

CITATION: Peel Exterior Maintenance Inc. v. 2497353 Ontario Corp., 2026 ONSC 5372
COURT FILE NO.: CV-23-00701789-0000
DATE: 2026-09-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Peel Exterior Maintenance Inc. v. 2497353 Ontario Corp. o/a GMCC et al.

BEFORE: Associate Justice Eckler

HEARD: August 27th 2026 by videoconference

COUNSEL: *Shane Greaves* appearing for the plaintiff/moving party

Stefanija Savic appearing for the defendants/responding parties

REASONS FOR DECISION

Overview

[1] This is a motion by the plaintiff Peel Exterior Maintenance Inc. for an Order striking the statement of defence of the defendants for failure to comply with a production Order made by this Court on July 21st, 2025 (“Production Order”) and with a further production order made by this court on April 21st, 2026.

[2] The defendants oppose the motion and argue that they have undertaken best efforts to comply with the Orders and further argue that they have now largely complied with the Production Order.

[3] For the reasons outline below, this motion is dismissed.

[4] Despite the fact that the plaintiff was not successful on this motion, in my view, it is nevertheless appropriate for a costs order to be made in the plaintiff’s favour. In particular, for the reasons outlined below, the defendants shall pay to the plaintiff costs of this motion on a partial indemnity basis in the amount of \$8,315.70. Unless otherwise agreed to by the parties, these costs are payable within 30 days.

The Action

[5] This simplified procedure action arises from an unpaid judgment issued by the Ontario Small Claims Court.

[6] The plaintiff, Peel Exterior Maintenance Inc. carries on business as a provider of landscaping and snow removal services.

[7] The plaintiff alleges that the defendants, 2497353 Ontario Corp. o/a GMCC, ("GMCC 249") Ground Maintenance Cleaning Contractors Inc. ("Ground MCC Inc."), 2497352 Ontario Inc. o/a JMCC ("JMCC-249") and JMCC Ltd. ("JMCC Ltd") (collectively the "Corporate Defendants"), are related and/or affiliated companies which carry on business from the same registered head office of 424 Gilbert Avenue, Toronto, Ontario, as providers of snow removal, landscaping and/or other services.

[8] The defendants dispute that the corporate defendants are related and/or affiliated.

[9] There is, however, no dispute between the parties that the defendant, Mr. Peniche, is the sole director/officer and the controlling mind of each of the Corporate Defendants and that the Corporate Defendants all carry on business from the same registered head office of 424 Gilbert Avenue, Toronto, Ontario.

The Small Claims Court Judgment

[10] On October 16th 2017, the plaintiff entered into eight contracts (the "Subcontracts") with a corporation, or corporations controlled by Mr. Peniche. The plaintiff agreed to provide its services at eight locations for a fixed period of time between December 15th 2017 and April 14th 2018.

[11] The Subcontracts described those services as "Winter Maintenance" services. This included clearance of snow from asphalt areas, salting/de-icing and sidewalk/walkway shoveling at the eight locations (the "Winter Maintenance Services").

[12] The plaintiff alleges that these are services that both the plaintiff and Mr. Peniche's corporations have historically provided to their respective clients.

[13] The plaintiff alleges that Mr. Peniche did not identify the complete corporate name of the company which was subcontracting the work to the plaintiff. Instead, the Subcontracts identified the corporation only as "GMCC" or "GMCC Inc.".

[14] One of the Subcontracts dated October 26th 2017 is in the record before me which confirms that the contract was entered into between "GMCC" and the plaintiff. In the contract, GMCC is referred to as the "corporation" and the plaintiff is referred to as the "contractor".

[15] After the plaintiff did not receive payment in full for the services rendered pursuant to the contract, it commenced an action in the small claims court on October 30, 2018 (the "Small Claims Court Action").

