

CITATION: Legacy Hospitality Exeter Inc v. Zurich Insurance Company Ltd, 2026 ONSC 5509

COURT FILE NO.: CV-26-00000353-0000

DATE: 2026/09/28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LEGACY HOSPITALITY EXETER INC., O/A COURTYARD BY MARRIOTT
– LONDON, Applicant

AND:

ZURICH INSURANCE COMPANY LTD., Respondent

BEFORE: Justice I.F. Leach

COUNSEL: Gordon McGuire, for the Applicant

Gregory J. Tucker, K.C., for the Respondent

HEARD: September 28, 2026

ENDORSEMENT

CORRECTION NOTICE

OCTOBER 5, 2026: THE ENDORSEMENT RELEASED ON SEPTEMBER 28, 2026, CONTAINED SEVERAL CLERICAL AND TYPOGRAPHICAL ERRORS. A CORRECTED VERSION IS ISSUED HEREBY. THE CORRECTIONS ARE ADMINISTRATIVE IN NATURE AND DO NOT ALTER THE SUBSTANCE OF THE ENDORSEMENT OR THE DISPOSITION OF THE MATTER.

[1] This matter was before me today for the scheduled special appointment hearing of an application brought for declaratory relief in relation to an underlying policy of insurance issued in relation to a hotel property owned by the applicant here in London.

Absence of confirmation

[2] Neither party had uploaded a confirmation in relation to the scheduled hearing; a failure which would have justified a complete non-hearing of the matter pursuant to “Superior Court of Justice – Southwest Region - Notice to the Public and the Profession” issued by Regional Justice Howard on August 13, 2025. Amongst other things:

- a. The notice reminded parties of their obligation to deliver and upload timely confirmations in relation to scheduled hearings, having regard to the increased importance judges necessarily placed on such confirmations, (e.g., to know with certainty that a matter is proceeding, the issues to be argued, and the material to be reviewed), such that preparation time will not be wasted in a current environment of growing demands on the judiciary and corresponding scarcity of judicial time.
 - b. The notice warned counsel that judges of the region had been directed to consider strict enforcement of Rule 37.10.1(4) of the *Rules of Civil Procedure* and Subrule 14.(11.1) of the *Family Law Rules* to deny a hearing of a matter to address and discourage failures to deliver and upload such confirmations in a timely way; i.e., to ensure their availability to the judge assigned to hear such matters.
- [3] Notwithstanding that failure, I spent considerable time over the weekend reviewing the substantial material, (approximately 1800 pages), that had been uploaded by the parties in relation to the application; i.e., to prepare for a discretionary hearing of the application on its merits in any event, if the matter was permitted to proceed as scheduled.

Preliminary concerns

- [4] While doing so, I nevertheless independently formed growing concerns, during my initial review of the material filed by the applicant, that there were fundamental procedural issues, (with corresponding substantive concerns), about the Applicant's request to have its request for relief addressed by way of this application proceeding; concerns that were reinforced when I then reviewed the material filed by the Respondent, echoing and formally raising the same concerns.
- [5] When the matter was called this morning, I informed counsel that I had reviewed the tendered application material in its entirety, so that I would be prepared to address the substantive issues if that was found to be appropriate. I nevertheless asked the parties to address the procedural issues as a threshold matter.
- [6] Having received submissions from counsel in that regard, I indicated that, for reasons to follow, I would be dismissing the application herein without prejudice to the ability of the Applicant to raise and/or pursue the issues raised by the application in the context of a previously commenced and extant/ongoing action in this court, (i.e., *Legacy Hospitality Exeter Inc. v. Zurich Insurance Company Ltd. and Zurich Insurance PLC*, London Court File No. CV-23-00701331-0000, commenced on June 19, 2023), addressing the same issues.
- [7] These are those promised reasons.
- [8] Time constraints prevent a more fulsome endorsement, but these relatively brief reasons hopefully will make clear my principal concerns.

