IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krivaia v. Hungerford,*
2026 BCSC 827

Date: 20260505
Docket: S253288
Registry: Vancouver

Between:

Svetlana Krivaia and Sergei Krivoi

Plaintiffs

And

Stephanie Hungerford and Andrew Hungerford

Defendants

- and -

Docket: S255340
Registry: Vancouver

Between:

Sergei Krivoi

Plaintiff

And

Stephanie Hungerford and Andrew Hungerford

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment on Costs

The Plaintiffs, appearing in person: S. Krivaia
S. Krivoi

Counsel for the Defendants: C.E. Hunter, K.C.
M. Zapach

Written Submissions from the Plaintiffs:	March 31, 2026 April 20, 2026
Written Submissions from the Defendants:	March 23, 2026 April 7, 2026
Place and Date of Judgment:	Vancouver, B.C. May 5, 2026

Table of Contents

I. OVERVIEW

[1] On March 11, 2026, I issued Reasons for Judgment on these matters, indexed at 2026 BCSC 408 ("Reasons").[1]

[2] I concluded that costs of the hearing should be awarded to the Defendants, even though the Plaintiffs were technically successful. However, I left open the question of what type of costs award should be made in favour of the Defendants (including whether the Defendants should be entitled to special costs of the hearing). I invited the parties to provide written submissions directed to this issue.

[3] The Defendants seek a lump sum award of $10,000 payable forthwith, for "elevated" costs, to be paid in lieu of a special costs award. The Defendants argue that the Plaintiffs' reliance on AI-hallucinated case law, combined with other misconduct (such as the late discontinuance of one action and mid-hearing abandonment of most claims), justifies this award.

[4] The Plaintiffs' first position is that no costs should be awarded against them, and that each party should bear their own costs. Alternatively, any award should be nominal (or at the scale of ordinary difficulty). They argue that their conduct falls well below the high threshold required to justify punitive cost consequences.

[5] For the reasons that follow, I conclude that the Defendants are entitled to uplift costs of the Strike Applications, at 1.5 times the applicable tariff, assessed at Scale B. These costs are payable forthwith following assessment by the Registrar.

II. ISSUES

[6] The following issues are raised by the parties:

a) Are the Defendants entitled to costs given the outcome of the hearing?

b) What scale of costs is appropriate to fix in this case?

c) What activities should the costs award cover?

[1] All defined terms in the Reasons are adopted here.

d) Is it appropriate to fix costs as a lump-sum award rather than directing an assessment before a Registrar?

e) When should the costs award be payable?

[7] I turn to the first issue.

III. ARE THE DEFENDANTS ENTITLED TO THEIR COSTS?

[8] In my Reasons, I ruled that a costs award should be made against the Plaintiffs. I explained my decision regarding costs at paragraphs 96–103 of the Reasons. These are excerpted below for ease of reference:

> [96] Rule 14-1(9) provides that:
>
> Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
>
> [97] An award of costs typically follows the outcome of the court proceeding and is awarded to the substantially successful party in the litigation: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454 at para. 14.
>
> [98] The Court has discretion to depart from the usual rule of awarding costs to the successful party, but that discretion must be exercised judicially: *Bazylak v. British Columbia*, 2025 BCSC 2346 at para. 81, citing *Cowherd v. Fraser Valley Health Region*, 2004 BCSC 698 at para. 4, *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 73.
>
> [99] When considering whether to depart from the usual rule that the successful party is entitled to their costs, the court may consider various factors, including: (a) misconduct of that party in the course of the litigation; (b) failure of the successful party to accept a formal offer to settle; and (c) any ruling against the successful party on one or more issues that took a discrete amount of court time (see *Culos Development (1996) Inc. v. Baytalan*, 2024 BCSC 1634 at para. 8, citing *Loft v. Nat,* 2014 BCCA 108 at para. 49; *JM Bay Properties Inc. v. Tung Cheng Yuen Buddhist Association*, 2025 BCSC 2281 at paras. 30–32).
>
> [100] In this case, there are two matters that impact the award of costs. These relate to the Plaintiffs' conduct during litigation.
>
> [101] First, while the Plaintiffs were technically successful in defeating the Application to have their claim struck for abuse of process, this success is significantly mitigated by the timing of their revised position and the current state of their pleading. The Plaintiffs defeated the application to have most of their claims struck because they withdrew them prior to the Court making its decision. Their revised position abandoning many of the impugned claims came after the hearing had commenced and significant resources had been expended by the Defendants. Further, the Plaintiffs still need to make further amendments to bring the pleading into compliance with the Rules. These