[16] GMCC 249 defended the Small Claims Court Action and filed a defendant's claim. Following a three-day trial in the small claims court action, the Deputy Judge:

- awarded judgment to the plaintiff in the plaintiff's claim for the full amount claimed of \$27,121.09;
- dismissed the defendant's claim; and
- awarded costs of \$12,000 to the plaintiff after the defendants had erroneously made allegations of fraud as against the plaintiff (the "Judgment")

[17] Including interest, the total amount owing under the Judgment now exceeds \$42,000.00.

[18] After the Judgment was issued, the Judgment Debtor, GMCC 249 underwent an examination in aid of execution (the "Examination"). The Judgment Debtor took the position that it has no, or nominal assets and has ceased operations.

[19] It is the plaintiff's position that in order to defeat its creditor, the Judgment Debtor/GMCC 249 ceased operations approximately one month after it was served with the plaintiff's claim in the Small Claims Court action, on November 6, 2018.

[20] Nevertheless, the plaintiff alleges that the defendant Mr. Peniche continues to carry on the same snow removal business through one or more of the other corporate defendants. As a result, the plaintiff cannot enforce the Small Claims Court judgment against the Judgment Debtor.

[21] Mr. Peniche's position is that the three corporate defendants Ground MCC Inc., JMCC-249 and JMCC Ltd. ("the Alleged Unrelated Defendants") were not parties to the Subcontracts. Mr. Peniche argues that these Alleged Unrelated Defendants are neither parents nor subsidiaries of GMCC 249 and consequently the corporate Alleged Unrelated Defendants cannot be held liable for any debts owed by GMCC 249.

The Action

[22] The plaintiff commenced this action wherein it seeks damages from the Corporate Defendants and Mr. Peniche personally via various causes of action including misrepresentation and breach of contract. The plaintiff also seeks an oppression remedy against the defendants pursuant to section 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c.B-16 (the "OBCA").

[23] The Statement of Claim alleges *inter alia* that Mr. Peniche abandoned the Judgment Debtor/GMCC 249 and began operating its business through Ground Maintenance Cleaning Contractors Inc. (Ground MCC Inc.) and/or other related companies in order to frustrate the

Judgment, including by transferring its business and assigning the benefits of any contracts to the other companies.

[24] The defendants have denied these allegations and maintain that that JMCC, Ground Maintenance and 249-JMCC and Mr. Peniche were improperly named as parties to this litigation. The defendants argue that these three corporate entities are neither parent entities nor subsidiaries of 249-GMCC and consequently cannot be held liable for any debts owed by the Judgment Debtor, 249-GMCC. The defendants argue that the plaintiff is abusing the court process in an attempt to enforce the Judgment against the three other corporate defendants because they have assets and the Judgment Debtor, the party that the plaintiff contracted with, does not.

Procedural History

[25] The defendant Mr. Peniche served an Affidavit of Documents in this action on January 15th, 2024.

[26] The plaintiff alleged that the Affidavit of Documents was deficient and was missing certain important and relevant documents. The plaintiff brought a motion to be heard on July 23rd 2024, seeking an order that the defendants produce further and better affidavits of documents.

[27] The parties appeared before me on July 23rd, 2024 and at that time the parties confirmed that prior to the motion being launched, no efforts were undertaken by the parties to agree to, or finalize a discovery plan as is required pursuant to Rule 29.1.03.

[28] The requirements of Rule 29.1.03 are mandatory. In the absence of a discovery plan made in accordance with the *Rules*, the court may refuse to grant relief or award costs on a motion under Rules 30 to 35 relating to discovery. (Rule 29.1.05(1))

[29] The plaintiff's motion was adjourned to be heard before me on September 2024, and the parties were directed to use their best efforts to agree on a discovery plan which complies with Rule 29.1.03(3). If the parties were unable to reach an agreement, the moving party's motion was ordered to be heard by me, on September 20th, 2024.

[30] The parties were not able to agree on a discovery plan.

