

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *CCR Resort Ltd. v. Jaff Family Resort Holdings Ltd.*,  
2024 BCSC 1658

Date: 20240906  
Docket: S140310  
Registry: Kelowna

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 A. Ross

## Reasons for Judgment

Counsel for the Plaintiff:

M.E.A. Danielson

Counsel for the Defendant:

D.W. Draht

Place and Date of Trial/Hearing:

Kelowna, B.C.  
August 8–9, 2024

Place and Date of Judgment:

Kelowna, B.C.  
September 6, 2024

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**Introduction**

[1] The plaintiff seeks an injunction preventing the defendant from blocking access to certain lands located near Malakwa, British Columbia.

[2] The plaintiff is the registered owner of the lands in question. The defendant holds an easement over those lands.

[3] For context, both the plaintiff and the defendant operate tourist businesses on adjacent properties.

[4] The portion of the land, and the business, that is in dispute constitutes a walking path, suspension bridge, and viewing platform over waterfalls on a waterway known as “Crazy Creek”. As explained in more detail below, the plaintiff’s business operates primarily on the west side of the creek. The defendant’s business operates primarily on the east side. The west end of the suspension bridge is on plaintiff’s land. The east end of the suspension bridge is on the defendant’s land.

[5] The defendant holds two easements to use certain of the plaintiff’s lands. In this action, the plaintiff alleges that the defendant is breaching the terms of one of the easements by restricting the plaintiff’s access to lands owned by the plaintiff.

[6] The plaintiff’s position is that this is a straightforward issue relating to the rights conferred by an easement over land.

[7] The defendant submits that the issue is equally straightforward from its perspective. The defendant says that the two easements, in the context of the business relationship, provide for exactly the activities that it is undertaking.

[8] For the reasons set out below, I dismiss the plaintiff’s application.

**Issues**

[9] The issue for me to decide is whether the plaintiff is entitled to an injunction preventing the defendant from blocking access to a part of the plaintiff’s land.

[10] As discussed below, the defendant acknowledges that it has no legal basis to block the plaintiff, its owners, employees or agents from that land. The real issue is whether the defendant can deny access to the plaintiff's customers.

**Description of the Parties and the Lands**

[11] The main areas in dispute provide access to hiking trails and a suspension bridge located, in part, on CCR's land. The suspension bridge spans "Crazy Creek" near a waterfall. Visitors to the suspension bridge must hike along one of the two trails carved through the forest. There are two access points to the trails and the suspension bridge: one from plaintiff's land and one from the defendant's land.

[12] The underpinning of the dispute between the parties arises from the placement of the suspension bridge over Crazy Creek:

- a) The eastern end of the bridge is on the property owned by the defendant.
- b) The western end is on property owned by the plaintiff.

[13] As discussed below, until 2020, the two properties were owned by related entities.

**The Plaintiff and Its Land**

[14] CCR is the registered owner of property located at 6162 TransCanada Highway, Malakwa, British Columbia (the "CCR Lands").

[15] CCR operates a business known as the Crazy Creek Hot Pools Resort ("CCR Resort"). CCR Resort provides access to hot pools, cabins, and RV sites. It also advertises access to hiking trails and the suspension bridge, among other amenities.

[16] The CCR Lands comprise one parcel of land that is bisected by both the Trans-Canada Highway and by Crazy Creek. The best metaphorical visual image I can give is to describe the CCR Lands as a square. Approximately 15 percent of the area in the top right corner of that square is bisected by the Trans-Canada Highway, creating a triangle of orphaned land. The parties describe that triangle as "CCR

North” and the remaining parcel (to the south of the highway) as “CCR South”. I use the same nomenclature.

[17] The triangle of land comprising CCR North is further bisected, near the right-hand border, from north to south, by Crazy Creek. Again, this is a simplified description. The property lines are not regular.

[18] The main business activity of the plaintiff, being the operation of the CCR Resort, takes place on CCR South. However, since 2011 it has earned income from ticket sales to the suspension bridge. It has always shared that revenue with the owner of the other property (now, the defendant).

### **The Defendant and Its Land**

[19] The defendant Jaff Family Resort Holdings Ltd. (“Jaff Resort”) owns the lands and premises located at 6207 TransCanada Highway (the “Jaff Lands”). The main business of Jaff Resort is providing access to tourists to view Crazy Creek from the suspension bridge.

[20] The Jaff Lands are located on the north side of the Trans Canada Highway. They are immediately to the east and north of the CCR North, although, again, the parcels are not regularly shaped.