> factors on their own are sufficient reason to deny the Plaintiffs costs of this hearing. They may also provide basis to award costs to the Defendants.
>
> [102] Second, the Plaintiffs' reliance on, and failure to verify the authenticity of, AI-hallucinated cases constitutes misconduct that is worthy of rebuke. I have already explained the serious affront to justice that occurs when a party files a court document relying on fictitious cases. Even if the Plaintiffs did not know that the cases they had cited in their pleading were false, their failure to check and independently verify the authenticity of their legal authorities is a serious oversight. This is sufficient reason on its own to deprive the Plaintiffs of any costs to which they might otherwise have been entitled. It may also provide the basis for a special costs award.

[9] Despite this, the Plaintiffs argue that there is no basis for the Court to award costs to the Defendants, given the outcome of the hearing. As I understand their position, they rely primarily on the following: they were acting in good faith; they did not intend to mislead the Court; the litigation arose from what they characterize as a genuine property dispute; and they ultimately refined their claims in response to the evidentiary record and the Court's concerns. Accordingly, the Plaintiffs argue that there is no justification for the Defendants to receive their costs of the hearing, nor does such an award serve the interests of fairness and proportionality.

[10] The Plaintiffs' submissions do not identify any error in principle in my earlier costs analysis, nor do they point to any new considerations that would justify revisiting the conclusion that the Defendants should receive their costs of this Application.

[11] I remain of the view that the Defendants are entitled to their costs, for the reasons previously articulated by me. Even though the Plaintiffs did not act with an intention to mislead the Court, their reliance on, and failure to independently verify, AI generated fictitious authorities constitutes misconduct worthy of rebuke. This feature of the litigation is sufficient on its own to deprive them of any entitlement to costs.

[12] In addition, the Plaintiffs' abandonment of numerous claims and the discontinuance of the Second Action occurred only after the hearing had commenced and after the Defendants had expended significant time and resources

preparing to meet those claims. These circumstances materially distinguish this case from one in which equity might support each party bearing its own costs.

[13] The Plaintiffs' emphasis on the underlying merits of their remaining claims also does not alter the entitlement analysis. As I explained in my earlier Reasons, the costs determination is not driven by whether the Plaintiffs may yet advance a potentially viable trespass or encroachment claim, but by the manner in which this litigation was conducted to date.

[14] In summary, there is a sufficient basis to deny the Plaintiffs their costs and to award costs to the Defendants.

IV. WHAT SCALE OF COSTS SHOULD THE DEFENDANTS RECEIVE?

[15] I turn to whether the Defendants should be entitled to costs at Scale B (a matter of ordinary difficulty) or Scale C (a matter of more than ordinary difficulty).

[16] By operation of Rule 14-1(1) and Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, costs are assessed at Scale B, unless the court otherwise orders. This means that the default or presumptive scale for costs is Scale B. To succeed in having costs fixed at Scale C, the Defendants bear the burden of showing that the matter was one of more than ordinary difficulty. They have not met this burden.

[17] The Defendants have not provided a standalone argument in support of Scale C. Their position appears to rest largely on general assertions of complexity and effort rather than a focused submission explaining why the proceeding should be classified as one of more than ordinary difficulty. I accept that the hearing involved evolving pleadings, numerous causes of action, and a wide range of substantive and procedural issues. However, none of these was unusual or particularly complex. Further, just because a matter is time consuming does not mean that it is difficult for the purposes of determining the scale of costs.

[18] Consequently, I am satisfied that costs should be fixed at Scale B.

[19] I turn to whether the Defendants are entitled to “elevated” or uplift costs. The Defendants have articulated this as a claim “in lieu of special costs”.

[20] Special costs are punitive in nature rather than compensatory. The aim behind a special costs award is to deter misconduct while at the same time disassociate the court from reprehensible conduct committed by a party during the litigation: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (B.C.C.A); *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 42, leave to appeal to SCC ref'd, 39145 (1 October 2020).

[21] An award for special costs is discretionary. At issue is “whether the party against whom costs are awarded has engaged in reprehensible conduct or conduct that is deserving of reproof or rebuke”: *Tomic v. Tough,* 2013 BCCA 355 at para. 35, citing *Garcia*.

[22] In *Westsea Construction Ltd. v. 0759553 BC Ltd.,* 2013 BCSC 1352 at para. 73, Justice Gropper summarized the principles that apply for determining special costs:

> a) the court must exercise restraint in awarding specials costs;
>
> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
>
> c) simply because the legal concept of “reprehensibility” captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
>
> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court’s process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
>
> e) special costs can be ordered against parties and non-parties alike; and
>
> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a “bonus” or further compensation for that success.

