third party notice. The third party notice pleads that in the event that the plaintiff's claim is successful, the third parties are liable for damages for negligent misrepresentation.

[8] More specifically, the defendant alleges that Barry Siebenga, who is the father of the two current owners of the plaintiff, made certain representations on behalf of Crazy Creek Developments Ltd. regarding the inclusion of the suspension bridge and the boardwalks in the Jaff Lands when they were sold by Crazy Creek Developments Ltd. to the defendant.

[9] The third parties filed a response to the third party notice on September 17, 2024.

[10] Discovery in both the main action and the third party proceeding is in progress. Documents have recently been disclosed in the main action. No examinations for discovery have taken place in either the main or the third party proceedings.

[11] On September 6, 2024, the third parties filed a notice of application for a summary trial.

[12] The position of the defendant is that the issues raised in the third party proceeding are intertwined with the issues in the main claim, such that it would be inefficient and unjust to allow the third party proceeding to be adjudicated separately.

[13] The position of the third parties is that the issues raised in the third party claim are straightforward because Barry Siebenga denies that any misrepresentations were made. The third parties take the position that the issues in the third party notice are not at all intertwined with those in the main proceeding, while at the same time argue that the judge presiding on the summary trial application will be in the best position to determine the extent of any connection between the issues in the third party claim and those in the main claim. Accordingly, the third parties submit that I should decline to dismiss or adjourn the summary trial application at this preliminary stage in the absence of a full summary trial record.

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Issue

[14] The question to be resolved in this application is whether the defendant's application to adjourn or dismiss the third party claim should be granted.

Factual Background

[15] In the interests of providing the parties with a timely decision, I do not intend to repeat the factual background set out in Justice A. Ross's decision denying the plaintiff's injunction application. I will, instead, focus on what is set out in the pleadings, as they define the issues to be determined in both the main claim and the third party proceeding.

[16] In the notice of civil claim, it is alleged that:

> 4. CCR operates a business on the CCR lands which offers a hotel, camping areas, serviced recreational vehicle areas, and heated swimming pools (the "CCR Resort").
>
> 5. The defendant is the registered owner of the lands and premises at 6207 Trans Canada Highway, Malakwa, British Columbia [legal description omitted.]
>
> 6. There is a suspension bridge that connects the Jaff Lands to the CCR Lands (the "Bridge") which was built in or around 2004 and crosses Crazy Creek.
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> 7. The Bridge is owned jointly by the owners of the Jaff Lands and the CCR Lands.
>
> 8. Boardwalks, viewing platforms which offer views of Crazy Creek, and a ticket booth are present on the CCR Lands, which are wholly owned by CCR.
>
> 9. The previous owner of the CCR Lands and the Jaff Lands was Crescent Ridge Holdings Ltd. ("Crescent Ridge").
>
> 10. By an agreement in writing dated December 14, 2011, between the Crescent Ridge, as grantor and owner of the CCR Lands, and Crescent Ridge, as grantee and owner of the Jaff Lands, the Crescent Ridge granted an easement in perpetuity, inter alia, on, over, and through that portion of the CCR Lands for the use and enjoyment of the of the Jaff Lands by the owner and occupiers of the Jaff Lands and their respective agents, servants, workers, contractors, licensees, invitees and all other persons by their authority for ingress and egress to certain parts of the CCR Lands on the northern side of the Trans Canada Highway (the "Improvement Easement"). The Improvement Easement was registered to the title of the CCR Lands as instrument number CA2323060.

[17] In Division 2 of the response to civil claim, it is alleged that:

> 3. In specific response to paragraphs 6 - 8 of the Notice of Civil Claim the nature and extent of the parties' interest in the suspension bridge is directly at issue in these proceedings and is properly characterized as a legal issue rather than a fact. The suspension bridge, boardwalks and ticket booth are all necessary for the commercial operations of JAFF and, except where they are located on JAFF Lands, the rights over each improvement is governed by easement number CA2323060 (the “Easement).
>
> 4. In specific response to paragraph 9 of the Notice of Civil Claim, the Previous owner of the JAFF Lands was Crazy Creek Developments Ltd. The previous owner of the CCR Lands was Crazy Creek Resort Ltd.
>
> …
>
> 6. In specific response to paragraph 12 of the Notice of Civil Claim, the majority of the suspension bridge is located on JAFF Lands. A part of the suspension bridge is located on CCR Lands and is subject to the Easement.