[21] When tourists pull into the Jaff Resort property, they purchase tickets to visit the hiking trails and the suspension bridge.

[22] If the tourists walk the length of the suspension bridge from the east (on the Jaff Lands), they will end up on CCR North. The opposite is true for tourists who walk onto the bridge from the west (CCR North).

### **A Brief History of the Business Operations**

[23] Some of the dates below are unclear due to the passage of time. However, those missing pieces and dates do not affect the outcome of this application.

[24] At all material times, the CCR Lands have been owned and operated by CCR Resort Ltd.

[25] Until 2020, the Jaff Lands were owned by Crazy Creek Developments Ltd. (“CCD”).

[26] Mr. Barry Siebenga was the operating mind of both CCR Resort Ltd. and CCD.

[27] In or about 2004, the suspension bridge was built over Crazy Creek. The construction of the suspension bridge required substantial concrete bases to be installed on each end of the structure. No easement was granted at the time, despite the fact that the bridge was located on properties owned by separate entities. I infer that no easement was granted because the owners of the two properties were related companies, both controlled by Barry Siebenga.

[28] Until approximately 2011, the only access to the suspension bridge was from the Jaff Lands (then owned by CCD). There was no access to CCR North, because that triangle of land was orphaned by the Trans Canada Highway. There was no ability for anyone to access the CCR North from CCR South.

[29] In 2011, a pedestrian bridge was built from CCR South, over the Trans Canada Highway to CCR North. As a result of the construction of that bridge, there were two access points to the suspension bridge: one from the Jaff Lands and one from CCR North.

[30] A ticket booth was constructed on CCR North. The history of the construction and staffing of that ticket booth is unclear. Again, from 2011 until 2020, the delineation between the two owners was muddled.

[31] On December 20, 2011, two easements were registered against the CCR Lands. Again, at the time of the registration of the two easements, both of the subject properties were owned by related companies. Barry Siebenga signed on

behalf of both the dominant tenant (then CCD) and the servient tenant (CCR). In high overview:

- a) The First Easement was registered against the entirety of CCR North. It granted the owner of the Jaff Lands the right to operate a business and construct buildings on CCR North.
- b) The Second Easement was registered against the entire CCR property. It allowed tourists who wished to attend the Jaff Resort attraction, to exit on the highway, park at CCR South, and then access CCR North (and the suspension bridge) via the pedestrian bridge over the Trans Canada Highway. (This easement meant that eastbound traffic did not have to turn across the westbound lanes to enter the business now owned by the defendant.)

[32] I discuss the two easements in detail below.

[33] The best evidence is that, following 2011, the owner of the Jaff Lands (then CCD) constructed a ticket booth at the north end of the pedestrian bridge (on CCR North). That business started selling tickets for access to the suspension bridge. In addition, tickets were also sold at the main office of CCR Resort. Again, I infer that no real distinction was drawn because of the related ownership of the two entities.

[34] That was the situation until the summer of 2020. In July and August 2020, two things happened:

- a) CCD sold the Jaff Lands and the ongoing tourist business to the defendant, Jaff Resort.
- b) CCR entered into a management agreement with Barry Siebenga's two sons, Jason and Devon Siebenga.

[35] Almost immediately after August 2020, a dispute arose over CCR's right to sell tickets to tourists to visit the suspension bridge.

[36] The initial dispute was smoothed over with a series of yearly contracts. Those contracts provided that:

- a) CCR would be entitled to sell tickets to the attraction;
- b) CCR would pay Jaff Resort a percentage of the revenue (either 70% or 80%).

[37] That was the situation until the beginning of 2024 when the representatives of Jaff Resort indicated that they had no interest in pursuing a contract for 2024. Instead, Jaff Resort would staff the ticket booth on CCR North and require all guests to purchase a Jaff ticket to access the suspension bridge. Effectively, this move precluded CCR from selling tickets to the trails and suspension bridge.

[38] I heard evidence of discussions between the younger Siebengas and representatives of Jaff Resort in 2023 wherein CCR indicated that it wished to split the revenue from ticket sales on a 50/50 basis. It is common ground that no agreement was reached for 2024.

### **The Origin of this Action**

[39] After Jaff Resort informed CCR that it would be manning the ticket booth on CCR North and selling its own tickets CCR took the position that CCR owns the fixtures located on CCR North, and that CCR and its guests are entitled to free and unobstructed access to the CCR Lands and fixtures thereon.

[40] Not surprisingly, the Jaff Resort staffing of the ticket booth on CCR North has caused conflict and confusion. CCR's customers have been refused access to through the ticket booth unless they purchased a ticket from Jaff Resort.