[23] Similar to special costs, uplift costs are discretionary. However, in contrast to special costs, uplift costs are “not intended to punish the unsuccessful party but rather to indemnify the successful party”: *Ding v. Canam Super Vacation Inc.,* 2024

BCCA 102 at paras. 211, 213, citing *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462 at para. 30.

[24] The provision of uplift costs is governed by s. 2 of Appendix B, which stipulates that:

> **Scale of costs**
>
> …
>
> (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).
>
> (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).
>
> …

[25] Thus, to award uplift costs, the court must find: (1) the presence of unusual circumstances that would result in; (2) a grossly inadequate or unjust award of costs at the fixed scale: *Ding* at para. 211, citing *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at para. 42, *Shen* at para. 31.

[26] Importantly, a party's conduct which may fall short of what is required for special costs, can constitute unusual circumstances for the purposes of s. 2(5) of Appendix B "if it is deserving of some form of rebuke". Other factors that might warrant a finding of "unusual circumstances" are: (a) misconduct by the unsuccessful party; (b) the serious nature of the allegations; (c) the complexity or difficulty of the issues in the litigation; and (d) the importance of the litigation to the parties or to the development of the law: *Ding* at para. 212, citing *British Columbia v. Adamson*, 2017 BCSC 168 at para. 53.

[27] The Defendants submit that the Plaintiffs' litigation conduct justifies a departure from ordinary tariff costs. They argue that the Plaintiffs advanced numerous claims and positions that were abandoned late in the process, relied on

non-existent authorities in their pleadings, and materially increased the scope, complexity, and expense of the hearing. In the Defendants' submission, this conduct is deserving of rebuke and constitutes "unusual circumstances" within the meaning of s. 2(5) of Appendix B. Consequently, this warrants an award of elevated costs at 1.5 times the applicable tariff.

[28] The Plaintiffs submit that their conduct does not meet the high threshold required for special costs or uplift costs. They argue that absent a finding of bad faith, dishonesty, or abuse of process, each party should bear its own costs, or alternatively, costs should be confined to the ordinary tariff.

[29] The Plaintiffs emphasize that they are self-represented, that any citation errors were unintentional, and that their amendments and discontinuances reflect a good-faith effort to narrow the issues once the evidentiary record and legal framework became clearer. Further, the Plaintiffs argue that it would be unfair and disproportionate to impose elevated costs where the underlying dispute raises legitimate issues, and where some of the proceedings were discontinued or re-shaped rather than finally abandoned. They submit that these considerations militate against any finding of "unusual circumstances" under s. 2(5) of Appendix B.

[30] I do not agree that the absence of an intention to mislead the Court forecloses a departure from ordinary tariff costs. As the Court of Appeal explained in *Ding*, uplift costs under s. 2(5) of Appendix B are conceptually distinct from special costs. They are intended to compensate the successful party and may be ordered where there are unusual circumstances rendering the fixing of costs at the ordinary tariff grossly inadequate or unjust.

[31] In my earlier Reasons, I found that the Plaintiffs' reliance on fictitious authorities, without independently verifying their authenticity, constituted misconduct worthy of rebuke. I also found that the Plaintiffs abandoned multiple claims and substantially altered their litigation position only after the hearing had commenced, by which time the Defendants had already expended considerable resources preparing to meet those claims. While I accept that this conduct was not undertaken

with an intention to mislead the Court, it nevertheless represents a serious departure from acceptable litigation standards and materially increased the cost and complexity of the proceeding.

[32] In these circumstances, I am satisfied that the Plaintiffs' conduct constitutes unusual circumstances within the meaning of s. 2(5) of Appendix B and that an award of ordinary tariff costs would be unjust. An uplift to 1.5 times the applicable tariff at Scale B appropriately reflects the need to indemnify the Defendants for the unnecessary expense occasioned by the Plaintiffs' conduct, without being punitive.

V. WHAT ACTIVITIES SHOULD BE COVERED BY THE COSTS AWARD?

[33] In addition to seeking the costs of the hearing of the Strike Applications, the Defendants also ask for their costs of defending both the First Action and the Second Action. I see no sound basis for granting such a request.

[34] The costs issue before me concerns the specific Rule 9-5(1) applications brought in both actions by the Defendants. The ultimate disposition of the First Action or the Second Action is not the subject of this costs hearing. Further, the Defendants have not provided any principled or legal basis to justify expanding the scope of the costs award to cover other litigation activities.