Further background

- [9] Again, the material filed in relation to the application was substantial; i.e., addressing issues raised by the parties' substantial motion records, as well as a factum, responding factum, reply factum and sur-reply factum, and a large number of authorities cited and relied upon by the parties.
- [10] I will not endeavour to address the underlying facts, disputed issues and competing arguments in detail in this context. For present purposes, and only by way of general overview, the background to this matter includes the following:
- a. The applicant herein, (Legacy Hospitality Exeter Inc., operating as Courtyard by Marriott – London), is an Ontario corporation which operates a “Marriott” branded hotel on Exeter Road here in the city of London. Another hotel under the same or related ownership, (albeit a “Hilton” branded hotel), is operated on an adjacent parcel of land.
 - b. In or around May of 2021, the owners/operators of those two hotels engaged in a process of ensuring that insurance arrangements would continue to be in place for those two hotels
 - c. For a number of years, Zurich Insurance plc (otherwise known informally as “Zurich UK”), had been offering insurance in relation to such hotels via its “international hotel program”; an arrangement whereby Zurich UK issues a “master policy” of insurance to each hotel group to be insured via the program, with a “local policy” then being issued if and as necessary, (to comply with local laws), in the country where an individual hotel or group of hotels is located.
 - d. In May of 2021, Zurich UK, (via its underwriter Jonathan Harris), was asked to consider a submission requesting the provision of insurance, via the aforesaid international hotel program, for the two London hotels noted above. The would-be insureds were represented, during the ensuring dealings with Mr Harris, by their authorized insurance brokers and agents, Arthur J. Gallagher International Ltd. and/or related entities, hereinafter referred to as “AJG”.
 - e. Various documents and communications were exchanged during the course of those arrangements. The precise labels and descriptions assigned to such documents, and which documents may or may not have been intended to be referenced and/or incorporated by reference into resulting insurance policy documentation, are themselves now matters of dispute and controversy between the parties. However, there seems to be no dispute that such documentation included provision of documentation indicating/confirming the location of the two hotel properties and estimated building values, as well as estimated values for contents and business interruption, in relation to each hotel.
 - f. There also seems to be no dispute that the dealings between Zurich (via Mr Harris) and the would-be insureds (via AJG), resulted in a situation where there was not only a relevant “Master Policy” in place, (i.e., a policy issued in the United

Kingdom by Zurich Insurance plc, UK Branch, bearing policy number 711558918), underlying the insurance arrangements, but a “Local Policy” issued, (i.e., a policy issued in Canada by Zurich Insurance Canada Ltd., bearing policy number 8877855).

- g. There similarly appears to be no dispute that the relevant Local Policy was subject to an overall limit of \$42,642,250 in relation to any “occurrence”, in respect of which the policy was intended to provide coverage, and that a loss in respect of which the policy should respond occurred on or about January 9, 2022, when a sprinkler system ruptured on the sixth floor of the relevant Marriott branded hotel on Exeter Road, causing substantial damage to the hotel’s building and contents, as well as an interruption to the hotel’s business operations.
- h. At the risk of vast over-simplification, the resulting dispute between the parties centres on whether the insured is permitted to claim loss coverage up to the overall “occurrence” limit of \$42,642,250 specified in the Local Policy, or whether coverage available in relation to each of the two adjacent hotels covered by the Local Policy, (including the Marriott branded hotel that was damaged), is subject to an intended “sub-limit” of coverage applicable to losses claimed in relation to either of the two hotels when individually damaged. In broad terms, and again risking vast over-simplification:
 - i. The insured contends that the relevant Local Policy could have provided for such a sub-limit and contemplated that possibility, but actually failed to do so, such that the relevant policy should be approached, interpreted and applied as a “blanket” policy of insurance that provides one blanket limit of coverage, (i.e., the occurrence limit noted above), available to respond to either of the two hotel locations covered under the policy.
 - ii. The insurer contends that the broader “occurrence” limit was intended to apply only in relation to an occurrence simultaneously damaging both hotel properties, (a realistic possibility given the adjacent nature of the two properties), that the Local Policy otherwise clearly was not intended to extend coverage broader in scope than the corresponding Master Policy, (which set a separate sub-limit for each of the locations at an amount representing the declared building, contents and business interruption values for each location), and that a proper reading of the Local Policy, having regard to the intended meaning of the specific terms employed by the parties, (e.g., the “Schedule of Locations” referred to therein), and documents said to have been incorporated by reference into the Local Policy document, (e.g., the statement of values, location schedule and declaration documents), make it clear that the overall occurrence limit of liability of \$42,642,250 was subject to a specific location limit of the provided and agreed valuations for the properties, which in turn governed the amount of insurance premiums to be paid for such coverage. In the alternative, (if the wording of the Local Policy is for some reason not found to make clear that

intended sub-limit on coverage, although the insurer says it does, the insurer says that the circumstances clearly call for the equitable remedy of rectification insofar as there is clear and available evidence of the parties' actual common intention in that regard; i.e., not the subjective intention of the insurer and its underwriter Mr Harris, but an intention clearly shared by Mr Harris and AJG as the representatives of the insurer and the insured.

