

CITATION: Sweda Farms Ltd. v. Egg Farmers of Ontario, 2026 ONSC 5355

COURT FILE NO.: CV-08-357570

DATE: September 21, 2026

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sweda Farms Ltd., Best Choice Eggs Ltd and Tilia Transport Inc. v. Egg Farmers of Ontario, Harry Pelissero, Burnbrae Farms Limited, Burnbrae Holdings Inc., Maple Lynn Foods Limited, L.H. Gray & Son Limited, William Harding Gray, John Klei and The Estate of Johannes Klei;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: David B. Williams and Allison Webster for L.H. Gray & Son Limited and William Harding Gray;
Geoffrey P. Spurr for Egg Farmers of Ontario and Harry Pelissero;
Laurie L. Aitchison for John Klei and The Estate of Johannes Klei;
Peter Neufeld Sweda Farms Ltd., Best Choice Eggs Ltd. and Tilia Transport Inc.;

HEARD: August 10 and 17, 2026.

REASONS FOR DECISION

[1] The defendants, Egg Farmers of Ontario (“EFO”), Harry Pelissero, L.H. Gray & Son Limited (“LH Gray”), William Harding Gray, John Klei and the Estate of Johannes Klei, bring this motion seeking an order requiring the plaintiffs to post security for the defendants’ costs after discoveries and through to and including trial in the amount shown in its served and adjusted Bill of Costs, \$1,246,159, in ninety (90) days from the date of the order. I will refer to EFO and Mr. Pelissero together as the “EFO defendants,” LH Gray and Mr. Gray together as the “Gray defendants,” and John Klei and the Estate of Johannes Klei together as the “Klei defendants.”

a) *BACKGROUND*

[2] The defendants served and filed an affidavit sworn by Michael Walsh, the president of LH Gray. This affidavit contains as an exhibit an affidavit sworn by one Ted Hudson, then the Vice President, Sales and Industry Relations at Burnbrae Farms Limited (“Burnbrae”), which affidavit was sworn on November 14, 2016 in a successful motion by Burnbrae for a *Mareva* injunction concerning the enforcement of an unpaid costs order. The defendants also served and filed an affidavit sworn by Mr. Pelissero, the former General Manager of EFO. The plaintiffs served and filed an affidavit sworn by Svante Lind, the president of Sweda Farms Ltd. (“Sweda”). Messrs. Walsh, Pelissero and Lind were cross-examined on these affidavits and the transcripts of same were filed. I gleaned the following uncontested background facts from the evidence.

[3] Burnbrae, LH Gray and Sweda were at the material times in the business of producing, grading and marketing eggs. They were competitors. Burnbrae remains in business. Sweda and LH Gray do not. The egg business formed a part of the supply management system in Canada. The system in relation to eggs requires that egg producers be licensed and hold quotas allotted to them by provincial commodity boards such as EFO. These quotas determine the chickens to be possessed and the eggs to be marketed. Production is regulated to meet market demand. Prices are set for producers. Levies are exacted by egg grading purchasers and paid by producers for the purpose of sustaining the regulator and removing surplus eggs from the system.

[4] On May 4, 2005, following a determination that Best Choice Eggs Ltd. (“Best Choice”) had not obtained and remitted fees and levies, Best Choice commenced an action in Whitby against Ontario Egg Producers, the predecessor of EFO, Mr. Pelissero and one Mark Bevan seeking damages and injunctive relief for alleged interference with contractual relations. This will be called the “OEP Action.”

[5] In July, 2008, Sweda, Mr. Lind, Best Choice and another Lind company, Verified Eggs Canada Inc. (“Verified Eggs”), commenced an action in Toronto against various Burnbrae companies and individuals, Johannes Klei and John Klei seeking substantial damages for breach of contract, intentional interference with contractual and business relations, conspiracy, slander and defamation. This will be called the “Burnbrae Action.”

[6] On February 12, 2010 Sweda obtained an *ex parte* order (the “*ex parte* order”) in the OEP Action requiring that a former employee and independent contractor for LH Gray, Norman Bourdeau, produce a data storage device in his possession concerning documents relating to both actions (ie. the OEP and Burnbrae Actions) and transfer the device to a supervising lawyer for safekeeping. Mr. Bourdeau’s evidence was that he kept copies of this data in the face of an LH Gray direction to destroy relevant emails and business records. The order required that Mr. Bourdeau produce all relevant documents in his possession to the supervising lawyer.

[7] In 2010 the plaintiffs in these actions obtained an order consolidating these two actions and transferring them to Toronto. This consolidated action included LH Gray and Mr. Gray as defendants. A Fresh Amended Statement of Claim was allowed and was issued on December 29, 2011. This action was defended by all the defendants.

[8] In December, 2010 Mr. Bourdeau submitted a lengthy written petition to the Ontario Farm Products Marketing Commission complaining of LH Gray business conduct and seeking an investigation of LH Gray. On January 5, 2011 Verified Eggs and related companies filed a supporting petition. In April, 2011 Verified Eggs disseminated information critical of LH Gray at a Poultry Show in London, Ontario. These efforts were fed by the documents Mr. Bourdeau obtained.

[9] LH Gray moved to set aside the *ex parte* order. On March 10, 2011 Justice Peter Lauwers set aside that order but ordered that the data delivered to the supervising lawyer remain there until an agreement or court order concerning same.

[10] LH Gray then moved for an order holding Mr. Bourdeau in contempt of the *ex parte* order for retaining copies of the documents ordered by the court in the *ex parte* order to be delivered to

the supervising lawyer. On July 28, 2011 Justice Lauwers granted the contempt order. On April 12, 2012 His Honour ordered Mr. Bourdeau to pay a fine and costs of the contempt motion. Mr. Bourdeau appealed the contempt order to the Court of Appeal on April 30, 2012. The Court of Appeal upheld the Lauwers contempt order and ordered Mr. Bourdeau to pay further costs. Mr. Bourdeau sought leave to appeal that ruling to the Supreme Court of Canada, but this was dismissed.