[18] In Division 3 of the response to civil claim, the defendant states:

> 1. CCR is a business owned and operated by two brothers, Jason Siebanga and Devin Siebanga (the "Siebanga Brothers"). The father of the Siebanga Brothers, Barry Siebanga was instrumental in effecting the sale of the JAFF Lands and business from Crazy Creek Developments Ltd. to JAFF. Barry Siebanga, in the course of conducting the sale, carried out the following activities as representative of Crazy Creek Developments Ltd. and made the following representations to JAFF:
>
> a. Instructing the appraiser, in determining the appraised value of the JAFF Lands, to recognize the entire value of the suspension bridge;
>
> b. Requiring JAFF to pay for the suspension bridge and boardwalks as part of the purchase of JAFF Lands;
>
> c. Listing the JAFF Lands for sale as including the boardwalks and suspension bridge while the CCR Lands were listed without mention of the suspension bridge and boardwalks - the CCR Lands were listed as including the hot pools and hotel among other things, but not the suspension bridge or boardwalks;
>
> d. Representing to JAFF that Crazy Creek Developments Ltd. owned the suspension bridge;
>
> 2. In the event CCR's legal position is correct as alleged in the Notice of Civil Claim, which is not admitted but is expressly denied, then Barry Siebanga had a special relationship with JAFF in effecting the sale, and made untrue and misleading statements about ownership of various improvements upon which JAFF reasonably relied and has thereby suffered damages. Barry Siebanga was negligent in making these statements.

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> 3. Historically, Crazy Creek Developments Ltd. paid for the suspension bridge and boardwalks and recorded revenue earned from them in its financial statements. Crazycreek Resort Ltd., the predecessor of CCR on the CCR Land, at no time paid for the suspension bridge and boardwalks, nor did it record revenue derived therefrom.
>
> 4. Crazy Creek Developments Ltd. described its business operation as the operation of a tourist attraction in its most recent financial statement which was provided as part of its disclosure at the time of sale to JAFF. Crazy Creek Developments Ltd. reported the suspension bridge and boardwalks as part of its corporate income for tax purposes.

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[19] In the third party notice that names Barry Siebenga and Crazy Creek Developments Ltd. as third parties, it is alleged that:

> 3. Among other things, the land use rights attached to the Jaff Lands and CCR Lands (as defined in the Notice of Civil Claim) are in dispute in the within claim.
>
> 4. Among other things, CCR asserts that it holds a right to sell access to customers to some portions of the CCR Lands that are subject to easement number CA2323060 (the "Easement") and upon which improvements exist while JAFF denies that the Easement provides that right.
>
> 5. CCR is owned by two brothers, Jason Siebenga and Devin Siebenga (the “Siebenga Brothers”). The father of the Siebenga Brothers is Barry Siebenga. Barry Siebenga was responsible for carrying out the sale of both the CCR Lands and the Jaff Lands on behalf of the previous owner, Crazy Creek Developments Ltd.
>
> 6. As the representative of the vendor of the Jaff Lands in conducting the sale to JAFF, Barry Siebenga had a special relationship with Jaff. As the vendor [of] the Jaff Lands, Crazy Creek Developments Ltd. had a special relationship with Jaff.
>
> 7. In the course of his work marketing and selling the CCR Lands and Jaff Lands, Barry Siebenga, on his own behalf and on behalf of Crazy Creek Developments Ltd. made representations to Jaff. In the event the claim advanced by CCR succeeds, and Jaff denies that it will, then Barry Siebenga acted negligently by making untrue, inaccurate and misleading statements in conducting the sale of the Jaff Lands regarding the land use rights attached to the Jaff Lands.
>
> 8. Among other things, in effecting the sale of the Jaff Lands to Jaff, Barry Siebenga made the following representations as representative of Crazy Creek Developments Ltd. and on his own behalf: …

I will not set out the representations here, as they are identical to the representations listed in the response to civil claim.