[35] Despite the significant amendments to the First Action, and the discontinuance of the Second Action, the litigation between the parties remains ongoing, albeit in a narrower or reshaped form. The appropriate time to determine costs of the First Action is when it has come to an end.

[36] Nor should the costs of the discontinued proceeding be subsumed into the costs hearing of the within applications, merely because the proceedings are related or for the sake of convenience to the Defendants. The costs consequences of a discontinued proceeding are a separate matter that require their own analysis.

[37] Further, awarding costs for the discontinued action without a separate application blurs the distinction between discrete applications, risks unfairly duplicating cost consequences, and risks prejudging later cost entitlement.

[38] Finally, incorporating costs of the discontinued proceeding into this costs award would undermine proportionality by adding additional consequences into a decision focused on uplift costs under s. 2(5) of Appendix B.

[39] The Defendants request to have costs of defending the First Action and the Second Action, is dismissed.

VI. SHOULD COSTS BE FIXED AS A LUMP SUM AWARD?

[40] Rule 14-1(15) permits the court to award costs of a proceeding and to fix the amount of costs, including the amount of disbursements.

[41] In *Gichuru v. Smith*, 2014 BCCA 414, leave to appeal to SCC ref'd [2014] S.C.C.A. No. 547, one of the issues on appeal was the summary assessment of a costs award made by the trial judge. In setting aside the assessment of special costs, the Court stated as follows at para. 154:

> … The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[42] The conclusions of the Court in *Gichuru* are apt in this case.

[43] Registrars routinely assess costs for all types of matters. Aside from being the chambers judge, I have no special familiarity with this case such that it would be a better use of resources for me to assess costs rather than to have the Registrar, whose expertise is to assess costs, deal with the matter.

[44] As noted in *Kemp v. Vancouver Coastal Health Authority Ltd.,* 2016 BCSC 1541 at para. 51, the decision to fix costs is discretionary, and the discretion is to be

used sparingly. The circumstances in this case do not warrant the exercise of my discretion to assess costs summarily.

[45] The request for costs to be fixed is dismissed, and this matter is remitted to the Registrar for assessment of costs.

VII. WHEN SHOULD COSTS BE PAYABLE?

[46] The general rule is that costs follow the event and are payable to the successful party at the conclusion of the proceeding. Rule 14-1(13) provides:

> **When costs payable**
>
> (13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

[47] The Defendants ask that the costs award be payable forthwith. Though they have not expressly stated it, it can be inferred from the type of award sought, that they are also asking that the costs award be payable in any event of the cause.

[48] In *Martel v. Wallace*, 2008 BCSC 436 at para. 28, the Court noted that costs may be made payable in any event of the cause: (a) to deter unnecessary or unreasonable conduct in the proceedings; (b) if it is unlikely that the matter will proceed to trial; or (c) if the motion deals with discrete issues that are severable from the remaining claims.

[49] The presence of discrete issues on their own is not enough to justify departing form the general rule: *British Columbia (Securities Commission) v. Brar*, 2023 BCSC 1715 at para. 14.

[50] The first and third *Martel* factors support an award for costs to be paid in any event of the cause. The importance of the first *Martel* factor is evident in my noting of the Plaintiffs' late in the day concessions and the Notice of Discontinuance filed in the Second Action. The third *Martel* factor is also applicable, in that the Strike Application dealt with discrete issues that are severable from the remaining claims.

[51] The second *Martel* factor does not support an award payable in any event of the cause. That is because it appears at this juncture that the dispute between the parties will run the normal course and likely be resolved through a trial proceeding. However, the presence of this factor is not sufficient to overcome the other two *Martel* factors. Further, my finding supporting the payment of uplift costs adds additional support to making this costs award payable to the Defendants in any event of the cause.

[52] Thus, I am satisfied that the Defendants should have their costs payable in any event of the cause.

[53] I am also satisfied that the costs award should be payable forthwith, following the assessment by the Registrar.

VIII. SUMMARY OF ORDER MADE

[54] I order as follows:

1. The Defendants are awarded their costs of the hearing uplifted to 1.5 times the applicable tariff at Scale B.

2. This costs award is payable forthwith following assessment by the Registrar, in any event of the cause.

3. The matter is remitted to the Registrar for an assessment.

4. The Defendants' request to fix a lump sum award of costs is dismissed.

5. The Defendants request to have costs of defending the First Action and the Second Action, is dismissed.

"Shergill J."