[11] The parties exchanged affidavits of documents and productions in late 2011 and the spring of 2012. There was an unsuccessful mediation. In the fall of 2012 the plaintiffs served a motion for further productions but this motion was adjourned when the Gray defendants moved for partial summary judgment. There were no discoveries at this time.

[12] In May, 2013 the Gray defendants moved for partial summary judgment dismissing the action against them. They filed affidavits concerning the allegations of improper grading and conspiracy. The motion was dismissed primarily due to lack of documentary production to that date.

[13] In 2013 Burnbrae, Burnbrae Holdings Inc. and Maple Lynn Foods Limited (together “the Burnbrae defendants”) also moved for partial summary judgment dismissing the action against them. In October, 2013 Justice Corbett granted the motion and dismissed the action against the Burnbrae defendants. He discounted the plaintiffs’ evidence on damages and causation. He also awarded these defendants significant substantial indemnity costs for the motion and the action. The plaintiffs appealed this ruling to the Court of Appeal, but the appeal was dismissed with costs. The plaintiffs sought leave to appeal to the Supreme Court of Canada, but this leave was denied. The Burnbrae Defendants then went to considerable lengths, including a separate action and a successful *Mareva* injunction motion, to enforce the costs orders. They succeeded and were paid about \$520,000 in 2016.

[14] The action was put into case management. In July, 2014 the production motion was dealt with in part by a consent order for some production by the defendants, with the balance of the motion being adjourned. There was a cross-motion for production. Both motions were heard in February, 2015. In April, 2015 there was an agreement for further production; but no further production took place.

[15] In March, 2015 the plaintiffs changed lawyers and said they wanted to amend the statement of claim to streamline the pleading and increase the damages claimed to \$45 million. Discoveries were discussed. At this time, the defendants indicated their desire to move for security for costs up to and including discoveries.

[16] I replaced the retiring case manager, Master Hawkins, in February, 2017. I held my first case management conference on June 23, 2017. On consent, I prohibited an administrative dismissal order. The parties consented to the amended statement of claim and I set a timeline for the service of the amended pleadings. I set a schedule for the defendants’ motion for security for costs, which schedule had the motion to be argued on October 17, 2017. I deferred timetabling other interlocutory steps until this motion was done and did not schedule another case management conference as a result.

[17] The parties reached an agreement on security for costs. On October 10, 2017 I signed a consent order requiring the plaintiffs to post \$225,000 in security for the defendants' costs through to and including production, discovery and motions arising therefrom. The parties did not seek a case management conference with me to get a further timetable order.

[18] The parties organized and conducted discoveries on their own. Messrs. Gray and Pelissero were discovered on four days in December, 2017; Mr. Lind was discovered on five days in January, April and June, 2018. Mr. Walsh was discovered on two days in November, 2018 and Mr. Klei was discovered on one day in May, 2019. The plaintiffs produced four supplementary affidavits of documents during this time.

[19] From 2019 to 2023 some interlocutory steps were taken. Undertakings were answered. There was a consent motion for the release of the Sweda files with Farm Credit Canada. Written interrogatories were served on the defendants and were answered. Offers to settle were exchanged.

[20] On January 26, 2021 Ms. Webster emailed Roderick Winsor, the plaintiffs' lawyer at the time. She discussed having the action set down for trial upon completion of discoveries. She ended the email by stating that "once the action is set down for trial, we intend to renew our motion for security for costs and obtain an Order that a further payment into Court be made for the trial costs."

[21] On February 17, 2023 the plaintiffs hired their present counsel. On July 27, 2023 the plaintiffs attempted to serve and file a trial record. That did not happen due to several technical issues such as the filing of the EFO defence and the confirmation of the mediation. These issues were finally rectified by August, 2025, when the trial record was re-served and re-filed successfully.

[22] In the meantime, there was a lawyers conference call in October, 2023. The plaintiffs' lawyer indicated an intention to seek a pretrial conference. The defendants' lawyers objected and suggested instead convening a case management conference to timetable the plaintiffs' expert reports and the defendants' security for costs motion for their trial costs. The plaintiffs' lawyer said he would get instructions. In January, 2024 the plaintiffs' lawyer advised that his client would be serving a damages expert report in April or May, 2024. This report was served on March 5, 2025.

[23] On September 10, 2025, defendants' counsel wrote asking whether there would be a consent order for security for costs pertaining to the defendants' trial costs. On September 17, 2025 the plaintiffs' lawyer circulated the certification form for scheduling the pretrial and trial. The defendants' lawyers responded immediately indicating that the security for costs issue needed to be resolved first. On September 30, 2025 the plaintiffs' lawyer replied that his client needed to see the motion material to consent. The defendants' lawyer responded by providing the 2017 motion material, by stating that the grounds were the same but the quantum greater, and by asking again for a consent order.

[24] On November 21, 2025 the plaintiffs' lawyer confirmed that his clients would not consent, and that he would be seeking an appointment with the To-Be-Spoken-To Court ("TBST Court") to schedule the pretrial and trial. On December 9, 2025 the defendants' lawyer reiterated their opposition to this process and stated that there should be a case conference appointment to

schedule their motion for security for costs. An appointment with TBST Court was made for April 20, 2026. Plaintiffs' counsel agreed to seek the case management conference appointment.