[31] While the motion was adjourned to be heard before me on September 20th 2024, on July 25th 2024, counsel for the defendants advised plaintiff's counsel that she was not available on the September 20th 2024 scheduled return date for the motion. The parties therefore contacted the civil motions scheduling unit and adjourned this motion on consent to June 4th 2025.

[32] The parties were not able to agree to a discovery plan such that the production motion was heard before me on June 4th 2025.

[33] Following the hearing of the June 4th 2025 motion, this Court delivered reasons for decision dated July 21st, 2025. The reasons for decision describe in detail the nature of this action, a description of the parties and the requested productions. The reasons are lengthy and will not be summarized again here. Ultimately, for the reasons outlined in the reasons for decision dated July 21st, 2025, this Court ordered the defendants to produce some, but not all of the requested productions on the motion. (“Production Order”) Given that the plaintiff was partially successful on the motion the plaintiff was awarded costs of \$2750.00.

[34] On December 3rd 2025 the plaintiff served the notice of motion for this motion returnable on April 21st 2026, given that the defendants had not produced any of the documents required to be produced pursuant to the Production Order.

[35] On April 1st 2026, counsel for the defendants emailed plaintiff’s counsel providing various financial statements and banking statements required to be produced pursuant to the Production Order. This was the first time that any documents were provided to the plaintiff pursuant to the Production Order. However, the defendants highlight that the Production Order did not provide a date for when the productions were required to be produced.

[36] The parties appeared before me on April 21st 2026, the first return date for the plaintiff’s motion to strike. Counsel for the defendants advised the court that some of the documentation required to be produced in the Production Order had been produced. However, counsel also raised as an issue that when looking for the documentation required to be produced, the defendants became aware that some of the documentation may have been destroyed some years ago. In particular, the defendants filed an affidavit which provides evidence that the defendants’ record keeping policy called for the destruction of documents after seven years. Counsel confirmed that the defendants were looking to several different sources, including records that were kept in storage to attempt to locate all of the documents required to be produced pursuant to the Production Order.

[37] On April 21st 2026 this court provided the defendants with an additional 60 days to produce the documents required to be produced pursuant to the Production Order. The defendants were ordered to pay costs thrown away to the plaintiff, in the amount of \$1,000 within 30 days. The balance of the plaintiff’s motion to strike the statement of defence was adjourned to be heard before me on August 27th 2026.

[38] On June 26th 2026, the defendants provided further additional documents to plaintiff’s counsel, which documents were required to be produced pursuant to the Production Order.

[39] On August 20th 2026, and August 21st, 2026, the defendants produced further documents required to be produced pursuant to the Production Order.

[40] As of the date of the hearing of this motion, the defendants have in large part complied with the Production Order. However, the plaintiff highlights that the documents that have not yet been produced are critical to the plaintiff being able to successfully advance its case.

[41] It is against this backdrop that the plaintiff brings this motion pursuant to sub-Rule 30.08(2)(b) and Rule 60.12 of the *Rules of Civil Procedure* to strike the statement of defence of the defendants for failure to comply with the July 21st, 2025 Production Order and the subsequent Order made by this court on April 21st, 2026. (“the Orders”)

Position of the Parties

[42] Both parties agree that the applicable test on this motion is that outlined by the Ontario Court of Appeal in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)* (“*Falcon Lumber*”), 2020 ONCA 310 (CanLII). In *Falcon Lumber*, the Ontario Court of Appeal provided guidance and outlined various “common sense factors” for the Court to consider on a motion to strike a pleading for failure to comply with documentary disclosure obligations. In this regard, the Ontario Court of Appeal stated the following:

First, contrary to the appellant’s assertion, striking out a pleading under r. 30.08(2)(b) is not restricted to “last resort” situations, in the sense that it must be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. Some cases have granted the remedy where previous orders were breached: *DLE Consulting Inc. v. Graham*, 2016 ONCA 315, 130 O.R. (3d) 799; *Vacca v. Banks*, 2005 CanLII 1054 (Ont. Div. Ct.). In others, no prior order had been made: *Royal Bank of Canada v. Russo*, 2002 CarswellOnt 73 (Ont. Div. Ct.). However, courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading: *Koohestani v. Mahmood*, 2015 ONCA 56, 124 O.R. (3d) 205, at para. 54.