- i. As negotiations between the parties regarding the dispute continued, the insured commenced an action in this court; i.e., the already noted action in *Legacy Hospitality Exeter Inc. v. Zurich Insurance Company Ltd. and Zurich Insurance PLC*, London court file no. CV-23-00701331-0000, initiated by way of a statement of claim issued on June 19, 2023. That pleading speaks for itself. By way of general description, however, it seeks \$5,000,0000 in damages from the defendant insurers for alleged breach of contract, owing to the defendants' alleged failure to provide coverage and reimbursement for all of the losses sustained by the plaintiff in relation to the sprinkler rupture that occurred at the relevant Marriott branded hotel on January 9, 2022. As counsel for the Applicant described it during submissions before me, the claim was drafted broadly to assert a claim against the defendants "to the extent they don't pay, under the policy, what they're required to pay and what's owing under the policy".
- j. Although there was some suggestion in the material filed by the Respondent in this proceeding that the aforesaid action was commenced out of time, it was confirmed during submissions before me that any suggestion in that regard was made in error. In particular, the claim to be asserted by the plaintiff, pursuant to the disputed insurance coverage, was acknowledged to have been the subject of a tolling agreement that extended to commencement of the aforesaid action. It was nevertheless undisputed that there was no tolling agreement extending the time for commencement of a proceeding in relation to the dispute up to the time on which the notice of application herein was issued on February 2, 2026.
- k. The relief sought in the current application focuses on very specific declaratory relief, essentially asking that the only coverage limit applicable in the circumstances is the indicated general "occurrence" limit of \$42,642,250, without any further restriction or limitation created by any sub-limit as asserted by the insurer. In particular, the substantive relief sought by the application is specified to be as follows: "a declaration that the Hotel Owners and Operators Property and Business Interruption Insurance policy bearing policy no. 8877855 with policy period May 18, 2021 to May 17, 2022 provides a 'per occurrence' limit of \$42,642,250 and does not contain a sub-limit limiting recovery of building damage at the 864 Exeter Road location to \$17,000,000".
- l. The material filed in support of this application by the insured includes various documents introduced as exhibits by a short (two-page) affidavit sworn by a law clerk employed by counsel for the Applicant. In particular, that presented documentary evidence relied upon by the Applicant includes a copy of a

Declaration relating to the policy, a copy of what has been described as the “Local Policy”, a copy of what has been described as the “Master Policy”, and copies of correspondence exchanged between insurance adjusters retained by Zurich Insurance and an insurance adjuster apparently retained by the insured, including attachments thereto including a document referring to policy wording and a blank proof of loss form.

- m. The material filed in response to this application, on behalf of the insurer, includes a detailed eight-page affidavit sworn by Mr Harris, (the property insurance underwriter noted above, employed by Zurich Insurance), which provides evidence outlining the background, communications and some of the associated correspondence leading to writing of the insurance policy, and what Mr Harris essentially characterizes as evidence of the parties’ common intention regarding the parties’ intended agreement regarding coverage limits, which are said to be reflected in terms used in the policy and the parties’ common understanding as to what was meant by those terms, as well as documents that both parties intended to be incorporated into the written policy by way of reference, and are said to have incorporated into the policy by way of reference, so as to create the sub-limit on coverage asserted by the insurer. The affidavit sworn by Mr Harris attaches numerous documents as exhibits, including correspondence by way of various emails, a schedule showing valuations, Google map imaging showing the location of the relevant two hotels here in London, copies of the “line slips” executed in relation to each property, a copy of an executed Declaration referring to declared values, (said to relate to the sub-limits set out in policy wording), a copy of the Master Policy, (which refers to the overall combined property and business interruption loss limits, while also referring to separate specific limits in relation to each of the two hotels), and a copy of the “Local Policy”, which inadvertently was not issued until after the date of the relevant underlying property loss incident/occurrence.