[25] On March 11, 2026 Mr. Neufeld emailed me seeking a case management conference. I scheduled one for April 10, 2026. At that time I was told that, as this case has a long trial, the TBST Court appointment was cancelled and a Long Trial Scheduling Court ("LTS Court") appointment on December 9, 2026 was being scheduled. Concerning the security for costs issue, I ordered production in twelve days of the defendants' bill of costs, the draft notice of motion and trial witness lists and trial time estimates, all to facilitate the resolution of this issue given the earlier consent order on security for costs. I adjourned the conference to April 30, 2026. Counsel filed a trial witness list and trial time estimate showing a total of 44 witnesses and a 75-day trial, and a defendants' bill of costs showing a claim of security in the amount of \$1,120,000. On April 30, 2026 I was told there was no agreement as to security for costs. Mr. Neufeld said his clients opposed the motion on three grounds: quantum of the claim; the effect on my discretion of LH Gray liquidating its assets; and the delay in bringing the motion. I scheduled this motion.

[26] On the first day of the argument, there was an issue as to whether a two-volume supplementary responding motion record from the plaintiffs should be admitted. It contained an 11-page affidavit sworn by Mr. Lind on July 3, 2026. It had 18 exhibits. It was served on July 3, 2026, namely seven days after my deadline for the plaintiffs' responding motion material and on the same day the defendants were to deliver their reply material. It concerned exclusively the issue of the wherewithal of the Gray defendants to pay a damages judgment. The defendants opposed the admission. Mr. Neufeld stated that Mr. Lind did not anticipate the extent of the information he obtained on this issue and gave it to Mr. Neufeld late as a result.

[27] I denied the admission. I found Mr. Neufeld's explanation quite unsatisfactory. Mr. Lind knew about this motion, this issue and the motion schedule for months, and should have prepared accordingly. Ms. Allison pointed out that many of the documents came from the productions delivered some time ago. This was a clear flouting of my scheduling order. I also found this late service prejudicial to the defendants as it impeded proper reply. Finally, I found the relevance of the issue addressed by this material dubious given the caselaw, about which more will be stated below.

b) ISSUES

[28] Based on the motion material and the submissions, I find that the following issues need to be determined:

- a) Have the defendants proven that there is good reason to believe that the plaintiffs have insufficient assets in Ontario to pay the defendants' trial costs?
- b) Should the defendants be denied security for costs due to delay in bringing the motion?
- c) Should the defendants be denied security for costs due to the efforts of LH Gray to make itself judgment proof?
- d) Should there be a discount in security for costs due to the cost insurance of EFO?

- e) What is the proper quantum of security for costs to be posted?
- f) What is the timing to be imposed on posting security?

c) INSUFFICIENCY OF ASSETS

[29] The defendants move under Rule 56.01(1)(d) which provides that a court may, on motion by the defendant, order security for costs “as is just” where it appears that the plaintiff is a corporation and “there is good reason to believe” that the plaintiff has insufficient assets in Ontario to pay the defendant’s costs.

[30] It is well-established that a motion under this provision has two steps; see *Mansteel v. Katebian et al*, 2021 ONSC 5273 (CanLII) at para. 11. First, the defendant has the initial onus to satisfy the court that it “appears” that “there is good reason to believe” that the plaintiff corporation has insufficient assets to pay the defendants’ costs. It does not have to actually prove that the plaintiff has insufficient assets. If the plaintiff satisfies this onus, the onus switches to the plaintiff to prove with robust particularity that it indeed has sufficient assets in Ontario or a reciprocating jurisdiction to pay the defendant’s costs or, alternatively, that an order for security for costs would be unjust, such as where the plaintiff is impecunious and the action is not devoid of merit thereby making the order a bar to a potentially meritorious case.

[31] The plaintiffs did not challenge the issue of the initial onus. With good reason. The evidence shows that the plaintiffs have been rendered judgment-proof after the commencement of these proceedings. Mr. Walsh’s affidavit contains admissions Mr. Lind made in a cross-examination in the Burnbrae injunction motion on September 20, 2016. Mr. Lind admitted that Sweda no longer carried on business and that its only source of income was the rental of its property, which rental income he said was encumbered. He said that Best Choice was nothing but a payroll company for Sweda and had no sources of income or assets. He said that Tilia Transport Inc. (“Tilia”) had no current operations or sources of income. In answer to undertakings given at that cross-examination, Mr. Lind admitted that the bank accounts of Sweda and Best Choice were frozen and bound by security held by a trust called the Marhaban Trust, a trust run by family members and Mr. Lind. Mr. Lind admitted that Sweda sold its major asset, its quota, by 2010, that it then declared a large dividend to Mr. Lind, and that Mr. Lind assigned the dividend to the Marhaban Trust which lent it back to Sweda through intermittent payments pursuant to a promissory note secured by a general security agreement. He admitted that Sweda, Best Choice and Tilia sold their other assets in 2011 with the proceeds going to the Marhaban Trust. He said that the Marhaban Trust was not related to the plaintiffs, was not obliged to pay their debts, and had priority over their assets. This evidence no doubt was a major reason the plaintiffs consented to the order for security for costs in this action in October, 2017.

[32] The evidence shows that, following that 2017 security for costs order, the plaintiffs’ financial circumstances if anything worsened. In his affidavit, Mr. Pelissero states that Sweda tried to restart its egg grading operation in 2021, that the EFO did not allow this, that Sweda appealed this decision to the Agriculture, Food and Rural Affairs Appeal Tribunal, that this Tribunal dismissed the appeal on March 1, 2022, and that the Divisional Court dismissed Sweda’s application for judicial review of that decision on March 29, 2023. Mr. Pelissero also stated that Sweda retained a small amount of

quota after its selloff of quota prior to 2010, that Sweda sold this small amount in 2022 and 2023 for \$274,350 (subject to about \$68,000 in deductions), and that by the end of 2023 Sweda had absolutely no quota and remained out of business. Mr. Lind did not say in cross-examination that the plaintiffs' circumstances had changed since 2017.