Second, a court should consider a number of common sense factors when deciding whether to strike out a pleading under r. 30.08(2): (i) whether the party’s failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case: *Royal Bank of Canada*, at para. 12; and see the cases reviewed in *King v. Belair Direct* (2004), 2004 CanLII 19530 (ON SCDC), 184 O.A.C. 189 (Div. Ct.), at paras. 12-13.

Third, although a court may also consider the merits of a party’s claim or defence, as it does under r. 60.12 dealing with the failure to comply with an interlocutory order, this factor may

play only a limited role where breaches of production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations.

Finally, a court must consider whether an order to strike out a pleading would constitute a proportional remedy that is consistent with the recent calls of the Supreme Court of Canada to alter the Canadian litigation culture.

...

Orders to strike out pleadings are one means by which to ensure that the civil justice process delivers justice that is proportionate, timely, and affordable. Accordingly, when considering whether to strike out a party's pleading by reason of its failure to comply with its documentary disclosure and production obligations, in addition to the factors set out in paras. 50 to 54 above, a court should consider:

- the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and
- to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute. (*Falcon Lumber* at paras. 50-55)

[43] Having regard to the common sense factors outlined in *Falcon Lumber*, the plaintiff argues that it cannot be said that the defendants' failure to produce the required documents is inadvertent given that since the action was commenced in 2023, the defendants have failed to make full production and then unsuccessfully attempted to resist their disclosure obligations at the Production Motion. The plaintiff argues that the defendants' failure to comply with the Orders is clear and unequivocal. The plaintiff further argues that there has been no reasonable explanation for the default. With respect to the common sense factors, the plaintiff further highlights the following:

- The substance of the default is material in that it breaches two court orders in addition to the defendants' general disclosure obligations.
- While many documents have been produced between April 2026 and August 2026, the list of outstanding documents is significant.

- The default will prevent the Court from doing justice in this action. In particular the plaintiff argues that the plaintiff cannot conduct a historical analysis without the bank statements for 2017 and 2018, especially those of the judgment debtor which show its day-to-day activity prior to being served in the small claims court action. The plaintiff argues that the 2017 and 2018 bank statements are vital to tracking the activity of all defendants when the judgment debtor was actually operational. Without them, the plaintiff has no evidentiary reference points and cannot conduct a meaningful before and after analysis of the corporate defendants' operations.

[44] The plaintiff argues that the defendants' conduct has now caused the plaintiff to bring two motions to deal with the same issue being the defendants' failure to produce documents that ought to have been disclosed in their affidavit of documents in 2023. The plaintiff argues that the defendants' conduct has served to increase the cost of litigation to dissuade the plaintiff from pursuing its case on the merits. The plaintiff also highlights that the defendants' conduct has delayed the final adjudication of the case on its merits.

Analysis – Common Sense Factors

[45] I note first that the facts of this case are distinguishable from the facts in *Falcon Lumber* where the motion judge hearing the motion to strike out the statement of defence of the Lotey defendants, noted that i) there had been 30 dates for motions, cross-motions, and case conferences; (ii) on most court attendances the primary issue had been the Lotey Defendants' failure to provide complete productions; (iii) 22 orders or judicial endorsements had been made; (iv) six court production orders had been made against the Lotey Defendants; and (v) as of the date of the motion, the Lotey Defendants still had not made full and complete production of relevant documents.