Preliminary concerns

- [11] The above circumstances independently caused me to have concerns about the procedural steps being taken and not taken by the insured, and related substantive issues. Without limiting the generality of the foregoing:
 - a. In my view, the insurer clearly had commenced overlapping and duplicative proceedings in relation to the same underlying dispute. Without limiting the generality of the foregoing:
 - i. In my view, the insurance coverage dispute addressed by the previously commenced action inherently encompasses all potential issues relating to the scope of the underlying insurance coverage provided, including any and all issues that might limit the extent of the insurer’s obligation to provide coverage in relation to the identified occurrence and resulting losses. That would include the specific issue the insured now has attempted to segregate,

isolate and have decided by way of this separate and subsequently commenced proceeding.

- ii. Such duplicative proceedings clearly violate the legislative policy against multiplicity of proceedings set forth in section 138 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, which makes it clear that, as far as possible, multiplicity of proceedings shall be avoided”. The reasons for this are clear. Duplicative proceedings are an inherently inefficient way of addressing disputes, unnecessarily tie up more court resources than necessary, and increase time and expense for all concerned, such that they are inherently oppressive and prejudicial to a party being targeted by multiple and overlapping proceedings addressing claims for the same relief. Duplicative proceedings also inherently give rise to the prospect of inconsistent findings, rulings and verdicts. For all these reasons, duplicative proceedings are inappropriate, inherently an abuse of process, and should be discouraged.
- iii. However, the applicant’s commencement of a duplicative proceeding in this particular case raises additional concerns of a substantive nature. Without limiting the generality of the foregoing:
 1. When a dispute has been formally raised by commencement of an action, the *Rules of Civil Procedure* provide numerous mechanisms to have issues raised by the dispute addressed in a summary way, but subject to specified limitations; i.e., limitations which make clear the circumstances in which resort to such procedures is and is not appropriate, following compliance with other provisions intended to limit the availability of such procedures to circumstances where issues can be addressed with efficiency and fairness to all concerned, with consideration effectively being given not only to the interests of the parties but the court as well, to ensure that court resources are not being devoted inappropriately to matters that should be addressed in another manner.
 2. By attempting to segregate, isolate and advance a specific issue raised in the action by way of a separate application, the insured effectively is attempting to bypass many of the aforesaid procedural limitations and safeguards that apply to issues raised by way of an action. For example:
 - a. Rule 20.01(1) allows a plaintiff, after the defendant has delivered a statement of defence or served a notice of motion, to move with supporting affidavit material or other evidence for summary judgment on all or part of the claim advanced in the plaintiff’s statement of claim. A party bringing such a motion obviously may tender and rely upon

evidence, and realistically must do so, at which point the defence effectively is obliged to respond in kind. However:

- i. The rule generally contemplates the close of pleadings in an action before such a motion for summary judgment is permissible, so that the issues in the dispute will be formally defined by those pleadings; i.e., unless a defendant brings a motion bringing an earlier end to that process. In this case, the defendants to the action commenced by the insurer apparently have not yet delivered a statement of defence in that action brought by the insurer. Nor have they brought a motion.
 - ii. While an incomplete discovery process does not always prevent a summary judgment motion from proceeding, (e.g., insofar as it arguably may prevent the court from finding that there is no genuine issue requiring a trial), a defendant facing a motion for summary judgment, and obliged to “put its best foot forward” in responding to such a motion, arguably is deprived of procedural and substantive fairness when such a motion for summary judgment proceeds without allowing the defendant to garner the documentary and oral evidence capable of being obtained via the discovery process applicable to actions. In the wake of the insured effectively indicating that it now seeks to terminate further negotiation about the dispute and move the matter forward to a litigated conclusion, the defendant insurers seek to exercise the rights of discovery available to them in relation to the action. In that regard, the insurers take particular issue with the insured relying, in support of their application, solely on the affidavit of a law clerk; i.e., an approach which, in the view of the insurers, was not only inappropriate in terms of that law clerk having no direct knowledge of the underlying circumstances, but also effectively shielded the insurer’s agent, (whom the insurers expect to readily confirm the common intentions and meaning of exchanged communications described by Mr Harris), from cross-examination in the application context.
- b. Rule 21.01(1)(a) allows a party to an action to move before a judge for the determination, before trial, of a question of

law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs. However:

- i. No evidence is admissible on a motion under clause (1)(a), except with leave of a judge or on consent of the parties. In proceeding unilaterally with this subsequent application brought after commencement of its action, the insurer essentially seeks to file and rely upon evidence as of right, including evidence not specifically incorporated into its statement of claim by way of reference; i.e., pursuant to Rule 25.06(7) of the *Rules of Civil Procedure*.
 - ii. Decisions of this court have made it clear that Rule 21.01(1)(a) should not be used where, *inter alia*, material facts are in dispute and/or the question depends on a contract, with terms capable of different meanings. See, for example, *Portuguese Canadian Credit Union Ltd. (Liquidator of) v. CUMIS General Insurance Co.*, 2010 ONSC 6107. In my view, both considerations apply here.
- c. Rule 22 of the *Rules of Civil Procedure* allows parties to put a “special case” to the court for determination of a particular issue; i.e., in circumstances where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, and the presiding judge is satisfied that determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs. However:
- i. That Rule 22 “special case” procedure is clearly limited to situations where the parties have agreed on the proposed process, and have agreed on the underlying facts providing the context for the relevant question of law to be addressed. In particular, our court has made it clear that factual disputes ought not to be resolved via Rule 22. See, for example, *PCL Constructors Canada Inc. v. Allianz Global Risk US Insurance Co.*, 2014 ONSC 7480.
 - ii. In this case, there clearly was no party agreement reached in relation to the application brought by the

insured and, as noted above, there are material facts in dispute; e.g., in relation to the intended meaning of terms used in the relevant insurance policy, the documents (if any) that were intended to be incorporated by reference into the insurance policy, and whether the parties had an objectively provable common intention regarding these and other matters that should not only govern interpretation of the policy, but potentially ground a request for rectification if necessary by the insurers, who in my view likely will have an opportunity to formally request such relief in their anticipated defence pleadings in the action.

3. In my view, the effective bypassing of such procedural rules, by a party to an action commencing a duplicative application instead of abiding by the rules governing when and how issues raised by the action may be addressed, should not be encouraged or condoned. In particular, the rules outlined above do not exist for their own sake. Again, they attempt to strike a balance between expedience of issue determination, efficient use of court resources, (including restrictions on resort to such rules in circumstances where a court may not be in a position to provide an appropriate or fair substantive answer to an issue in a summary fashion, for reasons including but not limited to whether facts are in dispute and the filing of competing evidence would simply underscore the existence of such a dispute), and fairness to the litigants involved; i.e., so that issues are presented for determination when those concerned have been given a fair opportunity to put their best foot forward.
- iv. Counsel for the applicant sought to address and minimize such concerns by suggesting that the insured's commencement of its action was simply a protective measure to prevent the insurer's claim from being statute barred; i.e., arguing in particular that insurance claims presented "unique" circumstances in that regard, as insurance claims were often complex, the applicable limitation period was not subject to extension by discoverability, and that limitation period effectively did not make allowance for ongoing investigation and negotiations that might necessarily have to extend beyond the limitation period. With respect, I see nothing "unique" about insurance litigation in that regard. Without limiting the generality of the foregoing, many forms of litigation are complex, requiring extended and ongoing investigation and negotiation that might very well extend beyond expiry of the applicable limitation period. Litigants in all manner of disputes are required to be mindful of applicable limitation periods, and secure an appropriate and specific party agreement to toll/extend the applicable limitation period or commence a formal proceeding within the limitation

period. If and when the litigation proves impossible to resolve without further litigation, the parties to an action are expected to then take the steps contemplated by the *Rules of Civil Procedure* to move the action forward to a formal conclusion. They are not expected or authorized to simply ignore the existing action and start an entirely new proceeding by way of application to address issues already formally being addressed by the action.