[33] This evidence satisfies me that there is good reason to believe the plaintiff corporations have insufficient assets in Ontario to pay the defendants' trial costs.

d) DELAY

[34] The onus, therefore, shifts to the plaintiffs to defeat this motion. Importantly, they do not assert that the plaintiffs have sufficient assets to pay the claimed costs or that they are impecunious with a meritorious claim. They argue that the motion should be denied as a matter of "justice" due to what they allege was an unjustified delay in bringing the motion and the fact that LH Gray has rendered itself judgment-proof.

[35] I will deal with the issue of delay first. In *Unimac – United Management Corp. v Metrolinx*, 2015 ONSC 2372 (CanLII) in paragraph 52 I summarized this area of the law. I referred to the decisions of Master Graham (as he then was) in *Pelz v. Anderson*, 2006 CanLII 39571 (ONSC), the decision of Master Haberman in *Shuter v. Toronto Dominion Bank*, 2007 CanLII 37475, and the decision of Master Short in *Livent Inc. (Receiver and Manager of) v. Deloitte & Touche*, [2011] O.J. No. 1660 (Ont. Master). The following are the propositions I described: a defendant must move for security for costs promptly after learning that it has a reasonable basis for the motion; if there is a delay in bringing the motion that prejudices the plaintiff, that will be fatal to the motion; and if the delay is not explained, that is sufficient grounds in itself to deny the motion.

[36] Was there a delay in bringing this motion? The motion must be placed into the context of this action, the earlier motion for security for costs in 2017, and the consent order of October 10, 2017 requiring the plaintiffs to post \$225,000 for the defendants costs up to and including production and discovery. The motion before me was essentially the motion for security for costs of the second and last stage of these proceedings, namely the trial preparation and trial costs. It was a natural outgrowth of the earlier motion. There was no real dispute that the earlier motion was brought in a timely way. It was brought after pleadings, the heavily contested early production-related motions, the consolidation of the actions, the motions for summary judgment and the initial round of productions. I find that there was no delay here.

[37] Going forward, the only things that would have justified the defendants in not bringing this follow-up motion for security for the defendants' trial costs were clear evidence that the plaintiffs had suddenly acquired the wherewithal to pay costs and clear evidence that the plaintiffs had abandoned this action. As for change of the plaintiffs' wherewithal, as stated earlier, the plaintiffs' financial status if anything worsened after 2017. They clearly continued to be incapable of paying costs. The evidence indicates that both parties continued to be aware of this fact.

[38] As for abandonment, the hiring by the plaintiffs of their new lawyer, Mr. Neufeld, in February, 2023 and the steps taken by him on July 27, 2023 to try and set this action down for trial were, in my view, clear signals that the plaintiffs had not abandoned this case. This should have been

the trigger for the defendants' motion. Ms. Webster said as much in her earlier January 26, 2021 email. Yet, the case conference with me to schedule the motion was not sought until March 11, 2026, almost three years later. This was indeed a delay in bringing the motion.

[39] Was there an acceptable explanation for the delay? The defendants mentioned two events in relation to the delay. First, there was the trial record filing delay. Deficiencies in the trial record delayed the filing by the plaintiffs of the trial record from July, 2023 to August, 2025 - over two years. This does not, in my view, justify delaying the motion. If anything, it gave the defendants an opportunity to move before other steps were taken. Second, there was the defendants' attempt to obtain a consent order for security for costs, particularly from September 10, 2025 to November 21, 2025. While this effort is understandable as the first security for costs motion proceeded on consent, it does not justify delaying the second motion with the action now set down for trial and time being of the essence. I find these explanations unacceptable.

[40] The major explanation proffered by the defendants, however, came through the affidavit of Mr. Walsh where he stated that the defendants were waiting for service of the plaintiffs' expert report before moving. In October, 2023 Mr. Neufeld advised the defendants' lawyers that he would get instructions on holding a case conference to schedule the plaintiffs' expert reports and the defendants' motion for security for costs. Mr. Neufeld advised in January, 2024 that he intended to serve a plaintiffs' expert report in April or May, 2024. This report was in fact served no sooner than March 5, 2025. This is a period of 17 months. Mr. Walsh stated that the defendants were waiting for this report "in order to understand that it was clearly their [the plaintiffs'] intention to proceed to trial." He stated that, after 15 years of litigation and with no pretrial or trial scheduled, the defendants were entitled to wait for this report to confirm the plaintiffs' intention to move this case to trial before incurring the expense of this motion. The credibility of this statement was undermined in cross-examination when Mr. Walsh admitted knowing all along that the plaintiffs intended to go to trial.

[41] I find this explanation only marginally passable. Passable, as the allegations against the defendants concern serious, quasi-criminal conduct. After all this time, there were valid questions as to whether the plaintiffs would even attempt to establish serious evidence of this conduct and a connection with their claimed damages and proceed to trial. This was particularly the case in light of the success of the Burnbrae defendants in their motion for summary judgment. The defendants were, therefore, somewhat justified in waiting for this evidence. However, only marginally so, in my view. As stated earlier, the plaintiffs hiring of Mr. Neufeld on February 17, 2023 and their efforts to set the action down for trial starting July 27, 2023 should have sent the clear message that the plaintiffs had not abandoned this action and that this motion should be brought.

[42] The greatest factor in my decision on delay, however, concerns prejudice. There was no evidence from the plaintiffs that they would have changed course had the defendants brought this motion in 2023-24 when arguably they should have. This only makes sense. I infer from the evidence that the plaintiffs knew from as early as the resolution of the first motion for security in October, 2017 that this second motion was virtually inevitable if they carried on to trial after discovery. This inevitability was reinforced by the defendants' lawyers in their correspondence with the plaintiffs' lawyer starting with Ms. Webster's important email of January 26, 2021. Therefore, I infer further from the evidence that the plaintiffs' decisions to hire a new lawyer in 2023, to start

setting the case down for trial and to get an expert report factored in the risk of this motion and would not have changed had the motion been brought in 2023-24. I note that the plaintiffs did not assert that they would have changed course in the event of an earlier motion. I, therefore, find that the delay of this motion did not prejudice the plaintiffs.