[20] In the response to the third party notice, the third parties allege:

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> 3. Paragraph 8 of Part I of the Third Party Notice alleges that the Third Parties made certain representations. The Third Party Notice does not allege that any of these representations were untrue, inaccurate or misleading statements, and if so how. That is, there is no allegation of any misrepresentation at all.
>
> 4. In any event, the matters alleged in Paragraphs 8(a), (b) and (c) of Part 1 of the Third Party Notice are not representations at all.
>
> 5. The underlying dispute concerns the proper legal interpretation of certain easements benefitting the Jaff Lands as the dominant tenement. At all material times the Defendant had possession of the legal terms of the easement and retained its own legal counsel. The Third Parties never made any statements with respect to the terms of the easements, which in any event, could only ever be statements of opinion and not representations.

[21] In light of these pleadings, there is a dispute between the plaintiff and the defendant as to what exactly was included in the sale of the Jaff Lands and, more specifically, whether that sale included exclusive access to the suspension bridge and the boardwalks for the benefit of the defendant.

[22] I understand on the evidence before me that the CCR Lands and the Jaff Lands were put on the market at the same time, in the hope that one buyer would be found, but, ultimately, the defendant purchased only the Jaff Lands.

[23] The defendant says that if the court, at trial, concludes that the easements are to be interpreted in the manner alleged by the plaintiff, then the third parties were negligent in representing that the Jaff Lands included access to the entire suspension bridge and boardwalks.

[24] The third parties take the position on this application that this latter issue is appropriate to be dealt with on a summary trial application, separate and apart and prior to the resolution of the dispute in the main action.

Legal Framework

[25] The defendant relies on R. 9-7(11) and R. 9-7(15) of the *Supreme Court Civil Rules*, which provide that, under the heading, "Adjournment or dismissal":

> (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may

> (a) adjourn the summary trial application, or
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> (b) dismiss the summary trial application on the ground that
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> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii) the summary trial application will not assist the efficient resolution of the proceeding.
>
> …
>
> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[26] Although not set out in the notice of application, the defendant also referred the court to Rule 3-5(15) dealing with third party claims which provides that:

> (15) An issue between the party filing the third party notice and the third party may be tried at the time the court may direct.

[27] In addition, the defendant referred the court to Rule 22-5, which deals with multiple claims and parties. Rule 22-5(7) provides that:

> (7) If a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the court may so order.

[28] Rule 9-7(11)(b) was discussed in *Axion Ventures Inc. v. Bonner*, 2021 BCSC 2644 at paras. 25–29 [*Axion*]. Justice Sharma explained that an application under Rule 9-7(11) must be distinguished from one brought under Rule 9-7(15). The former rule allows a preliminary application to be brought before a full-blown summary trial hearing in which the applicant is not required to file materials addressing the merits of a summary trial application.

[29] Rule 9-7(15) deals with the issue of suitability in the context of the hearing of a summary trial application. As noted in *Axion* at para. 26, generally, the issue of

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whether a matter is suitable for summary trial is a determination that is considered on the basis of the full evidentiary record going to the merits.

[30] As the defendant has not filed materials in the summary trial application, I do not have the record before me to make any determinations under Rule 9-7(15). Therefore, the applicable rule for this application is Rule 9-7(11).

[31] An applicant under this rule bears a heavy onus to demonstrate that the case should not be decided summarily: *Axion* at para. 28. Justice Sharma relied on the decision of Justice Voith in *Cirius Messaging Inc. v. Epstein Enterprises Inc.*, 2017 BCSC 1751 at para. 22:

> Justice Voith noted at para. 22 that the application has to be "compelling in order to decide on a preliminary argument" that the case is not suitable and the applicant must meet a "very high standard". Justice Voith commented at para. 26 that the Rule 9-7(11) application "serves a useful winnowing function" by preventing applications from going forward where the difficulties associated with the application are readily apparent.