[41] The defendant acknowledges that it has restricted access to CCR customers who do not purchase a Jaff ticket. However, Jaff Resort says that it has continued to provide access to CCR North to CCR, its owners, agents, and employees. Jaff Resort only restricted access to CCR's customers. In that respect:



- a) Jaff Resort says that it is acting within its rights under the First and the Second Easements.
- b) CCR says that Jaff Resort is breaching the First Easement by restricting CCR's use of its own lands.

[42] On May 6, 2024, the plaintiff commenced this action, in which it seeks, among other relief, a permanent injunction.

[43] On June 5, Jaff Resort filed its response and a counterclaim. Jaff Resort also seeks an injunction, although that is not part of this application.

[44] Jaff Resort has also issued third party proceedings against Barry Siebenga and CCD. Again, those pleadings do not influence this application, but they provide some context, which I discuss below.

### **The Easements**

[45] There is a dispute over the proper contractual context for this application:

- a) The plaintiff submits that this litigation should be governed by the rights of the parties as described in the First Easement.
- b) The defendant submits that the First Easement must be read in conjunction with the Second Easement.

[46] An easement creates two tenements:

- a) A servient tenement (here, CCR North and CCR South) upon which another party (Jaff Resort) has certain rights granted by the easement;
- b) A dominant tenement (here, the owner of the Jaff Lands) which provides the owner of the Jaff Lands the right to use parts of the CCR Lands under certain terms.

[47] The First Easement reads, in part:

WHEREAS:

...

C. The transferee [Jaff] intends to construct certain improvements on the Dominant Tenement [Jaff Lands] including, but not limited to, commercial buildings, tourist attractions, including suspension bridge ... which will encroach on the Servient Tenement [CCR North].

...

1. The Transferor [CCR] grants to the Transferee [Jaff Resort] an Easement, in perpetuity, for the benefit of the Dominant Tenement [Jaff Resort] ... and the owner and occupiers for the time being of the Dominant Tenement, and their respective agents, servants, workers, contractors, licensees, invitees and all other persons by their authority:

(a) to permit the encroachment of the Improvements on the Easement Area and without restricting the generality of the foregoing to enter on the Easement Area to inspect maintain alter repair, reconstruct, remove or replace the improvements and to perform any work incidental thereto;

(b) to enter upon and to pass and repass both with and without vehicles... for the purpose of pedestrian and vehicular access, including ingress and egress, on, over and through the Easement Area ...

...

(e) to make place, erect, construct, maintain, repair and replace signage, decoration, lettering and advertising on, over and upon the Easement Area;

...

2. The Transferor [CCR] covenants and agrees with the Transferee [Jaff] not to make, place, erect, construct, or maintain on the Easement Area any building, structure, foundation or obstruction whatever, nor plant any growth nor place any soil or debris or other obstruction which might interfere with the access to any part of the Easement Area.

3. The Transferor further covenants and agrees with the Transferee not to otherwise do or knowingly permit to be done any act or thing which might interfere with the use by the Transferee of the easement area for the purposes herein stated.

...

6. The Transferee further covenants and agrees with the Transferor as follows:

...

(b) that the Transferee will, at its sole cost, operate and maintain the improvements and the Works and will do so in a safe and proper manner an, in the event that the Transferor is required to operate or maintain the Improvements or the Works, indemnify the Transferor for the cost of doing so;

...

(d) that the Transferor may use the Easement Area for its own purposes and enjoyment in conjunction with the rights herein granted to the Transferee.

7. The Transferor and the Transferee agree with one another that:

- (a) no interest in fee simple to the Servient Tenement shall pass or be vested in the Transferee under or by virtue of this Easement Agreement and the Transferor may fully use and enjoy the Servient Tenement subject only to the rights and restrictions herein set out for the benefit of the Transferee;
- (b) the rights, privileges and obligations herein set forth are and shall be of the same force and effect to all intents and purposes as covenants running with title to the Dominant Tenement in the Servient Tenement and shall inure to the benefit of and be binding upon not only the Transferor and the transferee but also their respective successors, assigns, successors in title, servants, agents and licensees; and ...

[48] The Second Easement allowed Jaff Resort customers to drive and park their vehicles on the plaintiff's land (CCR South). Those same Jaff Resort customers could then walk from their parked vehicles across CCR South and the pedestrian bridge to CCR North. (Again, when these easements were granted, the two parcels were owned by related companies.)