[43] The plaintiffs argued that the delay in bringing this motion evinced an improper motive behind the motion, namely an intention by the defendants to use this motion as a tactic to prevent this case from being heard on its merits. They referred me to the decision of the Court of Appeal in *Yaignaje v. Chevron Corporation*, 2017 ONCA 827 (CanLII) at paragraph 23 where the Court states that “Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rules 56 or 61 have been met.”

[44] I do not agree with this argument. The evidence shows that the defendants intended on bringing this motion as early as 2017 when they settled their initial motion. That intention has been consistent as reflected in the correspondence from the defendants’ lawyers. The defendants chose to delay the motion in late 2023 and early 2024 for a reason (ie. the plaintiffs’ expert report) I found to be only marginally passable. But this marginally passable explanation does not mask some nefarious intent to use the delay of this motion to end this litigation.

[45] Furthermore, and most importantly, the foundation of this allegation is unsubstantiated. There is no convincing evidence that this motion and its delay will in fact end the litigation. There is only Mr. Lind’s bald statement in his affidavit that he believes there is a “substantial risk that the practical effect of an award of security for costs would be to prevent adjudication of the plaintiffs.” He provides no evidence in support of this statement. In general, the plaintiffs proffer no evidence that their shareholders, directors, officers, persons with effective control over them and significant creditors are in fact impecunious and cannot pay the requested security for costs, even at this late hour. Given these circumstances, I am not prepared to conclude that the delay of this motion was a tactic intended to defeat this action.

[46] I will not, therefore, dismiss this motion due to the delay. I will, however, exercise my discretion and discount any order for security for costs due to what I find to be only a marginally passable explanation for the delay at this late hour.

e) *LH GRAY JUDGMENT-PROOF*

[47] The plaintiffs make, what they openly admit is, a “creative” further argument about a “just” order. They argue that LH Gray’s efforts to render itself judgment-proof should thwart this motion.

[48] It is undisputed that LH Gray recently ceased carrying on business in egg farming. In his affidavit, Mr. Walsh stated that in 2010 LH Gray undertook a corporate reorganization as part of succession planning, and on November 29, 2010 transferred its egg grading assets to a non-party, Gray Ridge Eggs Inc. Mr. Gray made a public announcement in April, 2025 that the ownership of Gray Ridge Eggs and other Gray companies was being transferred to a third party in May, 2025. LH Gray sold its farms recently. Mr. Walsh admitted in cross-examination that LH Gray’s last farm was

sold in May, 2026. LH Gray has now indeed been essentially rendered judgment-proof. None of these facts are disputed. What is disputed is whether this shows an improper motive.

[49] It is well-established law that the wherewithal of the defendant to pay costs or damages is irrelevant to a motion for security for costs. It is a motion only to be brought by a defendant; see Rule 56.01(1). Rule 56.01(1)(d) is also solely for the benefit of the defendant, namely to protect the defendant from having to incur the expense of defending a claim in circumstances where the defendant appears to have no real prospect of recovering costs from the plaintiff. This is the case regardless of how wealthy or impecunious the defendant is; see *Umbrella Warranty Ltd. v. Aviva Warranty Services Inc.*, 2022 ONSC 5652 (CanLII) at paragraph 13.

[50] The plaintiffs do not argue directly that the defendants be denied security for costs because they have the means to pay their own costs. The plaintiffs argue instead that it is the evidence of the efforts by LH Gray to render itself judgment-proof recently that raises the “injustice” of this motion. They argue that I should draw the inference from this evidence that this motion is indeed being used as a tactic to prevent this case from being heard on its merits.

[51] The plaintiffs rely heavily again on the decision of the Court of Appeal in *Chevron*. In this case, certain residents of Ecuador obtained a \$9.5 million judgment in 2011 against Chevron Corporation for environmental damage. The action was first commenced in the U.S.A. and then it was brought in Ecuador where the judgment was issued. The plaintiffs then brought an action in Ontario for recognition and enforcement of this judgment against Chevron and its seventh-level subsidiary, Chevron Canada. The Chevron defendants challenged the court’s jurisdiction. They failed but there was a stay. The stay was overturned on appeal by the Court of Appeal, which decision was then upheld by the Supreme Court of Canada. The Chevron defendants then pleaded and moved for summary judgment seeking a dismissal as against Chevron Canada claiming that there was no basis to pierce the corporate veil between the two companies. Summary judgment was granted. The plaintiffs appealed that decision. The Chevron defendants then moved for security for costs. It was granted in the amount of \$942,951. The plaintiffs appealed that ruling.

[52] The Court of Appeal overruled that decision stating that the motions judge erred in determining whether the order was just. The Court found that this motion was being used by Chevron as a tactic to end the litigation. The factors considered were the following: the action was to enforce a class-action judgment in the public interest and in which the appellants had no direct economic interest; while the strict test of impecuniosity was not met, there was evidence the appellants had limited means and funding; there was evidence Chevron contributed to the damage alleged; the case concerning piercing the corporate veil, while innovative, was not “devoid of merit”; Chevron is extremely wealthy; the history of this litigation made it clear that Chevron had the ability and intent to employ all available means to resist enforcement of the Ecuadorian judgment.

[53] The case before me is quite distinguishable from the *Chevron* decision. This is not public interest litigation; it is a case alleging damage to the plaintiffs’ economic interests. Furthermore, again and most importantly, the plaintiffs have not asserted in any way they are impecunious. There is Mr. Lind’s bald statement in his affidavit that there is a substantial risk an order for security for costs would prevent the adjudication of the plaintiffs’ claims; but there is nothing more. This leaves the impression that they may well be able to pay security for costs. After all, it is undisputed they paid

the Burnbrae defendants some \$520,000 ten years ago. Furthermore, whether the plaintiffs have a meritorious claim was not seriously argued on this motion and is not clear at all from the evidence. Also, the history of this litigation does not lead me to conclude that the Gray defendants intend to stop this litigation at all costs. They tried to stop the action against them with their motion for summary judgment 13 years ago, in 2013. They failed. Since that time, they have taken reasonable interlocutory steps, such as the first motion for security for costs, which was resolved in their favour on consent, and production and discovery.