[46] In the context of the immediate case, and having regard to the *Falcon Lumber* factors, I find that the circumstances do not warrant the severe remedy of striking the defendants' statement of defence. In my view the defendants' late compliance and/or failure to comply with their discovery obligations and this Court's prior Orders can be adequately and fairly dealt with at this time by a costs award as specified below. (*Aidoo v. Durbejai*, 2026 ONSC 1951 (CanLII) at paras. 16,17)

[47] I do not find that the defendants' failure to produce the Production Order documentation is deliberate. While the initial production motion was opposed, not all of the productions requested by the plaintiff on the production motion were ordered to be produced. Moreover, while there was a delay in providing the ordered productions following the July 21st, 2025 Production Order, the court acknowledges the defendants' argument that the Production Order did not contain a specific date for when the productions were required to be delivered. However, the court also finds that

this argument becomes less compelling in the face of the plaintiff's position that the requested productions ought to have been produced in the defendants' affidavits of documents.

[48] Ultimately, while there has clearly been some delay in providing the required productions, the evidence in the record confirms that between April 1st 2026 until the hearing date of this motion, the defendants have undertaken efforts to locate and produce the Production Order documents. Indeed, counsel for the plaintiff conceded that a significant number of the Production Order documents had been produced by the time this motion was heard on August 27th 2026. Both counsel made submissions on what documents have been produced and what documents remain outstanding. Given the number of defendants, their similar names, and counsel's use of different short form descriptions for the various defendants, there was some confusion and slight disagreement between the parties in terms of their positions on the status of the outstanding documentary productions to date.

[49] With respect to the three corporate defendants JMCC Ltd., JMCC 249 and Ground MCC Inc., it appears that the financial records and bank statements ordered to be produced have in large part now been produced with respect to these defendants. However, the plaintiff maintains that the documents that are missing are of critical importance to the issues in this litigation.

[50] It appears that the bank statements ordered to be produced for the three corporate defendants Ground MCC Inc., JMCC-249 and JMCC Ltd. have all now been produced. However, there was some disagreement with respect to the status of productions relating to JMCC Ltd. and JMCC-249.

[51] The defendants are of the view that they produced all financial statements for JMCC Ltd. except for the year 2017. The defendants continue to search for these older records and advised the court that they hope to be able to produce the 2017 records in the near future. The plaintiff is of the view that with respect to JMCC Ltd., the financial statements are missing for the year 2017 but also for the years 2018 and 2020.

[52] The JMCC 249 financial statements from 2017 to 2020 have been produced. The Ground MCC Inc. financial statements have been produced for the years 2017 to 2022.

[53] With respect to GMCC 249, the judgment debtor, the evidence of the defendants is that there are no financial records for GMCC 249 for 2017 as none were prepared as there was no revenue for this entity in 2017.

[54] The defendants have produced the bank records for GMCC 249 from January to March 2017 and from October 2018 onwards to 2022. Plaintiff's counsel raised as an issue during the hearing of the motion that the bank account number referenced for the Judgment Debtor in the 2017 productions is different than the bank account number referenced for the Judgment Debtor

in the 2018 bank records provided. However, this issue was only raised during the hearing of the motion and counsel for the defendants confirmed that she will need to make enquiries of her clients to explain the two different account numbers referenced in the GMCC-249 bank records provided to date.

[55] The financial statements for the Judgment Debtor GMCC-249 have also been produced for the years 2019 to 2023.

[56] Counsel for the plaintiff highlights that the defendants suggest that there are no financial records for 2017 with respect to the Judgment Debtor because they were not prepared due to no revenue being recorded that year for the Judgment Debtor. However, plaintiff's counsel rightly underscores that the 2019 financials for the Judgment Debtor also seem to confirm no revenue for the 2019 year, yet financial statements have nevertheless been produced for 2019.

[57] Counsel for the plaintiff also highlights that while the defendants' evidence is that some of the 2017 records with respect to the Judgment Debtor were destroyed in 2024, this was after the statement of claim was issued in this action in 2023. The plaintiff argues that the defendants should have preserved all relevant documents which would include the 2017 bank statements.