[32] Justice Voith in *Cirius Messaging Inc.* went on to describe the scope of the court's options under Rule 9-7(11)(a)–(b):

> [25] It is also not clear to me, respectfully, that Rule 9-7(11)(b)(ii) enables a judge to determine that a matter "is suitable" for summary disposition. Rather Rule 9-7(11), which addresses applications brought before or at the same time as a summary trial only provides the court with two options. The first option available to the court is to adjourn the summary trial application, under Rule 9-7(11)(a). The second option available to the court under Rule 9-7(11)(b) is to either dismiss the summary trial application on the basis that the issues raised by the application "are not suitable for disposition" or to dismiss the summary trial application on the basis that the application will not assist the "efficient resolution of the proceeding".
>
> [26] The ability of a judge to dismiss a summary trial application because it is "not suitable" for disposition on a summary basis is, however, not co-extensive with a positive determination that the matter "is suitable" for such determination. Providing the court with the ability to dismiss a summary trial application on a preliminary basis, under Rule 9-7(11), serves a useful winnowing function. It prevents such applications from proceeding in circumstances where the difficulties associated with the application are readily apparent.

[33] It is important to note that the two grounds upon which the summary trial application can be dismissed, based on a preliminary motion under Rule 9-7(11)(b),

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are disjunctive. The second ground in subparagraph (ii) that "the summary trial application will not assist the efficient resolution of the proceeding" is a standalone ground.

[34] In *Axion* at paras. 31–33, Justice Sharma sets out the considerations to be taken into account when assessing whether to permit a summary trial, which will resolve only one or a subset of the issues, in the overall proceeding:

> [31] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at para. 110, this court specifically addressed the factors relevant to suitability in situations where a summary trial would resolve some but not all issues in an action. The court addressed the factors to consider, which revolve around two primary issues: (1) whether the court can find the facts necessary to determine the issues of fact or law, and (2) whether it would be unjust to decide the issues by way of summary trial.
>
> [32] On the second ground, the court held that the following considerations arise:
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> a. The implications for determining only some of the issues in litigation, which requires the court to consider:
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> i. potential for duplication/inconsistent findings which relates to whether issues on summary trial are intertwined with those left for trial;
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> ii. potential for multiple appeals;
>
> iii. novelty of issues to be determined.
>
> b. amount involved;
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> c. complexity;
>
> d. urgency;
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> e. any prejudice likely to arise by reason of delay;
>
> f. cost of conventional trial in relation to amount involved.
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> [33] In *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, the BC Court of Appeal cautioned against approaching the preceding factors as a checklist, although they do provide a good indication of the factors that typically concern the court: para. 28. The court of appeal stated that “case law under Rule 9–7 and its predecessor, Rule 18A, makes it clear that, absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation”: para. 33.

[35] Finally, Rule 9-7(2) provides as follows:

> (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

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> (a) an action in which a response to civil claim has been filed;
>
> (b) a proceeding that has been transferred to the trial list under Rule 22-1 (7) (d);
>
> (c) a third party proceeding in which a response to third party notice has been filed;
>
> (d) an action by way of counterclaim in which a response to counterclaim has been filed.

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Positions of the Parties

[36] The defendant takes the position that the issues in the third party proceeding are inextricably intertwined with the issues in the main proceeding. It submits that although the court will have to interpret the easements in deciding the matters in issue, it will not do so in a vacuum. Rather, it will need to consider the surrounding circumstances regarding how the land was used prior to its sale, how it was divided, and how each parcel was marketed and sold. The defendant says that the circumstances of the sale must be examined, given their position that they understood they were buying the suspension bridge. Accordingly, the matters that will need to be determined in the third party proceeding overlap those at issue in the main proceeding.

[37] The defendant also submits that if their interpretation of the easements is found to be correct, namely that they have access to the bridge and the boardwalks that they thought they were buying, then there would be no need to determine the third party claim. Thus, they argue, proceeding to a summary trial on the third party claim in advance of deciding the issues in the main claim runs the risk of adding unnecessary process, needlessly increasing costs, and wasting judicial resources.

[38] More significantly, the defendant submits that having two separate proceedings runs the risk that two different triers of fact will be placed in the position of potentially making contradictory findings. They rely on the decision in *Kaba v. Cambridge Western Leaseholds Ltd*., 43 B.C.L.R. (3d) 80, 1997 CanLII 2627(C.A.), that such a situation could “constitute an embarrassment to the future trial judge who will hear argument on all the factual and legal issues”.

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[39] The defendant also relies on the decision of *Martin v. McNaughton*, 2009 BCSC 870, which deals with the predecessor rule to the current Rule 22-5(6)–(7) in the context of an application to sever a third party proceeding to have it determined separately. Although it is not argued in its notice of application, the defendant submits at the hearing before me that the test set out in *Martin* is applicable and that the onus is on the third party to bring an application to sever the third party claim from the main proceeding.