[54] Indeed, it is the glaring, and rather unique, fact of the earlier 2017 consent order for security for costs up to the end of discoveries that underscores this entire motion. The earlier order laid the foundation and motivation for this second motion for security for the trial costs if the plaintiffs' financial circumstances remained unchanged or got worse (which is what has happened) and the plaintiffs pressed on to trial. This intention was evinced consistently in the correspondence from the defendants' lawyers after the conclusion of discoveries, starting with Ms. Webster's email of January 26, 2021.

[55] Most importantly, I repeat, there is no convincing evidence that this motion will indeed end the litigation. The plaintiffs do not assert that those behind them (ie. shareholders, directors, officers, persons with effective control and major creditors) are impecunious and cannot pay security for costs, even at this late hour. In these circumstances, I am not prepared to conclude that the recent company dealings concerning LH Gray show a nefarious intention on the part of the Gray defendants to use this motion to end the litigation. This motion was almost inevitable once the plaintiffs decided to push on to trial.

[56] In his decision in *10760919 Canada Inc. dba Harbels Construction Ontario v. Crosslinx Transit Solutions Constructors*, 2023 ONSC 887 (CanLII) at paragraph 42 Associate Justice Robinson stated that since the *Chevron* decision plaintiffs commonly assert that security for costs motions are mere litigation tactics meant to defeat them. He cautioned that there must be convincing proof of such an allegation. I agree. While the court must be vigilant against tactical motions for security for costs, it must also be vigilant against backhanded efforts to turn the motion into a test of the defendant's wherewithal to pay for its own costs and the claimed damages.

[57] I, therefore, do not find that the Gray defendants are using this motion as a tactic to prevent this case from being heard.

f) INSURANCE COVERAGE

[58] In answer to interrogatory questions, EFO confirmed that it obtained directors' and officers' insurance coverage some time ago prior to this litigation. The policy provides coverage for any loss to EFO due to its obligation to indemnify its directors and officers for claims against them due to their "Wrongful Acts" as defined by the policy. This coverage was confirmed by the insurer as covering in this case the defence costs of Mr. Pelissero and the previous defendant, Mark Beavens, but not EFO itself. The coverage represents about 62% of the total defence costs for these defendants. Mr. Neufeld argued that there should be no security for the costs of these defendants as this would amount to double recovery, namely securing the partial indemnity costs of these defendants that are already paid by private insurance.

[59] I suspected that this position engages the private insurance exception to the double recovery rule. In *JDC Ltd. et al. v. CAW Ltd. et al.*, 2022 ONSC 1611 (CanLII), Justice Carole J. Brown in paragraph 95 described the doctrine this way: “. . . the law has recognized an exception to the rule against double recovery in the form of the private insurance exception: in general, benefits received by a plaintiff through private insurance are not deductible from the damage awards.” The doctrine is rooted in fairness, namely that a wrongdoer should not benefit from the plaintiff’s forethought and sacrifice in obtaining private insurance that covers the plaintiff’s loss; see *Cunningham v. Wheeler*, 1994 CanLII 120 (S.C.C.) on page 400. This doctrine was not raised in written and oral argument. I asked for written submissions, which were provided on September 4, 2026.

[60] Mr. Neufeld argued that this exception does not apply as security for costs is not a damage award, but rather an interlocutory, discretionary and protective measure. He argued that the issue is the amount of protection the defendants need given their insurance coverage for defence costs. He pointed out that courts are prepared to discount security for costs when plaintiffs have adequate adverse costs insurance that responds, with the reason being that there is no need for the requested security; see *Frantz v. NB Thrilling Films 4 INC. et al.*, 2017 ONSC 4637 (CanLII) at paragraph 18 and *Alary v Brown*, 2015 ONSC 3021 (CanLII) at paragraph 25. According to Mr. Neufeld, the court should engage in a similar assessment of the “need” of the defendants for security for costs given their own insurance for defence costs.

[61] I do not accept this argument for two reasons. First, security for costs does deal with “damage,” namely the damage to the defendant of incurring defence costs it cannot recover on a costs award against the plaintiff due to the plaintiff’s inability to pay costs. The motion is intended to provide the defendants with insurance against that damage. The plaintiffs essentially want here the benefit of a discount in that insurance by virtue of the EFO’s forethought and sacrifice in obtaining before the litigation and paying for standard directors’ and officers’ insurance that happens to cover defence costs up front in this case. There is no necessary relationship between the EFO insurance and this case. Such a discount would be an unfair benefit to the future “wrongdoer,” namely the plaintiffs defaulting on an adverse costs award after trial. In my view, this directly engages the doctrine of the private insurance exception to the double recovery rule.

[62] The decisions concerning adverse costs insurance are not relevant to this analysis. Those cases concern the ability of the plaintiff, not the defendant, to avoid the damage to the defendant of an unpaid costs award by way of insurance taken out by the plaintiff for this exact purpose - the very subject matter of the motion.

[63] Second, the plaintiffs’ argument asks the court yet again to assess the wherewithal of the defendants to pay for their own costs and their “need” for security for costs. The law is clear that the wherewithal of the defendants to pay for their own costs is irrelevant to this motion. I repeat that the court must be vigilant against any backhanded effort to turn this motion into an examination of the defendants’ means.

g) QUANTUM

[64] It is undisputed that the quantum of the security for costs order involves an estimation of what the defendants will reasonably expect to pay in partial indemnity costs for the trial of this

action. The reasonableness of the estimated costs will turn to a large degree on the level of complexity in the case. The complexity of a case is assessed on its own features and merits with only some regard to other cases; see *Fairfield Sentry Limited et al v PricewaterhouseCoopers LLP et al*, 2015 ONSC 4961 (CanLII) at para. 11.