[58] I find that the majority of the documents required to be produced pursuant to the Production Order have now been produced. There are certainly some questions that must be answered relating to the fact that the Judgment Debtor has produced documents which seem to reference two bank accounts for the Judgment Debtor. This issue was first raised during the hearing of the motion and counsel for the defendants confirmed that she will speak to her clients in order to clarify this issue. This issue can also be canvassed at the examinations for discovery along with the issue of the failure to prepare financial statements in 2017 due to the fact that there was no revenue for the Judgment Debtor for this year.

[59] One notable issue of concern raised during this motion relates to the defendants' evidence that some of the Judgment Debtor's documents were destroyed in 2024 pursuant to its corporate document retention policy. Having regard to this issue, the plaintiff argues that the circumstances of this case are similar to the facts in *Debono v. JCD Property Ltd.* 2025 ONSC 4139, aff'd 2026 ONCA 310 ("*Debono*") where Justice Myers ordered statements of defence to be struck pursuant to Rule 60.12, following the defendants' failure to comply with their documentary disclosure obligations and several court orders.

[60] In my view, the facts of the immediate case are distinguishable from the facts of *Debono* where the estate trustees alleged that David Debono, Elizabeth Muscat, and Jennifer Nesci, wrongfully removed several million dollars of assets of the business shortly before their mother died. The estate also claimed that Debono, Muscat, and Nesci refused to provide access to

financial documentation to allow the estate trustees to account for the estate's assets and to locate missing funds.

[61] In *Debono*, the Court made findings that as fiduciaries, the defendants moved substantial sums of their mother's money and had steadfastly refused to disclose particulars of their dealings or the whereabouts of the funds. The court underscored that the defendants "ignored" orders of the court obtained while their mother was still alive. The court further found that the defendants had repeatedly "breached clear terms of an order in this proceeding". (*Debono*, at para.15)

[62] In *Debono*, the evidence before the court was also clear that records had been erased. In this regard the court confirmed that "the estate's accountants also found that entries in the business software were erased and replaced before the mother died. They cannot tell who did it. But they say they cannot determine the state of individual loans, drawings, gifts etc. from the altered business records". (*Debono*, at para. 48) The court further noted that there was no accounting for pre-death cash rents and that there was almost no money in the bank accounts at the time of the mother's death. (*Debono*, at para. 48)

[63] Ultimately, in *Debono*, the court made a finding that the estate had "shown a *prima facie* case that upwards of \$6 million remained unaccounted for by the respondents".(*Debono* at para. 100) The court confirmed that the "practical burden is already on the respondents to explain where the rents and proceeds of borrowings have gone". (*Debono*, at para.100) The court concluded that *Debono*, Muscat and Nesci had ignored "multiple orders and made clear their refusal to disclose what they did with their mother's money", and that these parties "spent years and quite literally hundreds of thousands of dollars refusing to show where the money went and precluding the estate and the estate trustees from bringing in their own experts to look". (*Debono* at paras. 97 and 108)

[64] With reference to *Debono*, the plaintiff argues that in the immediate case, in the reasons for decision for the Production Motion, this Court also concluded that the evidence filed supports a "*prima facie* case". However, this issue should be clarified as this Court has not made a finding at this early stage of this litigation that the evidence supports a *prima facie* case. In this regard, what this Court determined in the Production Motion, is that "the plaintiff presented some evidence in support of the allegations" in the statement of claim in support of its position that Mr. Peniche organized his affairs and/or those of his companies in such a way as to hinder the plaintiff's ability to enforce its judgment. This finding was made by this Court in the context of a pre-discovery motion dealing with the scope of relevant documentary discovery with the court being mindful of addressing one of the defendants' arguments on the motion that "there was zero evidence" supporting the plaintiff's claim and that the plaintiff was engaging in a fishing expedition and was seeking documents based on broad unsubstantiated allegations in the pleadings.

[65] In terms of addressing the plaintiff's reliance on *Debono*, I note that there is no evidence in the record that any documents were destroyed after the Production Order was made. Both

parties filed affidavits in support of this motion. Unlike the case in *Debono*, where the affiants were cross-examined, in the immediate case, none of the affiants have been cross-examined.