[40] The defendant says that the third parties have not provided the court with any evidence to demonstrate that they will be prejudiced if the third party proceeding is not heard in advance of the main proceeding. Indeed, the third parties concede in their response to the application that there is no urgency for the summary trial to be heard and no special prejudice if the summary trial is not heard.

[41] Finally, the defendant submits that the plaintiff's estimate that the summary trial will only take one day is wholly inadequate, particularly given that this application devoted to procedural issues took a full day to argue. As such, they submit that the time savings that the third parties suggest would result from having the summary trial determined first and separately are overblown.

[42] The third parties submit that their proposed manner of proceeding is specifically contemplated for by Rule 9-7(2)(c) which allows for an issue or a third party proceeding generally to be determined by summary trial. The third parties submit that it is not bringing an application to sever the third party proceeding nor is it required to do so.

[43] The third parties submit that they are not litigating in slices, as they wish to have the entirety of the third party proceeding determined summarily. Further, they submit that only the judge on the summary trial will be in a position, with the benefit of a full record, to determine whether the third party claim is suitable for summary disposition and, in particular, whether the issues are so entwined to make it inappropriate to hear the issues in the summary trial separately from those in the main action.

[44] The third parties submit that this case is simply about the interpretation of the easements. Further, they submit that Barry Siebenga's evidence shows that he made no representations regarding the easements and, therefore, there are unlikely to be any conflicts in the evidence.

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[45] While the third parties do concede that there is no urgency to having the third party claim heard and no special prejudice if it is not heard summarily, they submit that the costs of a summary trial would be significantly less than being required to participate in a full trial.

Analysis

[46] There is some dispute between the parties as to the legal test that governs the resolution of this application. I am of the view that the principles articulated by Justice Sharma in *Axion* at paras. 31–33 are applicable.

[47] I accept the submissions of the third parties that I do not have the record before me to determine whether the issues in the summary trial are suitable for disposition by way of summary trial under Rule 9-7(11)(b)(i). The defendant has not filed any affidavit evidence which would allow me to assess the extent to which there are any conflicts in the evidence that are not appropriate to resolve on the basis of affidavit evidence.

[48] Nonetheless, I find that this application can be disposed of under Rule 9-7(11)(a) or, alternatively, Rule 9-7(11)(b)(ii).

[49] I am unable to identify a good reason why the issues in the third party proceeding should be isolated and tried separately from the issues in the main proceeding.

[50] Based on the pleadings, I find that there is the potential for both duplication and the risk of inconsistent findings regarding the circumstances of the sale of the Jaff Lands. In my view, evidence will be required to be called in both the third party proceeding and the trial of the main action regarding the circumstances under which

the parcels were divided, what the easements say, and how the lots were marketed and sold.

[51] I can see no justification for the duplication of judicial resources that would be required to hear the third party issues separately. It will be more efficient for one judge to adjudicate all of the issues in this proceeding.

[52] Further, if the summary trial is heard in advance of the main proceeding, there is also a risk that an appeal of that decision will delay the hearing of the main proceeding.

[53] The third parties concede that there is no urgency to having the summary trial heard, nor any special prejudice if it is not. Further, I do not accept that resolving the summary trial prior to the main action will necessarily eliminate the participation of the third parties as witnesses at the trial of the main action.

[54] I find that there will be significant prejudice to the defendant if they are required to first defend the third party proceeding separate and apart from the issues in the main proceeding. A resolution of the third party claim may ultimately not be required if the defendant's interpretation of the easements is accepted. As such, the defendant will be prejudiced by incurring costs to defend the third party proceeding before it is determined whether it is even necessary to resolve those issues. The defendant may also lose strategic advantages by being required to first defend the summary trial proceeding. This is particularly so in light of the immediate family connection between the third parties and the owners of the plaintiff.

[55] For these reasons, I am satisfied that it will not assist the efficient resolution of this litigation to try the issues in the third party proceeding separately from those in the main action. Accordingly, I dismiss the summary trial application.

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[56] My preliminary view is that the defendant is entitled to their costs as they were successful on this application, but I am willing to hear from counsel should either wish to make further submissions as to costs.

"Hoffman J."

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