[65] I am satisfied that this case has a significant level of complexity. The claim against the defendants is essentially for damages relating to an alleged conspiracy by the defendants over numerous years to undermine the business of the plaintiffs, particularly Sweda. The plaintiffs claim damages now exceeding \$45 million. The recently served plaintiffs' expert report asserts that the plaintiffs have suffered \$10 million in business loss. The report describes the loss by the plaintiffs of some 44 customers and producers, many of whom will now be called as witnesses at trial. The complexities of the egg supply management system in this country will also have to be explored through experts and others. I note that at the case management conference on April 30, 2026 I ordered that the parties reach an agreed statement of fact concerning this system, which I thought was readily achievable. I was told during argument that the parties were unable to reach such an agreement, leaving me to conclude that egg supply management itself has complexities that will have to be explored at trial given the allegations.

[66] The defendants filed a Bill of Costs showing their estimation of the partial indemnity costs all of them will incur for the trial. The Bill is broken down into four categories: fees for the preparation for and attendance at the pretrial conference and for preparation for the trial; fees for the attendance at trial; fees for post-trial matters; and disbursements. The total shown on the Bill is \$1,365,148. However, in argument Ms. Webster conceded a miscalculation of the rates that pertained to the lawyers for the EFO and Klei defendants and reduced the requested security to \$1,246,159. I will deal with each section of the Bill in their logical sequence.

g.1) Attendance at trial

[67] The defendants constructed their Bill by beginning with their attendance at trial estimate first. At the April 10, 2026 case management conference I ordered that the parties prepare their lists of trial witnesses and trial time estimates for examination-in-chief, cross-examination and re-examination of each witness assuming one trial day equaled five hours. The parties did that and produced a comprehensive list of 42 witnesses for all parties with the trial time totaling 75 days or 15 weeks. Ms. Webster went through this list and showed me to my satisfaction that this was an accurate list. It contains 19 witnesses for the plaintiffs and 23 witnesses for the defendants, including experts. The plaintiffs' witnesses included former employees of and producers for Sweda. The defendants' list included egg farmers, grocers who purchased eggs and financing firms.

[68] For trial fees, the defendants assumed there will be 8 hours of work for each lawyer attending the trial per trial day, namely 5 hours of court time and 3 hours of additional time. They assumed Mr. Williams, Ms. Webster and Mr. Spurr would be attending each trial day for the Gray and EFO defendants amounting to 600 hours for each. They assumed Ms. Atchison would be attending between 12 and 13 days or 100 hours. They then applied rates of 60% of each lawyer's actual rate. These rates in the end were not controversial. There were then some costs shown for clerks. The costs shown totaled \$698,100 plus HST.

[69] Mr. Neufeld disputed the time shown for the plaintiffs' witnesses, particularly for Messrs. Lind and Bourdeau. There is a total of 11 days for these two. Mr. Neufeld argued that his clients' entire case at trial will be done in 12 to 13 days. There is little I can refer to that will guide me here other than my general sense of what seems reasonable. It indeed took several days to discover Mr. Lind and Mr. Bourdeau is a key and controversial witness. Nevertheless, Mr. Neufeld's criticism appears to have some validity for these two witnesses as the time shown for them seems somewhat excessive.

[70] Mr. Neufeld's major criticism though was that it will not be necessary for Messrs. Williams and Spurr and Ms. Webster, all senior counsel, to be present for the entire trial. He argued that the EFO issues are more limited than they are for the Gray defendants and that there should be no more than 200 hours allocated to the EFO defendants, namely a third of the time shown. He argued that having two senior counsel present all the time for the Gray defendants was simply over-lawyering and that there should be no more than 200 hours allocated to the Gray defendants as well, namely no more than 16% of the time shown. He argued that as the Kleis defendants produced no evidence on this motion there should be no hours allocated to them.

[71] I find this criticism has only minor validity. The defendants make the excellent point that the plaintiffs chose to claim joint and several liability against all of the defendants. This means that all of the parties need to be present for and understand all of the trial evidence as their clients may be found liable for all of the damages. Furthermore, the Gray defendants are the major target for the conspiracy allegations, thereby making it imperative to have senior present throughout. Having said that, I also appreciate that parties must be economical in allocating their resources and must use lawyers (even associates) at lower rates as much as possible. I also find that the absence of evidence from the Klei defendants detracts significantly from their entitlement.

[72] Therefore, I accept, for the purposes of this motion, the trial time for Mr. Williams at 500 hours, Ms. Webster 600 hours, Mr. Spurr 550 hours, Ms. Atchison 50 hours and clerks the shown 40 hours. This produces, with the adjusted rates for Mr. Spurr and Ms. Atchison, a total of \$575,000 plus HST for the attendance at trial.

g.2) Preparation for pretrial and trial

[73] The defendants did not rely on actual time spent to date for any part of their position as to the quantum of security for the fees for preparing for the pretrial conference and trial. This is no doubt due to the fact that very little time has been spent on these activities to date, as the defendants have focused their attention on this motion moving forward.

[74] What the defendants did was create an estimate. Ms. Webster freely admitted that what the defendants did was the following: establish a reasonable total quantum for this time based on a formula and allocate that time between the lawyers in accordance with what they viewed was a reasonable distribution, with the time for Ms. Webster and Mr. Spurr getting the highest numbers.

[75] The key then for this motion is determining the reasonableness of the total quantum. Ms. Webster advised that the formula applied was the following: reasonable preparation time would be

about half of the trial time. The total cost shown for this segment of the defendants' Bill of Costs is \$396,750 plus HST, which is 56% of the \$698,100 plus HST shown for the trial costs.