### **This Application**

[49] In very simple terms:

- a) the plaintiff seeks an interim injunction preventing the defendant from “obstructing, interfering or any way limiting access or use by the Plaintiff, its agents, servants or guests” of CCR North;
- b) the defendant agrees that it cannot limit access to CCR North of the plaintiff, its owners, agents or servants. The defendant's position is that it is entitled to limit the access of CCR's “guests”, meaning the plaintiff's customers.

### **Test for Granting an Injunction**

[50] I discuss the test for granting an injunction below. I note the defence submission that the plaintiff is, in fact, seeking a mandatory injunction. I do not need

to address that submission, because I have found in favour of the defendant on the lower standard.

[51] The test for the granting of an injunction is drawn from the oft-cited decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117:

- a) The claim that forms the basis for the injunction must raise a serious issue to be tried;
- b) The applicant will suffer irreparable harm if the injunction is not granted; and
- c) The balance of convenience favours the granting of the injunction.

[52] I address each factor below. However, in brief overview, I reach the following conclusions in reaching my decision to dismiss the plaintiff's application:

- a) I find that there is a serious issue to be tried.
- b) I find that there is no irreparable harm.
- c) I find that the balance of convenience lies with the defendant.

**Serious Case to be Tried**

[53] On the first ground, the bar is low. The plaintiff need only establish that its claim is not frivolous or vexatious. The plaintiff says that it has easily cleared that bar.

[54] The plaintiff bases its claim on the property rights granted by easements.

[55] The plaintiff submits that an easement cannot create an exclusive or unrestricted right to the use of a piece of land. It is, by definition, a right to use the land that is less than an ownership interest. In *Macdonald v. Grant*, 85 B.C.L.R. (2d) 180, 1993 CanLII 1164 (S.C.), Justice Baker wrote:

However, "Gale on Easements", 14 Ed., London, Sweet and Maxwell, 1986, supports the view that even a grant of an easement cannot usurp the proprietary rights of the servient owner. At p.30 of his text he states the following:

"An easement, as already mentioned, involves a diminution of natural rights of ownership, and a grant under which the proprietary rights of the so called servient owner are either shared or usurped cannot create an easement. For instance 'No man can be considered to have a right of property, worth holding, in a soil over which the whole world has the privilege to walk and disport itself at pleasure'. The line is difficult to draw and each new case would probably be decided on its own facts in the light of common sense."

[56] The plaintiff says that, by refusing access to CCR North, the defendant is asserting a possessory right to that land. It is excluding access to the owner of the land. In law, an easement cannot provide such a possessory right that excludes the owner of the land.

[57] I note that the defendant does not dispute the overriding proposition that the easement does not create an exclusive possessory right to CCR North. The defendant says that it only seeks to exclude the plaintiff's customers from CCR North. The defendant's evidence seeks to make it clear that its employees have been instructed to provide free access to the owners and employees of the plaintiff.

[58] Again, the defendant submits that the easement provides it with the authority to restrict access to customers of the plaintiff. The defendant submits that it is doing exactly that by staffing the ticket booth on CCR North.

[59] In my opinion, the plaintiff satisfies the test for establishing a serious case to be tried. The claim is neither frivolous nor vexatious. The issue for the trial judge will be the breadth and proper interpretation of the two easements.

### **Irreparable Harm**

[60] The plaintiff submits that in cases involving land use, injunctive relief is preferable to damages. The ownership of land denotes the right to use the land. Justice Taylor put the matter very plainly in *Ward v. Cariboo Regional District*, 2021 BCSC 1495:

[302] Where there is an interference with property rights, the law is clear that injunctive relief is strongly favoured.

[61] The plaintiff submits that the defendant is barring access to the plaintiff's land. Injunctive relief is required to secure access to the property. Hence, the plaintiff is suffering irreparable harm.

[62] Again, the defendant does not dispute the legal propositions advanced by the plaintiff. The defendant focusses on the wording of the two easements. The defendant does not seek to, and has not purported to, exclude the plaintiff, its owners, agents, or employees from CCR North. Instead, the defendant is only excluding the plaintiff's customers.

[63] The defendant submits that the two easements must be read together:

- a) they were registered at the same time;
- b) they are designed to achieve one overall goal.

[64] Again, the context of the registration of the two easements relates to the 2011 construction of the pedestrian overpass which provided access to CCR North from CCR South and, by definition, from the location where the plaintiff operates its business.

[65] The defendant submits that, in the context of the two easements, it makes no business sense for the plaintiff to be allowed to sell tickets to access the suspension bridge.