- v. As highlighted by counsel for the insurers, there is another significant problem, related to the applicable limitation period, inherent in the approach adopted by the insured in ignoring the earlier action and commencing this separate application. In particular, the insured cannot simultaneously ignore the existing action, (as a means of effectively bypassing the rules applicable to actions and their corresponding restrictions), yet rely on the action as a means of sheltering the current application from operation of the limitation period; i.e., to commence an application relating to the insured's loss more than four years after the underlying loss giving rise to the insured's claim.
- vi. Counsel for the applicant also sought to minimize concerns about presentation of evidence in support of the application, (by the insured and the insurer), and the insurer's desire for an opportunity to employ the discovery procedures applicable to an action, by reliance on the substantive law applicable to the interpretation of insurance policies; e.g., reliance on the primary interpretative principle that effect should be given to the unambiguous language of an insurance policy, and law clearly making evidence of the subjective intention of one party to an insurance policy irrelevant and inadmissible. In my view, however, this "begs the question", (in the formal sense intended by that phrase, in terms of incorporating an assumed premise into a conclusive statement), in a number of ways. Without limiting the generality of the foregoing:
 1. The material before me indicates that there are clear issues as to whether the terms employed in the insurance policy are unambiguous and, indeed, what documents should and should not be considered to form part of the insurance policy to be interpreted.
 2. While evidence of subjective intentions of parties to a policy may be strictly inadmissible, and counsel for the insurer seeks to characterize the desired evidence of the insurers in that fashion, the insurers argue that their desired evidence is actually that of common intention, which is admissible in relation to interpretation of an insurance policy. The insured may or may not be proven right in its characterization of such evidence. In my view, however, that appropriate characterization is inherently another material fact that is in dispute.

3. If the evidence sought to be elicited and/or relied upon the insurer is indeed accepted as common intention evidence, and substantiates a specific common understanding and agreement regarding coverage that the wording of the Local Policy failed to adequately reflect, the insurer may have a claim for the equitable remedy of rectification; e.g., to prevent the insured from receiving more coverage, (for which it did not pay the premiums that otherwise would have been required for such coverage), than the parties mutually intended.
- b. The concerns highlighted above, in relation to material facts being in dispute, simultaneously highlight, in my view, why this matter would not have been amenable to resolution by way of an application in any event.
 - c. Counsel for the applicant lamented the prejudice his client would suffer if the insured was now obliged to revisit and proceed with its action after the passage of many years, during which that action effectively has been permitted to languish; i.e., insofar as the insured was said to be compelled to “go back to square one” in terms of litigation vis-à-vis the insurers. With respect, any such prejudice is of the insured’s own making. Nothing prevented the insured from pressing forward with the litigation commenced via its action before now; e.g., by demanding the delivery of defence pleadings from the insurers, (accompanied by an indication of intention to note the insurers in default if timely delivery of their defence pleadings was not forthcoming), and thereafter proceeding with completion of documentary discovery or resort, (if appropriate), to any of the rules outlined above. The insured simply chose not to do so, before then attempting to expedite the process, and do an “end run” around the applicable rules, by bringing this duplicative and inappropriate separate application proceeding.

Conclusion

- [12] For such reasons, I indicated that the application herein needed to be dismissed, albeit without prejudice to the insured’s ability to pursue its claim through its extant but long-stalled action. In particular, to be perfectly clear: dismissal of this application for the reasons outlined above is not intended to decide the substantive issues raised herein, by the applicant insured, in the insurers’ favour.

Costs

- [13] Although the respondent was entirely successful in its request to have the application herein dismissed, giving rise to a presumptive entitlement to costs in that regard, respondent counsel candidly acknowledged that no Bill of Costs had been prepared by the respondent to assist in determining what costs might be appropriate in that regard.
- [14] Moreover, after receiving further cost submissions from counsel, and engaging in further interactive discussion about an appropriate cost disposition, I was inclined to agree with counsel for the applicant that it would be appropriate to reserve quantification of costs to

the judge deciding the substantive issues, raised by the application, when decided in the context of the action.

- [15] Without limiting the generality of the foregoing, while I find that the respondent should be entitled to costs essentially thrown away by the respondent having to address dismissal of this duplicative and inappropriate application proceeding, I also think it extremely likely that the work devoted by the parties to address the substantive issues raised by the application almost certainly will not be wasted, but instead rechannelled usefully when the parties turn to addressing those substantive issues in the context of the action.
- [16] The judge who decides those substantive issues in the context of the trial will be in a much better position to make determinations segregation of the costs of addressing the substantive issues from the costs of addressing the propriety of this application, as well as determining which party should be awarded costs in relation to the substantive issues once they have been decided.
- [17] Costs thrown away by having to address the propriety of this application and its dismissal therefore are awarded to the respondent, but their quantification shall be reserved to the judge deciding the substantive issues, raised by the application, when they are addressed in the context of the aforesaid action.

Justice I.F. Leach

Date: September 28, 2026