[76] This formula strikes me as reasonable as it seems conservative. In my experience, many litigation lawyers apply a higher ratio for preparation time in relation to trial time, namely more like 1/1, given the amount of work that usually goes into trial preparation. We are after all discussing here the time for witness interviews, client preparation, reviewing and summarizing transcripts, obtaining expert evidence, legal research, communications with counsel, drafting memoranda of law, preparing for examinations, preparing submissions, preparing books of documents and authorities, preparing the pretrial memoranda and attending the pretrial conference. This is much work.

[77] Applying this 56% to what I found to be the reasonable trial costs with the adjusted rates, namely \$575,000 plus HST, produces the figure \$322,000 plus HST. Going further, and being consistent with the defendants' stated formula, applying 50% to \$575,000 plus HST produces \$287,500 plus HST. Applying the proportions indicated in the defendants' Bill of Costs to this figure shows a reduction of from 50 to 100 hours for each of Mr. Williams, Mr. Spurr and Ms. Webster, and just over 20 hours for Ms. Atchison. This again seems conservative and reasonable.

[78] Mr. Neufeld argued that the defendants' estimate in this category is grossly excessive, that the time for the Gray and EFO defendants should be no more than 80 hours for each, and that there should be 0 hours for the Kleis defendants given their absence of evidence. I do not agree concerning the Gray and EFO defendants. For them this is a large case with many fact and expert witnesses. The absence of evidence from the Kleis defendants must be accounted for in accordance with what I did with their trial time, namely a 50% reduction.

[79] In the end, I find that a fair total of the defendants' partial indemnity costs for their fees for time spent in preparing for pretrial and trial is \$260,000 plus HST.

g.3) Post-trial matters and disbursements

[80] With the rate adjustments, the time specified by the defendants for post-trial matters totals \$21,550 plus HST. This was not controversial.

[81] What was disputed was the defendants' disbursements which total \$100,000 (HST incl.). This total includes \$90,000 for an expert report and expert attendance fee and \$10,000 for transportation, hotels and accommodation. Mr. Neufeld argued that this total should be no more than \$50,000. He argued that the costs for experts are much too high.

[82] I disagree. There will no doubt be two defendants' experts, one on damages and the other on the supply management system. These witnesses will undoubtedly be expensive given the complexity of the issues.

[83] As for the other disbursements, this trial will be an in-person trial in Toronto, thereby requiring transportation and accommodation for the lawyers and witnesses. The defendants, the ones being sued here, have a right to choose their lawyers, including out-of-Toronto lawyers, and that right should be respected in this order. I accept the stated disbursements.

g.4) Conclusion as to quantum

[84] The concluding baseline calculation for a reasonable quantum of security for costs is, therefore, the following: $[(\$575,000 + \$260,000 + \$21,500) \times 1.13] + \$100,000 = \$1,067,845$.

[85] As stated earlier, I must now account for the only marginally passable explanation for the delay in bringing this motion. Due to this factor, I have decided to reduce the order for security for costs to be posted to **\$950,000**. I find this to be a reasonable order for security for costs in the circumstances of this case.

h) TIMING

[86] There was an argument about the timing of the posting of the security for costs. Mr. Neufeld wanted me to order that half the security be posted no later than thirty (30) days before the pretrial conference and the other half no later than thirty (30) days before the commencement of the trial. He argued that orders requiring that security for costs be posted in stages are now commonplace, as they ameliorate the burden on the plaintiff.

[87] I do not agree with this argument. Yes, staging the posting of security for costs is commonplace, but, as pointed out by Ms. Webster, that staging has already happened in this case with the first order for security for costs in October, 2017. That order dealt with security for costs for activity up to and including discoveries.

[88] Furthermore, further staging at this late hour makes no sense. The work of preparing for trial and the trial itself forms a continuum. Trial preparation flows naturally into trial work. To have the first done in part and then stopped because the plaintiff cannot post the second tranche of security amounts to a great waste and should not be countenanced. The defendants should be assured now as to the security for their trial preparation and trial costs.

[89] Therefore, I order that the plaintiff post security for the defendants' costs of preparing for trial and the trial in the amount of \$950,000 on or before ninety (90) days from today, September 21, 2026. Ninety days is the time period requested by the defendants and seems reasonable, particularly given the appointment on December 9, 2026 with the LTS Court. By that time, the plaintiffs should know whether they will be able to comply with this order.

i) CONCLUSION

[90] Therefore, in conclusion, I order that the plaintiffs post security for the defendants' trial preparation and trial costs in the amount of **\$950,000 on or before ninety (90) days** from today, September 21, 2026.

[91] Concerning the costs of this motion, the parties filed costs outlines. The Gray defendants' costs outline shows \$41,932.93 in partial indemnity costs and \$55,056.30 in substantial indemnity costs; the EFO defendants' costs shows \$22,895.43 in partial indemnity costs and \$29,370.33 in actual costs; and the Klei defendants bill of costs shows \$3,737.48 in partial indemnity costs and \$4,983.30 in substantial indemnity costs. The plaintiffs' costs outlines shows \$24,819.55 in partial indemnity costs, \$36,409.11 in substantial indemnity costs and \$40,272.30 in full indemnity costs.

[92] It appears that the defendants are the successful ones and deserve costs. I encourage the parties to confer and resolve the issue of the costs of this motion.

[93] If the parties cannot resolve the issue of costs, the following schedule applies:

- All those claiming costs must serve and file (by email sent to my Assistant Trial Coordinator) written submissions on costs of no more than four (4) pages on or before October 1, 2026.
- Written responding submissions on costs of no more than four (4) pages may be served and filed (by email sent to my Assistant Trial Coordinator) on or before October 14, 2026.

DATE: September 21, 2026

ASSOCIATE JUSTICE C. WIEBE