[66] The defendant submits that, in combination, the two easements permit Jaff Resort to operate the tourist attraction on CCR North. The access to that attraction was, in part, by way of the ticket booth at the end of the pedestrian bridge over the TransCanada Highway (on CCR North). Pursuant to the Second Easement, those Jaff Resort customers would utilize CCR South for parking. Hence, if the plaintiff were entitled to sell tickets to the suspension bridge, those (potential Jaff Resort) customers would never become Jaff Resort customers. They would become CCR

customers as soon as they purchased a CCR ticket. Hence, the Second Easement would lose all meaning and benefit. Thus, the First Easement must be read in the context of the Second Easement.

[67] The defendant further submits that it would make no business sense to have an attraction with two entrances if Jaff Resort only controlled one of the entrances. Jaff Resort notes that the First Easement provides that CCR must operate “in conjunction with the rights herein granted” to Jaff Resort. The defendant says that “in conjunction with” recognizes and protects Jaff’s existing business. Further, the First Easement states that CCR’s right to use CCR North is “subject only to the rights and restrictions ... for the benefit of [Jaff Resort].

[68] Hence, Jaff Resort argues that the two easements, read together, were designed to provide Jaff Resort with control over entry to the attraction from CCR North. The rights granted to Jaff Resort included the right to run a commercial tourist operation. CCR’s right to use the land is limited by the two easements.

[69] The defendant’s position is that the two easements, read in conjunction:

- a) provide the defendant with the authority to operate its tourist business;  
and
- b) limit the plaintiff’s ability to access CCR North to activities that are “in conjunction with” the defendant’s business.

[70] In my opinion, the defence submissions on the merits of its position provides important context for the plaintiff’s position on “irreparable harm”.

[71] I find that the plaintiff’s submission on “irreparable harm” overstates its case. I accept the defence position that it does not seek to exclude the plaintiff from its CCR North. As stated above, the defendant is only limiting access to CCR’s customers. The entity that is CCR still has full access to CCR North.

[72] It follows that, in my opinion, the plaintiff is not suffering irreparable harm. The loss suffered by the plaintiff (if proven) is the inability to sell tickets to customers.

[73] Of course, this is an injunction application, and not a trial. However, given that the plaintiff, its owners, agents, and employees will have access to CCR North, in my opinion, the plaintiff will not suffer any irreparable loss.

[74] In my opinion, the loss to the plaintiff (a corporate entity) if proven at trial, will be easily calculable. The evidence of the defendant is that they have a special card-reader indicating the total revenue from the ticket booth on CCR North. Presumably, those figures will provide some basis for the calculation of the plaintiff's damages (if successful in trial).

[75] Based on my reasoning above, the plaintiff will not suffer irreparable loss. This factor alone would be sufficient to dismiss the injunction application.

**Balance of Convenience**

[76] I am also satisfied that the balance of convenience lies in favour of the defendant.

[77] The accounting evidence indicates that the ticket sales to the suspension bridge constitute a significant majority of the defendant's annual income. The same cannot be said of the plaintiff.

[78] So far, in 2024, Jaff Resort has collected \$39,601 in ticket sales from the booth on CCR North. That level of financial activity gives some idea of the starting point for the assessment of the plaintiff's potential damage claim.

[79] I am satisfied that enjoining the defendant from controlling the access from CCR North could have a negative effect on the economic viability of the defendant. In my opinion, that weighs heavily in the defendant's favour on this aspect of the test.

[80] I further note that the First Easement requires the defendant to maintain the premises in safe condition and insure against loss. That obligation further speaks to the balance of convenience between the parties. The defendant may be placed in a financial position wherein it cannot afford to maintain the attraction in a safe



condition, but is forced to allow tourists onto the site because it does not control the CCR North ticket booth. It is conceivable that the defendant may seek to close the attraction for required repairs, putting it in breach of an order of this court.

[81] Looking at the issue from the opposite end of the bridge, if the injunction were granted, CCR could undercut Jaff Resort's pricing, thus taking a large share of the tourist income. I noted the terms of the First Easement above. Jaff Resort has the obligation to maintain and repair the trails and the bridge. Hence, in theory, if it obtained the injunction, CCR would have no need to build any cost structure into its pricing.

[82] For those reasons, in my opinion, the balance of convenience clearly lies with Jaff Resort.

**Summary and Decision**

[83] It follows from my discussion above that the plaintiff's application for an injunction is dismissed.

[84] The defendant is entitled to the costs of this application, at Scale B, payable forthwith.

"A. Ross J."