[66] With respect to any documents which may have been destroyed in 2024 pursuant to the defendants' document retention policy, there is insufficient evidence in the record to determine what documents have been destroyed and when they were destroyed. Moreover, I cannot conclude on the record before me that documents that have not yet been produced will prevent the plaintiff from advancing its case. In my view, it is too early to reach this conclusion and the record before me is not sufficient to allow me to reach the conclusion that the missing documentation will prevent the plaintiff from advancing its case and/or impede the fair determination of the case.

[67] The defendants have provided evidence that they always intended to comply with the Production Order and that the delay in complying with the Production Order in terms of the production of bank statements and financial records dating back to 2017 is due to the volume of documents required to be produced and the fact that many of the documents are quite old and not easily accessible by the defendants.

[68] Counsel for the defendants wrote to plaintiff's counsel on September 17th 2025, October 21st 2025, November 17th 2025, April 1st, 2026, April 7th 2026 and April 13th 2026, to advise that efforts were being made to comply with the Production Order but that it would take some time due to the volume of documents and the fact that some of the requested productions date back to 2017. The defendants' evidence is further that they were not aware that certain documents had been destroyed when the initial production motion was being argued. This issue came to light after further searches were undertaken in order to comply with the July 2025 Production Order.

[69] The defendants have provided evidence that it has always been their intention to comply with the 2025 Production Order. In order to comply with the Order, the defendants have conducted a thorough search of their records and have requested that their accountant conduct a thorough review of his records to locate all missing documents.

[70] Examinations for discovery have not yet been conducted and many if not all of the remaining gaps relating to the defendants' financial productions may well be filled.

[71] Based on the current evidence in the record before me, I am not satisfied that the defendants' failure to produce all of the documents ordered to be produced will result in prejudice to the plaintiff which will impact its ability to prosecute this action or will prevent the court from being able to do justice in this particular case.

[72] In my view the conduct of the defendants is not such that the severe remedy of striking their defence ought to be ordered. Nevertheless, it is acknowledged that the defendants have delayed this proceeding and caused the plaintiff to incur costs unnecessarily. In my view this

conduct should be addressed not by the drastic remedy of striking the defendants' defence but by ordering the defendants to pay costs of this motion, which should not have been necessary. In my view, it would be unfair to require the plaintiff to bear the financial burden of having to bring this motion.

Costs

[73] Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[74] Rule 57.01 provides that in exercising its discretion under section 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

[75] The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.).

[76] The plaintiff seeks costs on a substantial indemnity basis in the amount of \$11,087.60. The plaintiff's costs outline reflects partial indemnity costs of \$8,315.70. These amounts reflect a reduction of \$1,000.00, representing the costs award made at the April 21st, 2026 hearing wherein this court ordered costs thrown away in the amount of \$1,000.00 to be paid by the defendants to the plaintiff.

[77] Having regard to the nature of the motion, the number of defendants and the time which would have been required to review and organize the significant productions relating to the four defendants, I am satisfied that the costs sought by the plaintiff on a partial indemnity basis are fair, reasonable and within the expectation of the parties.

[78] I do not find that this is a case where substantial indemnity costs ought to be ordered. While the defendants have delayed in complying with the Production Orders, I also find that they have undertaken continuous efforts to comply with the Orders and I find that they have not deliberately ignored court orders. The two prior costs awards made by this Court have also been paid.

[79] That having been said, as noted, I find that this further motion was necessary because the defendants delayed in providing productions which in my view necessitated this motion. In this regard, I find that it is appropriate, fair and within the expectations of the parties that partial indemnity costs in the amount of \$8,315.70 inclusive of fees and disbursements be awarded to the

plaintiff. Unless otherwise agreed to by the parties, these costs are payable by the defendants to the plaintiff within 30 days.

ASSOCIATE JUSTICE ECKLER

DATE RELEASED: September 22nd, 2026